

Abhishek Rana, *Renascence of the Red Dragon: A Critique on the EU and US Response to China's Transition to a Market Economy under the WTO*

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RENASCENCE OF THE RED DRAGON: A CRITIQUE ON THE EU
AND US RESPONSE TO CHINA'S TRANSITION TO A MARKET
ECONOMY UNDER THE WTO

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China's Protocol of Accession to the WTO in its subparagraph 15(a)(ii) allowed the WTO Members to treat China as a non-market economy; however, post December 11, 2016, the situation has changed as the concerned subparagraph has expired, and thereby has created a situation of uncertainty in relation to China's market economy status. This article will first shed light on topics such as non-market economies (NMEs) and the legal rules concerning them under the WTO regime. Secondly, it will focus on the history and evolution of the non-market economy methodologies under the national regimes of the European Union and the United States. Lastly, China's main trading partners' reactions to these developments post-December 2016 are discussed. This article concludes that none of the provisions in China's Protocol of Accession makes it obligatory for the other Members to afford a market economy status to China after December 2016.

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I. INTRODUCTION

During the 1940s, the Multilateral Trading System came into effect with countries signing the General Agreement on Tariffs and Trade (GATT), which defined the very goals and objectives of liberalising and promoting trade as a driver of economic development. GATT with its market-based nature came from the unsuccessful establishment of the International Trade Organization; thereby, formed by market economies -for market economies. As an outcome, activities by State-controlled economies to acquiesce to the General Agreement in the early negotiations could only deliver irregular outcomes and strategy suggestions. Nonetheless, with its goal of becoming universal, the Multilateral Trading System initially offered support to both non-market economies (NMEs) and market economies (MEs) to take part in its activities.¹ However, with the advent of the

¹ Vera Thorstensen, *WTO – Market and Non-Market Economies: The Hybrid Case of China*, 1 LATIN AM. J. INT'L TRADE L. 765 (2013) [hereinafter Thorstensen].

Cold War, the NMEs left the deliberations, as the formal trade relations between market economies and the Soviet Union were, largely, managed by political strategies as opposed to international economic considerations; thereby, making it easier to form the GATT, 1947.

Post the 1950s, common perception hailed the GATT system, along with the Organisation for Economic Co-operation and Development (OECD), as a club of market economies; while the Council for Mutual Economic Assistance (Comecon) was to be the club hailing centrally-planned economies. Thus, the GATT rules were understandably unable to envisage the treatment of different features and aspects concerning the NMEs, as their rules were designed to cater only to the market economies. However, after numerous rounds of negotiation, which resulted in the formation of the World Trade Organisation (WTO), it was noticed that the accession and existence of countries working with a non-market economy within the multilateral trading system also contributed in bringing to light the nuanced details of trade between market and non-market economies.²

With the commencement of the Cold War, post the creation of the WTO, all the economies that were invited to take part in the Multilateral System, agreed to become market economies in the future. These countries agreed to become MEs after accepting specific rules within their respective Protocols of Accession and with the goal of operating at their full capacity in the Organisation.³ The case of China – the first major hybrid economy of the world⁴ that contained NME features to accede to the WTO in 2001, attracted attention of other Members of the WTO and thereby reignited the debate over necessary systemic rules and reforms.⁵

At the very turn of the century, China acceded to the WTO since major economies like the United States were already treating China as an NME since 1981 and it was being troublesome to the Chinese exporters as their home market prices and costs were not being considered for the calculation of normal value, which inadvertently lead to higher dumping margins being imposed on imports from China. However, to give shape to its policy shift to a market economy, some of China's historical governmental practices and policies were to be revised owing to their inconsistency

² *Id.*

³ *Id.*

⁴ Panel Report, *China -Report of the Working Party on the Accession of China*, WTO Doc. WT/ACC/CHN/49, (adopted Oct. 1, 2001) [hereinafter Report on China's Accession to the WTO].

⁵ Thorstensen, *supra* note 1.

with the WTO principles.⁶ Members of the WTO feared that free enterprise could suffer a blow as they took cognizance of the massive role which the Chinese government played in its economy.⁷ Consequently, in its accession to the WTO, China permitted the WTO Members to refer to China as a non-market economy while it took further steps to become a market economy.⁸

An expanse of literature exists on whether China should be accorded the market economy status (MES) or not, and what anti-dumping (AD) measures should be taken after December 2016 as per China's Protocol of Accession to the WTO in 2001.⁹ Furthermore, the WTO Agreements, notably the Anti-Dumping Agreement (ADA) and the GATT 1994, failed to define the specificities of market economies and non-market economies. Additionally, they do not regulate the ME or NME classification as understood by the Members of WTO.¹⁰

Being entrenched in the laws of the respective WTO Members, these terms can be implied in different ways by different countries. Since China's Accession Protocol does not define the market or non-market economy status of China, the expiry of Article 15(a)(ii) does not imply that Members of the WTO have to accord China the status of an ME.¹¹ Therefore, the main issue is deciphering what to precisely expect out of the expiry of the aforesaid Protocol after December, 2016, in order

⁶Michael Flynn, *China: A Market Economy*, 48 GEO. J. INT'L L. 297, 301 (2016) [hereinafter Flynn].

⁷WAYNE M. MORRISON, CONG. RESEARCH SERV., RL33536, CHINA-U.S. TRADE ISSUES 42 (2018).

⁸Folkert Graafland & Elena Kumashova, *China's Protocol of Accession and the Anti-Dumping Agreement: Temporary Derogation or Permanent Modification?*, 9(4) GLOB. TRADE & CUSTOMS J. 154, 156 (2014) [hereinafter Graafland].

