

Should China be Granted Market Economy Status? : In View of Recent Development

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The Protocol for China's accession into the WTO stipulated certain differential treatment for China, including the determination of normal value in anti-dumping investigations for the transitional period of 15 years. This treatment was authorized by the Protocol in response to concerns raised by other WTO Members at the time of China's entry into the WTO. Since the transitional period is over in November 2016, there is an argument supporting the grant of market economy status to China, although the Protocol does not require the automatic grant of market economy after the passage of the transitional period. However, China's recent trade measures, which have been adopted to press another WTO Member to meet its political objective, raise a question as to whether China is indeed ready for market economy status. This article analyzes such case and offers a view on the grant of market economy status to China.

Keywords: China, WTO, Market Economy Status, GATT/WTO Rules, Trade Governance

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1. Introduction

On December 12, 2016, China requested consultations with the US and the EU¹ concerning certain provisions of the US trade law and the EU regulation,² which set forth methodologies to determine normal value in anti-dumping proceedings involving products exported from China. Neither the US nor the EU currently grants China “market economy status,”³ and the relevant provisions of the US trade law and the EU regulation authorize them to adopt the methodology that allows the determination of normal value on the basis of the production factors (plus amounts for general expenses and profit) as identified in a third “market economy country.”⁴

This practice, allowing the use of surrogate values, exposes a substantial portion of Chinese exports to anti-dumping challenges, because the competitiveness of much of the Chinese exports is based on the costs of production, including labor cost, that are lower than those of its competing trade partners.⁵ However, the US and the EU practice would be supported by the argument that the role of the government and state-owned enterprises (“SOEs”) is substantial in China’s economy, and the government support lowers the cost of production in China in a way that is not available in other market-economy countries.⁶ There is a little justification to inhibit the expansion of exports based on the exporting country’s innate competitiveness, such as lower labor cost. If the lower production cost is not a result of economic competitiveness but of the economic structure that allows government support and control of the economy and trade, however, there is a legitimate interest in adjusting the gaps created by the structural difference.

There is also a broader trade-governance related concern that is associated with the recognition of market economy status. All governments influence international trade one way or another for their own political and economic concerns.⁷ However, if the government of an importing country readily controls exports and imports beyond what is permitted under the GATT/WTO legal regime to meet its own political objectives, then this practice will be inconsistent with the core principles of the market economy, because the supply and demand of goods and services would then be influenced by governmental decisions, rather than market forces. The Chinese government has recently adopted a series of measures, arguably outside the GATT/WTO rules. It restricted imports of certain services and goods

from South Korea (Korea),⁸ in order to put pressure on it to meet China's political demand.⁹ This policy is inconsistent with the core requirement of the market economy and contradictory to China's own demand for market economy status.

This research examines China's demand for market economy status and the consistency of its trade measures against Korea. This paper is divided into the following structure. Part two will discuss relevant rules of the US and the EU trade law that raised the current dispute and the Protocol on China's accession into the WTO that authorized the methodology in the determination of dumping based on the value of the factor of production in a third country. This part will also examine the role of the government in the Chinese economy and trade that raises concern and objection to granting China market economy status. Part three will critically analyze China's recent trade measures that have restricted imports of certain goods and services from Korea. Recently, China objects to the deployment of the US missile defense system called 'THADD' (Terminal High Altitude Area Defense)¹⁰ in Korea for its security concerns.¹¹ China's trade measures have been motivated to put pressure on Korea to discontinue the deployment of THADD. In this part, the compatibility of China's measures with the GATT/WTO disciplines and its demand for market economy status will be investigated.