⁹See also Paul C. Rosenthal & Jeffrey S. Beckington, *The People's Republic of China: A Market Economy or a Non-market Economy in Anti-dumping Proceedings Starting on December 12, 2016*, 9 (7/8) GLOB. TRADE & CUSTOMS J. 352 (2014); Matthew R. Nicely, *Time to Eliminate Outdated Non-Market Economy Methodologies*, 9(4) GLOB. TRADE & CUSTOMS J. 160 (2014); Bernard O'Connor, *Much Ado About 'Nothing' (2016)*, 'China and Market Economy Status' (2015), 10(5) GLOB. TRADE & CUSTOMS J. 176 (2016); Stephanie Noel, *Why the European Union must Dump so-called 'Non-market Economy' Methodologies and Adjustments in its Anti-dumping Investigations*, 11(7/8) GLOB. TRADE & CUSTOMS J. 296 (2016) [hereinafter Noel]; Stephanie Noel & Weihuan Zhou, *Replacing the Non-Market Economy Methodology: Is the European Union's Alternative Approach Justified Under the World Trade Organization Anti-Dumping Agreement?*, 11(12) GLOB. TRADE & CUSTOMS J. 559- 567 (2016).

¹⁰Edwin Vermulst, Juhí Dion Sud & Simon J. Evenett, *Normal Value in Anti-Dumping Proceedings against China Post-2016: Are Some Animals Less Equal than Others?*, 11(5) GLOBAL TRADE & CUSTOMS J. 212, 215-216 (2016) [hereinafter Edwin Vermulst et al.].

¹¹*Id.*

to escape the application of rules as prescribed in the Anti-dumping Agreement for 'normal value' as established for Chinese products.¹²

Having said that, it is contentious whether Member countries of the WTO would employ the second supplementary provision to Article VI:1 GATT 1994 (second Ad Note to Article VI:1 GATT 1994) to escape the obligation of setting the normal value based on the domestic prices or costs, for example, by employing analogue country methodology. Furthermore, it may seem plausible that WTO Members may not employ the surrogate country (or analogue country) methodology post December 2016. However, they may resort to applying certain techniques whilst calculating the 'normal value' of the goods by adjusting the prices of those inputs which they think have little effect on the market prices.¹³

Hence, the author in his research concludes that the onus is on the Chinese exporters to prove that there is an existing market economy in either the whole of China or the specific sector to which their product belongs. If they are unable to prove the existence of ME conditions, then the WTO Members can continue treating China as a non-market economy.¹⁴

II. LEGAL RULES UNDER THE WTO CONCERNING NME

A. Introduction

China became a Member of WTO in the year 2001 through its Protocol of Accession, in which it committed to a series of obligations, which for all theoretical purposes, should lead to a market economy. References have been made to China's status as an NME in a few provisions of this protocol, namely in its Article 15 which deals with the difficulties arising from the non-existence of market economy conditions and the related complications in assessing the appropriate amount of dumping and subsidies.¹⁵ Moreover, there is no clear definition under the Protocol for the term 'non-market economy', as provisions of Article 15 only presumes China to be an NME, and gives no further clarifications.¹⁶

Referring to Article 15 of China's Accession Working Party Report, it was stated that:

¹² *Id.*

¹³ *Id.*

¹⁴ Flynn, *supra* note 6.

¹⁵ Thorstensen, *supra* note 1.

¹⁶ *Id.*

“Several members of the Working Party noted that China was continuing the process of transition towards a full market economy. Those members noted that under those circumstances, in the case of imports of Chinese origin into a WTO Member, special difficulties could exist in determining cost and price comparability in the context of anti-dumping investigations and countervailing duty investigations...”¹⁷

Subsequently, the Working Party proved some of the NMEs’ effects on the WTO system, namely on the proper functioning of the mechanisms. Yet, it was unable to define what precisely was to be deemed in order to become an NME or a ‘full market economy’.¹⁸ With this context, one can raise pertinent questions such as: what is known as a market economy and how can it be defined?

Even though the bone of contention with the concept of NME revolves around the dumping investigations, as demonstrated by China’s Protocol of Accession, such definition is pivotal in shedding light on other NME challenges that question the rules of multilateral trading systems, and also in understanding China’s participation along with other NMEs in the WTO.¹⁹

B. *Legal Rules*

There exists diversity and gradations in the economic parameters as applied to a market economy and a planned one, further complicating the issue of defining an ME or NME.²⁰ Apart from the United Nations Conference on Trade and Development (UNCTAD), a detailed legal definition has still not been conceived among the entire spectrum of international economic organisations.

1. UNCTAD

As per UNCTAD, “a national economy of a country that relies heavily upon market forces to determine levels of production, consumption, investment and savings without government intervention” is known as a market economy.²¹ Similarly, UNCTAD’s definition of a non-market economy (NME) is stated as follows:

¹⁷ Report on China’s Accession to the WTO, *supra* note 4, at ¶150.

¹⁸ Thorstensen, *supra* note 1.

¹⁹ Thorstensen, *supra* note 1.

²⁰ *Id.*

²¹ *Market Economy*, UNCTAD’s Glossary of Customs Terms at <https://legacy.asycuda.org/cuglossa.asp?term=Market+Economy&submit1=Search> (Last visited Jan. 13, 2019)

“A national economy in which the government seeks to determine economic activity largely through a mechanism of central planning, as in the former Soviet Union, in contrast to a market economy which depends heavily upon market forces to allocate productive resources. In a non-market economy, production targets, prices, costs, investment allocations, raw materials, labour, international trade and most other economic aggregates are manipulated within a national economic plan drawn up by a central planning authority; hence, the public sector makes the major decisions affecting demand and supply within the national economy”.²²

According to the author, this is one of the better definitions for NME as it is quite exhaustive in its approach; however, the concept of an ME varies from one Member State to the other, making each country eligible of having its own definition, while the WTO has no definition at all.

2. World Trade Organization

The very first discussion on the NME concept at the multilateral trading system occurred during the Ninth Session of GATT Contracting Parties held from 28th October 1954 through 18 March 1955.

Article VI of the GATT 1994 provides for international regulation on topics related to dumping and subsidies matters,²³ while its second Supplementary Provision (i.e., Second *Ad Note*) acts as an interpretative clause, and in its paragraph 1 states that:

“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.”²⁴

Moreover, Point 2 of the *Ad Note* also refers to the price comparability determinations between market and non-market economies. However, can one classify the text mentioned in Point 2 as a legal WTO definition of an NME?

²² *Id.*

²³ Thorstensen, *supra* note 1.

²⁴ Interpretative Note Ad Article VI, General Agreement on Tariffs and Trade, Oct. 30, 1947, 61. Stat. A-11, 55 U.N.T.S. 194.

Evidenceto this Ad Note containing a definition of NME in itself is present in Article 15 of the Tokyo Round Subsidies Code,²⁵ paragraph 1 of which states that:

Article 15

Special situations

“1. In cases of alleged injury caused by imports **from a country described in NOTES AND SUPPLEMENTARY PROVISIONS to the General Agreement (Annex I, Article VI, paragraph 1, point 2)** the importing signatory may base its procedures and measures either:

(a) on this Agreement, or, alternatively

(b) on the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade.”²⁶ (Emphasis added)

The panel on the US – Antidumping and Countervailing Duties, with an indirect reference to the Ad Note,²⁷ stated as under:

“We also consider it significant that the predecessor to the SCM Agreement – the Tokyo Round Subsidies Code – contained a provision that **explicitly addressed the concurrent use of NME methodologies** in anti-dumping investigations, and of countervailing duties, in respect of imports **from NMEs**. Where imports from **non-market economies** were at issue, Article 15 of that Code imposed upon the importing Member a choice between the use of anti-dumping measures or of countervailing duties...”²⁸

It can safely be presumed that this article deals with imports from NMEs and the same inference can be drawn from the Appellate Body’s decision in this case,²⁹ wherein it was mentioned that:

“Article 15 of the Tokyo Round Subsidies Code imposed upon an importing signatory a choice between the use of anti-dumping duties and

²⁵ Thorstensen., *supra* note 1.

²⁶ Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade, Apr. 12, 1979, 1186 U.N.T.S. 204.

²⁷ Thorstensen, *supra* note 1.

²⁸ Appellate Body Report, *US – Antidumping and Countervailing Duties*, WTO Doc. WT/DS/379 (adopted Oct. 22, 2010) [hereinafter *US- Countervailing Duties*].

²⁹ *Id.*, ¶ 574; Thorstensen, *supra* note 1.

the use of countervailing duties against imports **from NMEs**. This provision thus prohibited the concurrent application of the two types of duties, regardless of whether this in fact resulted in the imposition of double remedies.”³⁰

Within the heading of Paragraph 1, the reference to the Ad Note is quite explicit. Therefore, it seems reasonable to conclude that the Ad Note refers to the Dispute Settlement Body (DSB) a definition of an NME.³¹ This interpretation is further confirmed by the Appellate Body in the case of EC – Fasteners, in a footnote to its decision:

“We observe that the second Ad Note to Article VI:1 refers to a ‘country which has a complete or substantially complete monopoly of its trade’ and ‘where all domestic prices are fixed by the State’. **This appears to describe a certain type of NME**, where the State monopolizes trade and sets all domestic prices. **The second Ad Note to Article VI:1 would thus not on its face be applicable to lesser forms of NMEs that do not fulfil both conditions**, that is, the complete or substantially complete monopoly of trade and the fixing of all prices by the State.”³²

This decision led to the inference that, even though the Ad Note assigns a definition to an NME, it does not encompass the entire meaning of the expression. According to the Appellate Body, there are other different types of NMEs besides “a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State.”³³ Although the Ad Note cannot apply to these other types of NMEs, they could still be recognised from the same.

The matter pertaining to NMEs was also addressed in the Agreement on Subsidies and Countervailing Measures (SCM). Article 29.1 of the SCM Agreement approaches the market economy issue while dealing with time-frame extensions for countries in transition to market economies as:³⁴

Article 29

Transformation into a Market Economy

³⁰ US- Countervailing Duties, *supra* note 28.

³¹ Thorstensen, *supra* note 1.

³² Appellate Body Report, *China -Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WTO Doc. WT/DS397/AB/R (adopted July 15, 2011).

³³ Thorstensen, *supra* note 1.

³⁴ *Id.*

“29.1 Members in the process of transformation from a centrally-planned into a market, free-enterprise economy, may apply programmes and measures necessary for such a transformation.”³⁵

Further, Article 29.3 of the SCM Agreement is detrimental in assessing the countries considered for transforming from a centrally-planned into a market-ordered economy (as per Article 29.1). It shall bring to the Committee’s notice the subsidies and the countervailing measures of those subsidies, to which the SCM Agreement’s Article 3 shall apply.³⁶ In the absence of a legal definition, the WTO Members are potentially able to deliberate over the matter to some degree. Notifications under the SCM Agreement under its Article 29.3 have already been submitted by countries that were to be transitioning into a market economy.³⁷

C. China’s Protocol of Accession to the WTO

For a country to successfully join the WTO, it is mandated to negotiate the terms of accession.³⁸ In China’s case, it manifested into a strenuous fourteen-year long process.³⁹ In fact, China’s accession process was languishing for many years owing to the Member countries’ concerns about China’s transition to a market economy in addition to their concerns relating to the prevalent pricing policies and any form of price control mechanism in China.⁴⁰ Such concerns were pointedly centred on the difficulties faced by other Member States when determining the costs and the respective price comparability⁴¹ under the anti-dumping and countervailing duty cases.⁴²

The Members raised concerns about the involvement of the Chinese government in its economy and felt that the same could result in having a distortive effect in assessing the Chinese prices and cost, resulting in unreliability in Chinese prices and affecting the anti-dumping investigations severely.⁴³ Addressing these

³⁵ Agreement on Subsidies and Countervailing Measures, art. 29.1, Dec. 31, 1999, 1869 U.N.T.S. 14 [hereinafter SCM Agreement].

³⁶ Thorstensen, *supra* note 1.

³⁷ *Id.*

³⁸ Mitsuo Matsushita, *The World Trade Organization: Law, Practice, and Policy*, 14 KING’S C.L.J. 283, 584 (2003)

³⁹ *Id.*

⁴⁰ Report on China’s Accession to the WTO, *supra* note 4.

⁴¹ FLYNN, *supra* note 6.