2. Dispute over the Grant of Market Economy Status to China

A. The US and EU Rules on the Determination of Normal Value in Anti-Dumping Investigations

China argues that the US and EU rules of trade on the determination of normal value in anti-dumping investigations involving imports from China are inconsistent with relevant GATT/WTO rules, including the WTO Agreement on Implementation of Article VI of the GATT 1994 (hereinafter Anti-Dumping Practices Agreement or ADP Agreement).¹² Article 2 of the ADP Agreement provides:

1. A product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price

of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.¹³

2. 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.¹⁴

This Article stipulates that the normal value is to be determined by comparison with the comparable home price (i.e. the price prevailing in the exporting country) or, alternatively, making a comparison to the price of the product sold in a third country or to the full production cost of the product plus reasonable profit (where an adequate comparison to the home price is not feasible).

The relevant rules of the US and the EU trade law are in line with these provisions. Section 773(a) of the Tariff Act of 1930 (Tariff Act) provides that the US Department of Commerce (“USDOC”) determines normal value based on: (1) the price at which the like product is sold or offered for sale for consumption in the exporting country; (2) the price at which the like product is sold or offered for sale for consumption in a third-country export market; or (3) the cost of production in the country of origin, including an amount for administrative, selling, and general costs, and for profits.¹⁵ The EU Regulation 2016/1036 also provides similar rules for the determination of normal value.¹⁶

Both the US and the EU, however, apply different rules to imports from China in the determination of normal value. Section 773(c)(1) of the Tariff Act requires the USDOC to determine normal value on the basis of the values of the factors of production (plus amounts for general expenses and profit) as identified in a third country, if an investigation involves imports from a country that is designated as a “non-market economy” by the USDOC and if, under the USDOC finding, available information does not permit the determination of normal value in accordance with the methodologies set forth in Section 773(a) of the Tariff Act.¹⁷

The USDOC determined that China is a non-market economy in 2006 and has not changed this designation.¹⁸ Thus, for imports from China, Section 773(c)(1) applies in the determination of normal value.

The EU rules apply similar exceptional rules in the determination of normal value in anti-dumping investigations regarding imports from China. Article 2(7) (b) of the EU Regulation expressly refers to China and requires that the provisions in Articles 2(1) to 2(6) for the determination of normal value apply only if that producer is able to substantiate that market economy conditions prevail in respect of the manufacture and sale by that producer of the like product concerned under the present market-economy criteria.¹⁹ For all producers who are unable to demonstrate this standard, Article 2(7)(b) requires the application of normal value calculation rules set forth in Article 2(7)(a) which determines normal value on the basis of prices or constructed value in a surrogate market-economy country.

The applications of these rules result in discriminatory treatment against Chinese producers who are unable to demonstrate that market economy conditions prevail under Article 2(7)(a) of the EU Regulation or supply information that would permit the determination of normal value under the methodologies under Section 773(a) of the Tariff Act. The process is not applied to the producers of other market-economy WTO member countries (hereinafter WTO Members) undergoing anti-dumping investigations. Given that the labor cost in China would be lower than in other industrialized countries,²⁰ the authorized comparison to the cost of production in a third market-economy country is likely to result in a normal value that is higher than what would be found without such comparison and, ultimately, a finding of dumping. As a result, more Chinese exports have been targeted by anti-dumping measures than exports from any other country in the last two decades.²¹

B. Protocol on China's Accession into the WTO

Section 773(c) of the Trade Act and Article 2(7) of the EU Regulation authorize separate treatment to export from China in anti-dumping investigations. These provisions are consistent with relevant provisions of the Protocol on China's Accession into the WTO.²² Paragraph 15(a) of the Protocol provides:

- (a) In determining price comparability under Article VI of the GATT 1994 and

the Anti-Dumping Agreement, the importing WTO Member shall use either Chinese prices or costs for the industry under investigation or a methodology that is not based on a strict comparison with domestic prices or costs in China based on the following rules:

- (i) If the producers under investigation can clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product, the importing WTO Member shall use Chinese prices or costs for the industry under investigation in determining price comparability;
- (ii) The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product.²³

Paragraph 15(a) permits the WTO Members to adopt “a methodology that is not based on a strict comparison with domestic prices or costs in China” for the producers who cannot demonstrate that the prevalence of market economy conditions in the industry. This provision offers a regulatory basis for Section 773(c) of the Trade Act and Article 2(7) of the EU Regulation, which authorize the determination of normal value by comparison to the production costs in a third country.