⁴² *Id.*

⁴³ Christian Tietje & Karsten Nowrot, *Myth or Reality? China’s Market Economy Status under WTO Anti-Dumping Law After 2016*, 34 POL’Y PAPERS ON TRANSNAT’L ECON. L., 5 (2016) [hereinafter Tietje et al.].

concerns, China came to an agreement that in the absence of market economy conditions, a comparable market economy could be used to assess cost and prices to see to anti-dumping investigations.⁴⁴ However, by allowing a surrogate market to assess prices and costs or by the usage of analogue country methodology, the Chinese exporters were prevented from relying on their company's actual data to determine the normal value of their product.⁴⁵ As an obvious aftermath of this endeavour, dumping margins were heightened⁴⁶ and so were the anti-dumping duties on those imported Chinese goods.⁴⁷

However, China's Protocol of Accession holds a one-of-a-kind sunset provision that came in effect on December 11, 2016. However, it fails to resolve whether importing countries should be permitted to employ surrogate country methodologies in anti-dumping investigations after December 11, 2016. Notwithstanding a few critics who deem all alternative pricing methodologies to be terminated with the sunset provision, the plainly worded text of China's Protocol of Accession cannot be used to substantiate such a conclusion:⁴⁸

Article 15

Price Comparability in Determining Subsidies and Dumping

“Article VI of the GATT 1994, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement") and the SCM Agreement shall apply in proceedings involving imports of Chinese origin into a WTO Member consistent with the following:

(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

⁴⁴ Report on China's Accession to the WTO, *supra* note 4.

⁴⁵ Graafsma, *supra* note 8, at 154.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Graafsma, *supra* note 8

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.

(b) In proceedings under Parts II, III and V of the SCM Agreement, when addressing subsidies described in Articles 14(a), 14(b), 14(c) and 14(d), relevant provisions of the SCM Agreement shall apply; however, if there are special difficulties in that application, the importing WTO Member may then use methodologies for identifying and measuring the subsidy benefit which take into account the possibility that prevailing terms and conditions in China may not always be available as appropriate benchmarks. In applying such methodologies, where practicable, the importing WTO Member should adjust such prevailing terms and conditions before considering the use of terms and conditions prevailing outside China.

(c) The importing WTO Member shall notify methodologies used in accordance with subparagraph (a) to the Committee on Anti-Dumping Practices and shall notify methodologies used in accordance with subparagraph (b) to the Committee on Subsidies and Countervailing Measures.

(d) 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.”⁴⁹

D. Market Economy Status and WTO Studies

Quite a few lawyers and jurists, who are concerned with the consequences and the meaning of Article 15 of the Accession Protocol, base their arguments on the general rules of interpretation of treaties⁵⁰ as given under Articles 31 and 32 of the Vienna Convention on the Law of Treaties,⁵¹ which are also applicable to the agreements under the WTO.⁵² This practice of interpretation has been employed in numerous WTO decisions by the Panel and the Appellate Body.⁵³

The main principles of explaining the content of treaties stipulate that the intentions of the drafters and the context in which a treaty is adopted are to be closely observed.⁵⁴ In addition to this, an approach has to be undertaken that is textual in nature⁵⁵ and one that cannot “add to or diminish rights and obligations provided in the WTO Agreement”.⁵⁶ Moreover, it is important that “the interpretation of a treaty must give meaning and effect to all of its clauses and, thus, [cannot] reduce individual provisions to inutility”.⁵⁷

Notwithstanding a situation wherein one follows these instructions, a unanimous answer as to what methodologies would be applicable post-December is not available, if China or its exporters fail to showcase that they operate under market economy conditions.⁵⁸ When confronted in a legal debate, there are two main

⁴⁹ World Trade Organisation, China’s Protocol of Accession to the World Trade Organisation, art. 15, WT/L/432, Nov. 23, 2001 [hereinafter China’s Accession Protocol].

⁵⁰ Hannes Dekeyser et al., *China: NME at the Gates?*, 7 Eur. Inst. Asian Stud., Research Paper Nov., 2016, http://www.eias.org/wp-content/uploads/2016/11/EIAS-Research-Paper-NOVEMBER2016_-_China-NME-at-the-Gates-1.pdf. (Last visited Jan. 12, 2019) [hereinafter Dekeyser].

⁵¹ Vienna Convention on the Law of Treaties, arts. 31, 32, 1155 UNTS 331 (1969) [hereinafter VCLT].

⁵² Appellate Body Report, *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WTO Doc. WT/DS50/AB/R (adopted Dec. 19, 1997) [hereinafter India-Patent Protection].

⁵³ Dekeyser, *supra* note 50.

⁵⁴ VCLT, art. 31.

⁵⁵ Appellate Body Report, *Japan - Taxes on Alcoholic Beverages*, ¶¶34,122,123, WTO Doc. WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (adopted Oct. 4, 1996).

⁵⁶ India - Patent Protection, *supra* note 52.

⁵⁷ Rao Weijia, *China’s Market Economy Status under WTO Antidumping Laws after 2016*, 5(15) TSINGHUA L. REV. 151 (2013) [hereinafter Weijia].

⁵⁸ *Id.*

opinion groups that are formed.⁵⁹ Both of them contain subgroups that stray away from the main line of reasoning. While the first group maintains a proposition in favour of the investigating authorities being able to ignore the usual methodology, if and only if, the conditions mentioned in the Ad Note were met, equating it to de facto awarding of MES status to China;⁶⁰ the others maintain that Members of the WTO can still employ the criteria set in their domestic legislations which are provided in the later sections of this article.⁶¹

E. Market Economy Status – De-Facto

As the author has earlier highlighted, a number of legal jurists have contested that with the expiration of clause (a)(ii) of Article 15 of the Accession Protocol. Member countries of WTO will forsake the right to shift from the standard methodology while zeroing down on a normal value, as Article 15 would make China a de facto ME.⁶² The ME status that is awarded under national rules is independent of the international law, as the Members are mandated to apply the ordinary methods as prescribed in the WTO Anti-Dumping Agreement making them regard China as any other regular Member state.⁶³ Owing to this reason, the normal value is now expected to be set using Chinese prices and costs as mandated under ordinary rules prescribed by Article 2 of the Anti-Dumping Agreement (ADA).⁶⁴ Consequently, the question whether China is classified as a market economy was only a concern until December, 2016, as the paragraph (d) of Article 15 of the Accession Protocol provides the early termination of this non-market economy methodology.⁶⁵

Having said that, Article 2.7(b) of the European Union (EU) Basic Anti-Dumping Regulation requires adaptation, lest it contradicts EU's commitments at the WTO as the sole feasible calculation of normal value would be through Chinese prices and costs.⁶⁶ Taking the adoption of the Protocol as a point of departure, Paragraph

⁵⁹ Dekevser, *supra* note 50.