The justification for this treatment is that China has been a “socialist market economy” in which the government plays more extensive roles in the management of the economy than other traditional market-economy countries. Here, the government supports for export industries under its ownership (SOEs) and control.²⁴ This state support enables China’s exporting industries to produce at the costs that are lower than those prevailing in other market-economy countries. The WTO Members, including the US and the EU, were also concerned that their own domestic industries would have to face intense competition from China’s large export industries, on the terms more beneficial to these industries as a result of China’s accession into the WTO. These concerns prompted the imposition of stricter terms of accession on China than any other WTO Member had to accept.²⁵ These are creating leeway for other WTO Members to check against imports from China, such as paragraph 15(a) and product-specific transitional safeguard measures only applicable to imports from China on more relaxed terms.²⁶ This

'leeway' is, however, transitional. Paragraph 15(d) provides:

Once China has established, under the national law of the importing WTO Member, that it is a market economy, the provisions of subparagraph (a) shall be terminated provided that the importing Member's national law contains market economy criteria as of the date of accession. In any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession. In addition, should China establish, pursuant to the national law of the importing WTO Member, that market economy conditions prevail in a particular industry or sector, the non-market economy provisions of subparagraph (a) shall no longer apply to that industry or sector.²⁷

This provision allows China to avoid the application of paragraph 15(a) in two ways. The first is to acquire market economy status from the importing WTO Members under the national law of the latter and the second is the expiration of the transition period. The Protocol stipulates that the provisions of paragraph 15(a) (ii) expires 15 years after the date of accession. China has endeavored to obtain market economy status, which will prevent the application of the discriminatory treatment to its producers. Some WTO Members, such as Korea and Australia, have granted China market economy status, while China's other trade partners, including the US and the EU have not yet done so. In addition, they have adopted a methodology that authorizes the determination of normal value by comparison to the costs in a third country in anti-dumping investigations. China objects to this treatment and filed a complaint with the WTO against the US and the EU.²⁸

Should China then be granted market economy status for the purpose of anti-dumping investigations? The Protocol does not obligate the WTO Members to grant market economy status automatically after a period of time, although it stipulates that the provisions of paragraph 15(a)(ii) expires 15 years after the date of accession.²⁹ The grant of market economy status, however, is to be determined by the national law of each individual WTO Member.³⁰ As the stipulated 15 years have already been passed as of November 2016, China contends that it is inconsistent with the terms of the Protocol for the US and the EU to maintain the discriminatory provisions of Section 773(c) of the US Trade Act and Article 2(7) of the EU Regulation.³¹

Paragraph 15(d) indicates that the provision of paragraph 15(a)(ii) is

transitional in nature and 15 years has been already expired since the date of China's accession. Thus, the Protocol does not provide any justification for the US and the EU to maintain the present methodology outside the rules of the ADP Agreement, which do not authorize the determination of normal value by comparison to the cost of production in a third country.³² Article 2.2 of the ADP Agreement instead allows methodologies to determine normal value by making comparison to the price of the like product exported and sold in a third country or to the full production cost in the country of origin plus reasonable profit where an adequate comparison to the home price is not feasible. Importing countries may use these methodologies if they consider that the home price in China may not represent the true market price.³³

C. Role of Government in China's Economy and Trade

Some of the WTO Members are substantially reluctant to granting China market economy status. Sandy Levin, top Democrat on the House Ways and Means Committee, stated that China has “acted like a non-market economy in so many respects with their state-owned companies, with subsidies, with dumping...”³⁴ The head of the US Trade Representative, Robert Lighthizer, has also opined in his recent testimony before Congress that any decision to label China a ‘market economy’ would have ‘cataclysmic’ consequences for the WTO.³⁵ The dispute over granting market economy status to China concerns the role that the government plays in the economy and trade in China.

From 1949 to 1978, China maintained a socialist planned economy in which the government decided and planned on production and distribution with control over international trade.³⁶ The 1978 “Reform and Open Door Policy” has reduced governmental control over the economy and trade by adopting the elements of market economy, such as private corporations and (gradual) trade liberalization.³⁷ This successful market-oriented economic reform has led China to become the second largest economy in the world and the largest exporter. However, the government has still retained significant control over the economy, although such control is diminishing.³⁸

The role of the government in China is a subject of frequent debate in recent years. There is an argument in favor of further privatization in the Chinese economy and reduction of the government role. The 2014 Trade Policy Review

for China notes relevant points raised by several WTO Members that government intervention affects the allocation of resources in China and competitive conditions of companies in and outside China.³⁹ The Review cites that the SOEs in China benefit from the provision of cheap inputs and credit from the Chinese government.⁴⁰ On the other hand, the role of the government in China may be justified from the perspectives of economic development. Other successful countries, such as Korea, Taiwan, Singapore, and Japan, adopted active state-led, export-driven development policies for decades, many of which have also been adopted by China.⁴¹ New Development Economics (“NDE”) recognizes the complimentary role of governments and markets in economic development.⁴²

Perhaps what is more concerning and potentially contradictory with respect to granting China market economy status is the willingness of its government to use its influence over trade as a means to fulfill its political objectives outside the mandate of the GATT/WTO rules, regardless of its trade-distortion effect and damage to its own consumers and trade partners. Such willingness has been demonstrated by China’s recent adoption of a series of measures against exports in certain goods and services from Korea over a political dispute arisen from the deployment of THADD. This type of politically-motivated trade measures is off-track from the core of the market economy.

3. China’s Measures against Imports from Korea: Are They Compatible with the GATT/WTO Rules and China’s Demand for Market Economy Status?

A. Background

China and Korea have maintained close economic and trade relations. Trade between these two countries amounted to USD 211.4 billion in 2016, dramatically increasing from USD 68.3 billion in 1992.⁴³ China is the largest exporting market for Korea, taking up over 25 percent of exports from Korea, and the largest source of imports. For China, Korea is also the largest source of imports and the fourth largest export market.⁴⁴ Korea is also the largest investor in China, totaling USD 4 billion in 2016.⁴⁵ Signifying their close economic and trade relations, the two

countries signed a free trade agreement in 2015 and have also participated in a broader regional trade agreement under negotiation, “Regional Comprehensive Economic Partnership” (“RCEP”), which covers 16 countries in the Asia-Pacific region.⁴⁶ The close relationship between China and Korea has been described as “strategic cooperative partnership.”⁴⁷

The Sino-Korea relationship met a turning point in 2016 following North Korea’s nuclear test and test launching of its long-range missiles. In response to these threats, the then Park Geun-hye administration of Korea agreed with the US to deploy THADD in Korea. China strongly objects to this deployment, because of the capacity of the THADD radar system with a potential range covering much of Chinese territory.⁴⁸ China considered the deployment of THADD not only a missile defense system against North Korea, but also a part of larger US missile defense (“MD”) system against China.⁴⁹ For China, THADD threatens its security interest and undermines the ‘strategic balance’ in this region.⁵⁰ Foreign ministry spokesman Shuang Geng has warned at a press briefing that China “will firmly take necessary measures to uphold our interests.”⁵¹

China has not formally announced these measures that are potentially inconsistent with the relevant GATT/WTO rules⁵² or recognized that these measures have been adopted to press Korea to discontinue its deployment of THADD. Yet, the timing and the specific measures against imports from Korea are consistent with the continuing pattern in which the Chinese government adopted similar trade measures against imports from its other trade partners, such as Vietnam, Japan, Norway, Taiwan, and the Philippines, over its political disputes with these countries, as a means to press them to accept China’s political demands.⁵³