⁶⁰ *Id.*

⁶¹ F. Martin Malvarez, *China's NME Treatment after December 2016*, (Oct. 28, 2015) at <https://static1.squarespace.com/static/5537b2fbc4b0e49a1e30c01c/t/5645f48be4b0abd1d824c753/1447425163219/Malvarez+-+China+2016+Methodology+-+Final+version.pdf>. (Last visited July 16, 2017)

⁶² Dekevser, *supra* note 50.

⁶³ *Id.*

⁶⁴ *The Interpretation of Section 15 of China's WTO Accession Protocol*, at 27-31 (Jan. 28, 2016), [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/535023/EXPO_STU\(2016\)535023_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/535023/EXPO_STU(2016)535023_EN.pdf). (last visited Jan. 12, 2019). [hereinafter Bellis]; Graafsma, *supra* note 8; Weijia, *supra* note 57.

⁶⁵ Dekevser, *supra* note 50.

⁶⁶ Bellis, *supra* note 64.

151 of the Working Party Report further substantiates the claims that Article 15(a)(ii) cites only “a temporary derogation from the Anti-Dumping Agreement” as opposed to a lasting alteration.⁶⁷ The report was prepared by a team that was formulated in 1987 to analyse and ascertain the request of the People’s Republic of China to join the GATT, and henceforth, the WTO, to deliberate the terms of accession. The same can widely reflect the intentions of the mediators as well.⁶⁸

The statement given by Ms. Barshefsky, the former US (The United States of America) Trade Representative involved in the deliberations of the proposed agreement further substantiates this narrative.⁶⁹ In a polemical remark, she referred to a 15-year period, within the span of which dumping calculations used a “special non-market economy methodology” where applicable.⁷⁰ Hence, it is argued that, if even the termination of Article 15 (a)(ii) fails to result in the end of the analogue country methodology to be employed for the Chinese exporters, then the resultant meaning of the same provision is likely to indicate that the Chinese producers operate within an NME.⁷¹ However, as it happens, this argument is invalid as it is not backed by the provisions made available within Article 15 and since the very same presumption is represented in part (a)(i).⁷² In its place, (a)(ii) is supposed to give rise to the possibility of employing an alternative methodology, serving as the only provision in Article 15 to be able to facilitate the same.⁷³

Comparing anti-dumping investigations that are independent of Chinese figures could be an eventuality in the future if one considers the Ad Note, but not the Accession Protocol.⁷⁴ A different faction of legal experts also believe that even though Article 15 fails to label China as an NME categorically, it still meets similar treatment to countries that come under the Ad Note. Notwithstanding the point that the expiration of (a)(ii) fails to bequeath the unquestionable status of market economy, which it was supposed to acquire for at least a ‘juridical second’ on December 12, owing to importing Members not being able to employ a

⁶⁷ Graafsma, *supra* note 45, at 154.

⁶⁸ Report on China’s Accession to the WTO, *supra* note 4.

⁶⁹ Dekevser, *supra* note 50.

⁷⁰ C. BARSHEFSKY, *ACCESSION OF CHINA TO THE WTO* (2000), at <https://www.gpo.gov/fdsys/pkg/CHRG-106hhr67832/html/CHRG-106hhr67832.htm>. (Last visited Jan. 12, 2019)

⁷¹ Dekevser, *supra* note 50.

⁷² Graafsma, *supra* note 45, at 154.4

⁷³ Dekevser, *supra* note 50.

⁷⁴ K. William Watson, *It’s Time to Dump Nonmarket Economy Treatment*, Free Trade Bill. No. 65, at <https://www.cato.org/publications/free-trade-bulletin/its-time-dump-nonmarket-economy-treatment> (Last visited Jan. 12, 2019)

methodology without having updated domestic Chinese prices and costs.⁷⁵ However, if governments want to derogate from the ordinary methodology, the onus is on the importing Members who are required to prove that the conditions set in the second Ad Note and WTO ADA are satisfied.⁷⁶

The aforesaid essentially categorizes China as an ME, as Article 15 does not support the employment of an analogue country methodology. Furthermore, even in the situation wherein China stays as an NME, it would not seem to have any direct implications on the calculations of the normal value for anti-dumping purposes.⁷⁷ As opposed to what certain academicians would claim, this interpretation would not deem the rest of Article 15 inconsequential, for it would still be feasible to ground special calculations addressed to in the chapeau of Article 15, on the Ad Note.⁷⁸

The second sentence of paragraph (d) of Article 15 has been deemed purposeless, as after December 11, 2016, it ceases to have any influence.⁷⁹ As a result of the same, in the event an importing Member happens to apply alternative methodologies post December, China would then be sufficiently equipped to raise the matter in front of the WTO Dispute Settlement Body (DSB).⁸⁰ Therefore, if the European Union and the United States don't comply with the WTO rules after the expiry period, then a WTO authorized retaliation by China would be a certain eventuality, after the decision of the WTO DSB.⁸¹

F. *Unceasing Practice of Using Alternative Methodologies*

The WTO Member States as per the Antidumping Agreement are allowed to apply 'alternative methods, which includes taking external benchmarks rather than taking home prices and costs while calculating the margins. Jurists who are against the proposition of awarding MES to China have claimed that the chapeau of the subparagraph (a) and (a)(i) of Article 15 of the Accession Protocol can form a sufficient basis for permitting the WTO Member states to impose alternative methodologies from December, 2016. The same would continue to be in effect unless China manages to establish its market economy conditions in conformity with the other WTO Members. It was, however, conceded that after the expiration

⁷⁵ Dekevsler, *supra* note 50.

⁷⁶ Tietje et al., *supra* note 43.

⁷⁷ Edwin Vermulst et al., *supra* note 10, at 212.