B. China’s Trade Measures against Korea

1. Ban on the sales of tour packages to Korea

It has been reported that high-ranking officials from the China National Tourism Administration called for a closed meeting on March 2, 2017 and gave verbal instruction to travel agencies in Beijing to suspend the sales of tour packages to Korea without specific duration.⁵⁴ The instructions are known to have been given under the threat of cancelling their license to operate as travel agencies in case of non-compliance.⁵⁵ Travel agencies in other regions in China were also expected

to stop selling tour packages to Korea following regional meetings.⁵⁶ Tuniu, a Chinese online travel agency, *e.g.*, took down all travel packages to Korea as of March 3, 2017. A sales person with Tuniu confirmed with FINANCIAL TIMES that they had removed all tour packages to Korea for the THADD issue.⁵⁷

This ban has inflicted substantial damage to Korea's tourism industry that is heavily dependent on Chinese tourists. As many as 8 million Chinese tourists visited Korea in 2016, which was about 47 percent of all foreign tourists in that year.⁵⁸ The ban is expected to affect around 70 percent of Chinese tourists visiting Korea on tour packages or purchasing flight tickets through a travel agency, which was no longer permitted by the terms of the ban.⁵⁹ The rest could also be affected by the notice issued by the China National Tourism Administration on travelling to Korea, which advises Chinese citizens to be mindful of outbound travel risk and carefully select their travel destinations, citing the recent denial of admission of Chinese citizens at the immigration checkpoint at Jeju Island.⁶⁰ The effect of the ban has been immediate and significant; the number of Chinese tourists to Korea dropped by 66.6 percent in April of 2017 and 64.1 percent in May compared to the same periods in the previous year.⁶¹

2. Suspension of the sales and distribution of Hallyu-content entertainment

'Hallyu' 韩流 refers to popular Korean cultural content, such as K-pop music, K-drama, movies, Korean fashion and cosmetics. It has been highly popular in China in recent years. *E.g.*, K-drama has gained great popularity among young Chinese, and popular Korean TV dramas, such as "Descendants of the Sun" and "My Love from the Star," have amassed billions of views on Chinese online streaming sites,⁶² with a single popular Korean soap generating nearly USD 500 million in economic activity, including through tourism and cosmetic sales.⁶³ Concerts starring Korean pop musicians attracted a large number of audiences in a number of cities around China. Hallyu has permeated into all walks of life in China. Senior politician, such as Wang Qishan, has described himself as a casual viewer of Korean dramas, and even China's influential military (and conservative) newspaper has advocated "Descendants of the Sun" as an ideal advertisement for military conscription, one that should be copied.⁶⁴

Despite the widespread popularity of Hallyu throughout China, the Chinese government has imposed restrictions. Commercial performances open to the

general public are subject to the approval of governmental authorities in China. Since September 2016, the Chinese Culture Ministry, which has the authority to grant permission to commercial performance by foreign artists, has not approved a single performance involving Korean pop artists, while it had authorized 6 Korean artists to engage in commercial performance in China during the months of July and August of 2016.⁶⁵ In addition, no show program funded, affiliated, produced by Korean companies, or starring Korean artists, has been allowed, and Korean dramas, other TV programs and films have been banned from broadcast in China.⁶⁶

This ban was carried out by oral instructions, not by formal announcements, as has been in the case of tourism.⁶⁷ In addition to the THADD issue, rising concern about overpowering Korean influence over China's pop culture and young population may also have prompted the Chinese government to use this opportunity to restrict Hallyu contents.⁶⁸ The popularity of Hallyu had reached to the point that China's Ministry of Public Security found it necessary to warn that "watching Korean dramas could lead to divorce, legal troubles, and gratuitous plastic surgery (a distraught Chinese husband evidently sought out face work after his wife fell for a Hallyu actor)."⁶⁹ Regardless of the government's motive, Korean entertainment industries have sustained severe damage as a result of this ban. Top 3 Korean entertainment agencies, YG Entertainment, SM Entertainment and JYP Entertainment, have lost most of their revenues from China, which have dropped to 6.6 percent, 8 percent and 3 percent of their previous sales, respectively.⁷⁰

3. Shutdown of Lotte Retail Stores

A number of retail stores operated by Lotte, one of the largest Korean conglomerates, have also been subjected to the restrictive measures by the Chinese government. Lotte has been blamed in China for offering its golf course to house THADD, in exchange of government owned-land elsewhere. Lotte has operated department stores and supermarkets in China. Up until March, 2017, 79 Lotte stores out of its 99 outlets in China had been forced to shut down, 63 stores by the government ostensibly due to fire code violations and the rest due to nationalistic protests.⁷¹ The number of closed stores increased to 87 by April. The estimated damage for the two months of closure amounted to USD 170 million.

Again, China has not made any official announcement or formally recognized

that the shutdown order was due to Lotte's support for Korea's deployment of THADD. China's reaction has taken the form of sudden inspections, protests, and boycotts.⁷² Some of the closed Lotte stores attempted to fix the cited fire code violations, but the government did not allow reopening of the stores. China's Ministry of Foreign Affairs has denied knowledge of any restriction being placed on Korean businesses over THAAD, although the country's state media had warned in advance that offering land for THAAD would not lead to a positive result.⁷³ Taobao, the largest e-commerce platform, also closed its Lotte website without giving any reason.

4. Technical Barriers to Trade ("TBT")

At a WTO TBT meeting convened from March 28 to 30, 2017, the Korean Agency for Technology and Standards ("KATS") asked the TBT committee to examine three trade barriers imposed by China.⁷⁴ One measure in question involved the restriction by the Chinese government that each baby formula maker could sell only nine products under three brands.⁷⁵ They were also required to register their products with the China Food and Drug Administration and the Certification and Accreditation Administration of China.⁷⁶ Despite higher price tags, Korean baby formula products have been highly popular among Chinese consumers for their quality. In response to the strong market demand in China, they exported 98 products to China before the restriction.⁷⁷

Without a formal announcement of the Chinese government, however, this restriction has widely been perceived as THAAD-related retaliation due to its timing (October of 2016) and suspect trade protection for the benefit of competing Chinese producers.⁷⁸ The other two measures were the higher registration fee for non-Chinese medical equipment makers, which was twice as high as the fee collected from the Chinese makers, and the non-recognition of internationally accredited certificates for medical equipment, forcing foreign medical equipment firms to separately obtain approval from the Chinese government.⁷⁹

C. Compatibility with the GATT/WTO Rules and China's Demand for Market Economy Status

The measures discussed in the preceding sub-section are suspect violations of relevant GATT/WTO rules. As to the TBT issue, Article 2.2 of the WTO

Agreement on Technical Barriers to Trade provides:

Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations *shall not be more trade-restrictive than necessary* to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, inter alia: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, inter alia: available scientific and technical information, related processing technology or intended end-uses of products.⁸⁰

The restriction on the number of baby formula products and brands per each baby formula maker that can be exported to China constitutes governmental measures covered by the TBT Agreement.⁸¹ It is questionable whether this restriction will pass the test under Article 2.2. This is trade-restrictive as the restriction limits the number of products and brands that could be exported to China, but China has not presented any legitimate objective to be met by this restriction. The higher fee charged to the foreign medical equipment producers is also a suspect violation of Article 2.2, unless China advances a legitimate reason for the higher fee, and Article III of the GATT, which requires Members to accord non-discriminatory treatment to imports *vis-à-vis* domestic products.⁸²

As to the separate registration requirement for foreign medical equipment producers, the TBT Agreement requires importing countries to use international standards, as a basis for their technical regulations except when such international standards would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives.⁸³ This rule does not prohibit separate registration *per se*. However, China could be in violation if it did not approve the medical equipment which met the global standard required for the internationally accredited certificates.