⁷⁸ B. O'Connor, *The Myth of China and Market Economy Status in 2016*, at <http://worldtradelaw.typepad.com/files/oconnorresponse.pdf>. (Last visited Jan. 12, 2019) [hereinafter Connor-I].

⁷⁹ Edwin Vermulst et al., *supra* note 10.

⁸⁰ Dekevsler, *supra* note 50.

⁸¹ Weijia, *supra* note 57.

of (a)(ii), the leftover provisions do not demarcate clear instructions to ascertain the treatment of Chinese products in a situation where the producers are unable to demonstrate their workings in accordance with the market economy conditions.⁸² Questionably, this sort of a blank space in legislation could be interpreted by individual Member states, based on the text of chapeau (a), allowing for a flexible application under the NME approach.⁸³

Moreover, the remaining portions of Article 15 necessitate being taken into account, in consonance with the rules of treaty interpretation. Hence, provision (d) continues to lay the onus of proof on China or its exporters to prove that they operate in an ME in accordance with the preconditions set by the importing countries within their national laws.⁸⁴ If and only if China meets these conditions, the entire subparagraph (a) will cease to apply, besides the condition that the importing country will follow Article VI of the GATT and the Antidumping Agreement to employ ordinary methodology of calculation.⁸⁵ It can be observed that a different conclusion would deem the remaining text of Article 15 (a) and (d) inconsequential.⁸⁶

Furthermore, as per the supporters of the interpretation above, there is no deadline that exists for the US and EU to adapt its Anti-Dumping regimes by the end of 2016.⁸⁷ So, the only effect of the expiration of (a)(ii) of Article 15 was to allow stand-alone Chinese exporters the opportunity to prove ME conditions for their respective businesses and/or as a whole in China, which remains under the presumption of an NME until proven otherwise, although it does not have any effect⁸⁸ on the US and EU legislation as it anyway allows for a differentiated market economy treatment.⁸⁹

Therefore, as per the aforementioned argument, it is not entirely up to the investigating authorities to prove the conditions of NME in China after December, 2016.⁹⁰ Also, the US and the EU might like to resort to new trade protectionist

⁸² Dekevser, *supra* note 50.

⁸³ B. O'Connor, *Market-economy status for China is not automatic* (Nov. 27, 2011), <http://voxeu.org/article/china-market-economy> (Last visited Jan. 12, 2019) [hereinafter Connor-II].

⁸⁴ Dekevser, *supra* note 50.

⁸⁵ Connor-I, *supra* note 78.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ L. Ruessmann, & J. Beck, *2016 and the Application of an NME Methodology to Chinese Producers in Anti-dumping Investigations*, 9(10) GLOB. TRADE & CUSTOMS J. 457, 457-63 (2014).

⁸⁹ Dekevser, *supra* note 50.

⁹⁰ Report on China's Accession to the WTO, *supra* note 4.

measures to protect their commercial businesses.⁹¹ Nevertheless, if the US and EU decline to take into consideration the domestic prices of Chinese products and the cost put on by Chinese exporters, then China can take necessary steps by getting a WTO DSB ruling in their favour—which has been presumed by quite a few jurists,⁹² and thereafter legally retaliate against these two big economies.⁹³

It is quite important to note herein that China has already approached the WTO DSB after the failure of consultations with the United States⁹⁴ and the European Union⁹⁵ once the December 11, 2016 deadline expired. These disputes are concerning the impugned methodology used for the determination of ‘normal value’ under the US and EU anti-dumping regimes for products from NME countries like China, and have been mainly brought under the alleged violations of Articles 2.1 and 2.2 of the Anti-dumping Agreement (Article VI of GATT 1994) and Articles I:1 and VI:1 of the GATT 1994.

III. NON-MARKET ECONOMY TREATMENT UNDER THE NATIONAL REGIMES

A. European Union

The European Commission introduced a polemic in its 33rd Annual Report to the Council and European Parliament on the anti-subsidy, anti-dumping actions and safeguard measures, making the point that several fundamental steps in anti-dumping investigations are not mandated to be uniform throughout EU’s trade partners.⁹⁶

“In an anti-dumping investigation, Commission services usually compare the export price of a product with its ‘normal value’, which is the price paid in the domestic market of the exporting country or a constructed normal value (Article 2 (1) of the basic antidumping regulation). However, this methodology can only be used if costs and prices in the exporting

⁹¹ Charles De Marcilly & Angelie Garde, *Status of Market Economy to China: What Political Answers can be given to this Legal Straitjacket?* (Apr. 19, 2016), <https://www.robertschuman.eu/en/doc/questions-d-europe/qe-389-en.pdf> (last visited Jan. 13, 2019).

⁹² Weijia, *supra* note 57.

⁹³ Dekevsar, *supra* note 50.

⁹⁴ Acceptance by the United States of the Requests to Join Consultations, *United States — Measures Related to Price Comparison Methodologies*, WTO Doc. WT/DS515/9 (Jan. 11, 2018).

⁹⁵ Constitution of the Panel Established at the Request of China, *European Union — Measures Related to Price Comparison Methodologies*, WTO Doc. WT/DS516/10 (Apr. 3, 2017).

⁹⁶ Edwin Vermulst et al., *supra* note 10.

country are reliable and the result of supply and demand, i.e. not subject to significant distortions . . . ”⁹⁷

At that time, especially with regard to the anti-dumping investigations, the concept of MES was presented to help identify cases wherein the ‘usual’ methodology could have been employed. The Commission, in its official documents on MES emphasised and reiterated the point that an ME designation is essentially channelled by the enforcement of its anti-dumping legislations.⁹⁸ Moreover, the Commission noted in its 2008 appraisal of China’s progress towards MES that:

“ . . . The assessment of Market Economy Status (MES) is not a judgement of the general functioning of the Chinese economy or a political judgement on whether a market economy per se exists in China. It focuses on a number of specific technical areas related to the influence of state intervention on prices and costs in China. These influences, where they exist, are obviously relevant to trade defence investigations, because they determine the extent to which the costs of exports from China reflect the unfair influence of state intervention.”⁹⁹