Regarding China's restrictions on tour packages to Korea, Hallyu-content entertainment, Lotte store operations in China, the Chinese government has not formally announced the cited measures. It has instead used internal guidelines or instructions, as have been reported, that were restricted to certain administrative levels and went down to be enforced by lower levels. The internal guidelines

and instructions amount to a ‘measure’ that is subject to the application of the GATT/WTO rules. In the WTO jurisprudence, a measure is defined as “any act or omission attributable to a WTO Member can be a measure of that Member. [...] The acts or omissions that are so attributable are, in the usual case, the acts or omissions of the organs of the state, including those of the executive branch.”⁸⁴ Thus, the internal guidelines and instructions from the government or its agency constitute a ‘measure’ subject to the GATT/WTO disciplines. Lack of formal announcement or the recognition of the existence of the measure by the government is not relevant, either.

As regard the restrictions, the General Agreement on Trade in Services (“GATS”) prescribes different modes of supply of a service that are also applicable to the services subject to the restrictions.⁸⁵ *E.g.*, the restriction on tour packages to Korea is relevant to mode 2 of supply of a service (in the territory of one Member into the territory of any other Member, consumption abroad); Hallyu-content entertainment to mode 4 (by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member, movement of natural persons); and Lotte Store operations in China to mode 3 (by a service supplier of one Member, through commercial presence in the territory of another Member, commercial presence).⁸⁶ The restrictions are inconsistent with some of the key provisions of the GATS. Article II of the GATS provides:

1. With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member *treatment no less favourable than that it accords to like services and service suppliers of any other country.*⁸⁷

Article XVI also stipulates requirements of market access. It provides:

1. With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member *treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.*⁸⁸

The restrictions specifically target the listed services from Korea in contravention to the MFN requirement under the GATS Article I. Here, they do not target

imports from other WTO Members (such as limitations on tour packages and Hallyu entertainment) and the Market Access requirement under the GATS Article XVI where China made commitments under its Schedule of Specific Commitments (such as retailing services).⁸⁹ The existence of the measures in question (internal guidelines and instructions) have been disclosed by the specific accounts of media reports, sudden change of government behavior (such as in the shutdown of Lotte stores), and that of domestic industry under direct control of the government (*e.g.* the removal of popular tour packages to Korea), despite lack of formal announcement by the government.

China's measures against Korea are not consistent with its demand for market economy status. China's major trade partners, such as the US and the EU, have argued that the behavior of the Chinese government in economy and trade is not congruent with the expected market economy.⁹⁰ This type of political interference with trade proves that it was motivated to press China's trade partners to accept its political demand, proves the point. In response to Korea's complaint, China's Foreign Ministry spokesperson Chunying Hua stated: "We support normal business and other exchanges between China and South Korea. Foreign businesses operating in China have to abide by Chinese laws and regulations."⁹¹ She stressed that public opinion should be respected and heard, and it is up to the Chinese market and consumers to decide whether the companies are successful.

If this were to be true, the Chinese government should have left it to the market to decide whether or not the public continue to consume goods and services imported from Korea. Instead, it chose to issue internal guidelines and instructions to restrict certain goods and services imported from Korea, which is not consistent with its own position articulated by spokesperson Hua. China's trade measures against Korea are indeed similar to the pattern established by the previous conduct of the Chinese governments repeatedly adopting trade measures against imports from its other trade partners for political reasons. When a territorial dispute between Vietnam and China arose in 2014, *e.g.*, the Chinese government restricted imports of agricultural products from Vietnam and adopted similar travel restrictions.⁹² There was a similar case with Taiwan.⁹³ China also prohibited the import of salmon from Norway over the award of the Nobel prize to Liu Xiaobao in 2010, a Chinese political dissident.⁹⁴ Another restriction was imposed on tours and the export of rare-earth minerals to Japan over a territorial dispute with Japan

in 2010 and 2012.⁹⁵ The Philippines were also subjected to China's restrictions on group tour packages and imports of its agricultural products due to a territorial dispute.⁹⁶