Furthermore, there have been instances where foreign governments have requested for MES. However, in those instances, the Commission has proposed to establish “ . . . whether the conditions in the country concerned have evolved to the extent that prices and costs can be used for the purpose of trade defence investigations.”¹⁰⁰ The herculean number of suggestions and the numerous hurdles in the way of initiating this sort of reform by the Commission, as provided in their documents concerning MES, gives an impression that a trading partner would only be able to meet these conditions once it undergoes an economic transition or reaches the desired stage of advanced development.¹⁰¹

In another view, as has been witnessed in most of the instances of Anti-Dumping enforcements by the Commission, the evaluation of MES is a rather technical

⁹⁷ Commission Staff Working Document, *The 33rd Annual Report from the Commission to the Council and the European Parliament on the EU’s Anti-Dumping, Anti-Subsidy and Safeguard activities* (2014), http://trade.ec.europa.eu/doclib/docs/2015/august/tradoc_153702.pdf. (last visited Mar. 7, 2017)

⁹⁸ Edwin Vermulst et al., *supra* note 10.

⁹⁹ Commission Staff Working Document, *Progress by the People’s Republic of China towards Graduation to Market Economy Status in Trade Defence Investigations*, ¶4, at http://trade.ec.europa.eu/doclib/docs/2009/june/tradoc_143599.pdf. [hereinafter Working Document-I.] (Last visited June 15, 2017).

¹⁰⁰ *Id.*, at 5.

¹⁰¹ Edwin Vermulst et al., *supra* note 10.

exercise, untarnished by the deliberations, both tactical and strategic.¹⁰² Thus, the Commission, in a rather technocratic manner, proceeded to enlist a criterion having five parameters that must be attained before the MES status can be granted. In its latest publication on China's eligibility for MES status, the five parameters were as following:

- “1. [A] low degree of government influence over the allocation of resources and decisions of enterprises, whether directly or indirectly (e.g. public bodies), for example through the use of state-fixed prices, or discrimination in the tax, trade or currency regimes.
2. [A]n absence of state-induced distortions in the operation of enterprises linked to privatisation and the use of nonmarket trade or compensation system.
3. [T]he existence and implementation of a transparent and non-discriminatory company law which ensures adequate corporate governance (application of international accounting standards, protection of shareholders, public availability of accurate company information).
4. [T]he existence and implementation of a coherent, effective, and transparent set of laws which ensure the respect of property rights and the operation of a functioning bankruptcy regime.
5. [T]he existence of a genuine financial sector which operates independently from the state and which in law and practice is subject to sufficient guarantee provisions and adequate supervision.”¹⁰³

The spectrum of policies that are affected by these five parameters is extensive, including topics like regulation of prices, laws governing corporations, bankruptcy, and the regulation of financial systems of the nation. This ended up giving an impression that the MES status mandated meeting grossly high standards—yet this was hard to believe as only 15¹⁰⁴ EU trading partners have failed to attain the MES till date.¹⁰⁵ In turn, the most pivotal question which begs an answer is: what is to be demonstrated by a trading partner to be able to subscribe to all the given

¹⁰² *Id.*

¹⁰³ Working Document-I, *supra* note 99.

¹⁰⁴ European Commission Press Release MEMO/16/61, College Orientation Debate on the Treatment of China in Anti-Dumping Investigations (Jan. 13, 2016), http://europa.eu/rapid/press-release_MEMO-16-61_en.htm. (last visited Jan. 13, 2019)

¹⁰⁵ Edwin Vermulst, *supra* note 10.

parameters? The Commission has arguably stated the following concerning the first parameter as:

“ . . . To meet this criterion, a state must demonstrate that it does not exercise undue influence over the allocation of economic resources in the economy or decisions of companies. This could take the form of price fixing, obligations to produce for export, restrictions imposed on exports of raw materials or subsidies for industrial inputs.”¹⁰⁶

Making a case by referring to China’s constraints on imports and exports, tax measures, fixing of prices, the subsidy on input goods, and policies concerning industries, it was concluded that China failed to pass this test. Furthermore, the Commission settled the debate by stating that “ . . . In order to meet this criterion it would be necessary for the Chinese authorities to demonstrate that the forms of intervention outlined above had been discontinued.”¹⁰⁷ However, the word ‘discontinued’ indicates towards an all embracing omission of the offending policy instruments and has the potential of not sitting well with the perspective of MES which was to be granted on the accomplishment of a desired stage of development.¹⁰⁸

The discussion surrounding the Commission’s stance on Chinese industrial policy measures is an evidence of the rift between the two parties and the strength of the demands for a laissez-faire approach. Notwithstanding the steps which the Chinese government has taken to encourage economic activities beneficial for development and upward mobility and the fact that the Commission has cited that these may encompass a ‘legitimate approach’,¹⁰⁹ it goes on further to argue that:

“ . . . The only question for the current assessment is whether such policies distort domestic competitive conditions in favour of domestic operators and thereby make domestic cost prices and costs unreliable”.¹¹⁰

This addresses a highly vital point that even if a policy is determined to be legitimate it may be outdone by a finding that it could have initiated a distortion.¹¹¹ Holding the Commission’s perspective, the Chinese economy was able to meet the second parameter in one of its first assessments of its MES as of 2004. However, in 2008, the Commission put forth that it was never in possession of any ‘external

¹⁰⁶ Working Document-I, *supra* note 99, at 7.

¹⁰⁷ *Id.*, at 12.

¹⁰⁸ Edwin Vermulst, *supra* note 10.