4. Conclusions: Is China Ready for Market Economy Status?

In the 2017 Davos Forum, China's President Xi Jinping stated: "Pursuing protectionism is like locking oneself in a dark room," and "Wind and rain may be kept outside, but so is light and air."⁹⁷ Ironically, the recent trade measures adopted by China and the policy reflected therein are directly contradictory to his statement. Chinese consumers lost their opportunity to enjoy light and air, including immensely popular Hallyu-content entertainment on TV and in concerts, group tours to Korea, shopping opportunities at Lotte stores, and a full range of high-quality baby formula products from Korea, among others. Injury from these trade measures has not been limited to Korean exporters. Since the adoption of the trade measures, Korean investments in China have been reduced⁹⁸ and the number of Korean tourists has also been dropped, causing injury to potential beneficiaries in China who could have benefitted from Korean investments and tourists.⁹⁹ The continuing restrictions on Lotte store operations will also risk the livelihood of 25,000 Chinese employees of Lotte throughout China.

In the context of anti-dumping investigations, the Protocol seems to be clear that its transitional provision, which allowed the comparison to the production cost in a third country for the determination of normal value, is to be expired 15 years after China's accession into the WTO.¹⁰⁰ The Protocol does not specifically condition the expiration of this provision on further commitments on the part of China. Therefore, the continuing application of the expired provision is likely to be incompatible with the Protocol once the transitional period expired in November 2016. However, the grant of market economy status is a more complex question. As reflected by President Xi's statement, it is relevant to the role of China who wants to lead the world's economy and trade.¹⁰¹

China's trade measures with political objectives against Korea and its other trade partners appear not to be consistent with this role. Given China's massive

economic and trade power as the second largest economy and importer in the world and the substantial asymmetry of economic power existing between China and its most other trade partners, the Chinese government could have a temptation to resort to trade sanction for its own political interests. However, if China wants to be recognized as a market economy and exercise its leadership in the world trade and economy, Chinese authorities need to distinguish its political interests from economic and trade benefits. If China continues trade interference, its trading partners may instead try to lower their trade and economic reliance on China to reduce the risk of politically-motivated trade retaliations in the future. This will, in turn, undermine China's trade and investment interests and adversely affect its position in the world economy and trade.¹⁰²

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2. Section 773 of the Tariff Act of 1930 and Regulation (EU) 2016/1036, arts. 2(1)-2(7).
3. WTO Members may recognize, under the terms of their own laws, that China is a market economy in which case such Members must adopt the regulatory standards that are generally applicable to the other Members in the determination of normal value in anti-dumping proceedings. *See Accession of the People's Republic of China*, ¶ 15.d, WTO Doc. WT/L/432 (adopted on Nov. 23, 2001).
4. These values are referred to as 'surrogate values.' *See supra* note 1.
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 11. *Id.*
 12. *Supra* note 1.
 13. ADP Agreement art. 2.1.
 14. *Id.* art. 2.2.
 15. Sections 773(e) and 773(f) of the Tariff Act further specify the methodologies for determining the cost of production in the country of origin.
 16. EU Regulation (2016/1036), art. 2(1)-(6).
 17. 19 C.F.R. § 351.408. It set forth the implementing regulations of Section 773(c).
 18. Following Section 771(18)(c) of the Tariff Act, the USDOC determination that a country is a non-market economy shall remain in effect until revoked by the administering authority.
 19. EU Regulation (2016/1036), art. 2(7)(c).
 20. These WTO Members would include, among others, Korea, Japan, the EU, and the US in which wages and labor cost tend to be higher.
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 22. *See* Protocol on the Accession of the People's Republic of China [hereinafter The Protocol], WTO Doc. WT/L/432 (adopted on Nov. 23, 2001).
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