¹⁰⁹ *Id.*

¹¹⁰ Working Document-I, *supra* note 99.7

¹¹¹ Edwin Vermulst, *supra* note 10.

information' that can put its earlier assessment in jeopardy.¹¹²With respect to the third parameter, the Commission argued that:

“... In order to meet this criterion it is necessary for a state to demonstrate that within its economy companies are subject to a transparent and rigorous system of company law. This includes being subject to international accounting standards and international standards for shareholder protection and transparency. Transparent and reliable company records are absolutely central to trade defence investigations, as they are the chief means of determining a company's costs . . . ”¹¹³

However, while studying the expanse of reforms instituted by the Chinese government for the concerned area, the Commission's findings were clear that China had never met this parameter. The Commission laid great emphasis on the effective implementation and, as and when applicable, proper enforcement of these reforms and it was argued that 'adoption of a shareholding system is also an important step, but its final impact on corporate governance remains to be seen'.¹¹⁴Quite different from the first parameter, one which could be satisfied by the Chinese taking back its state measures, China was to be ultimately assessed in a manner wherein the enterprises are subject to the enforcement of the aforesaid corporate governance reforms. Additionally, where the first parameter tends to favour smaller and a less meddlesome state, the discussion ensuing within the Commission seems to favour a bigger state in certain factions of policy.¹¹⁵ It is worth noting that, China was given no benefit of the doubt concerning the implementation of these reforms. When it assessed China on the fourth parameter, the Commission argued that:

“ . . . To meet this criterion a state must demonstrate that within its economy an effective legal regime with respect to property rights, bankruptcy, and the protection of intellectual property. Ambiguities over private ownership are important in trade defence investigations, because they can effect access to credit by private companies, and non-payment of royalties for the use of intellectual property can obviously constitute an unfair cost distortion . . . ”¹¹⁶

Besides repeating the contention that it was too early for them to assume the proper enforcement of reforms to the property rights, laws concerning bankruptcy,

¹¹² *Id.*

¹¹³ Working Document-I, *supra* note 99.

¹¹⁴ *Id.*

¹¹⁵ Edwin Vermulst, *supra* note 10, at 212.

¹¹⁶ Working Document-I, *supra* note 99.

competition law by the Chinese, the Commission exercised its prerogative to harangue the different policy alternatives chosen to bring those reforms. For instance, the Commission raised serious concerns on the rationale behind using the leftover resources of the state-owned bankrupt enterprises to assist the fired workers than giving preference to using those resources to pay back the lenders.¹¹⁷ The Commission also made a strong comment on the Bankruptcy law and advised to use the available trained expertise to bring the new law into effect. Subsequently, China failed to meet the fifth parameter as well. According to a review by the Commission in the year 2008:

“ . . . To meet this criterion a state must demonstrate that its financial sector operates free from state control and is governed by commercial standards in terms of cost of credit. These things are central to trade defence investigations, because access to credit at special rates constitutes an obvious and unfair competitive distortion in favour of a company”.¹¹⁸

The Chinese claim of absolute fairness while allocating credit was rejected outright by the Commission. To substantiate their reasons behind the doubts, the Commission maintained that, “while state-owned enterprises were responsible for less than 30% of Chinese national income, 70% of lending by state-owned banks went to state-owned enterprises”.¹¹⁹ Chinese banks were also found to have defaulted and failed in assigning capital by international prudential standards; where the cost of the capital, too, was disputed to be “artificially lowered for many enterprises”.¹²⁰ Moreover, the Chinese role in coercing banks into ‘fixing’ interest rates through its central bank was one of the major concerns, as it allowed for an “unfair distortion of true prices”.¹²¹ However, these criticisms have partially lost ground since the onset of the global financial meltdown, and one may have to reconsider the banking regulations and the attempts of the state to sway bank lending. In any case, however, it is worth noting the absence of upper limits applicable to commercial banks to decide Renminbi (RMB) loan interest rates, and that the People’s Bank of China also abolished the floor lending rate as of July 2013,¹²² as part of the sustained reforms to the banking sector.

¹¹⁷ Working Document-I, *supra* note 99, at 17.

¹¹⁸ *Id.* at 19.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 25.

¹²¹ *Id.* at 27.

¹²² Tom Orlik & Lingling Wei, *China Loses a Key Control over Banks*, WALL ST. J., July 19, 2013,

Since the Commission's 2008 review on China's MES, no other review has been made available in the public domain, even if it was conducted. As categorically stated by the Commission in August of 2015, it has undergone no consultations after 2008 on MES with China.¹²³ The reasons for the Chinese fallout remain unknown, and their refusal to participate in Commission's MES process brings to light a lot more about China's assessment of its transparency and technocratic nature.¹²⁴

B. *United States*

1. Non-Market Economy Criteria under the US Trade Regime

As prescribed by the trade law regime of the US, the term NME is accorded to a foreign country that is determined by the administering authority to not be functioning on market principles of pricing or cost structure, "so that sales of merchandise in such country do not reflect the fair value of the merchandise".¹²⁵ Presently, the agency that is responsible for determining the NME status in the US is known as the Department of Commerce (DOC).¹²⁶ In 1988, the Omnibus Trade and Competitiveness Act (OCTA) endowed the US DOC with authority to take discretionary administrative measures to determine the NME status for a trading country. The determination of the same can be put into effect '*with respect to any foreign country at any time*' and remains in force until expressly revoked by the DOC.¹²⁷ If and only if an interested party lays claim that the concerned trading country is no longer an NME, substantiating its claim in accordance with factors that the DOC takes account of, will the DOC issue a formal inquiry to assess the status of the aforesaid country as an NME or otherwise.¹²⁸ Taking this as a point of departure, the most recent example in the form of the US DOC recognising an NME as a market economy is the case of the Russian economy (on June 7, 2002) becoming a market economy, after DOC exercised its powers successfully.¹²⁹

<http://online.wsj.com/article/SB10001424127887324448104578615430573714510.html>.

(Last visited Jan. 13, 2019)

¹²³ Edwin Vermulst, *Assessment of Trade Defence Policy Decisions for 2014*, DIRECTORATE-GENERAL FOR EXTERNAL POLY, at 6, (Aug., 2015) at http://www.europarl.europa.eu/RegData/etudes/STUD/2015/549060/EXPO_STU%282015%29549060_EN.pdf. (Last visited Jan. 12, 2019)

¹²⁴ Edwin Vermulst, *supra* note 10.

¹²⁵ 19 U.S.C. § 1677 (2006).

¹²⁶ Jieun Lee, *China's Nonmarket Economy Treatment and US Trade Remedy Actions*, 3 J. WORLD TRADE 495, 503-05 (2016) [hereinafter Lee].

¹²⁷ 19 U.S.C. § 1677(18)(c) (2006).

¹²⁸ 19 U.S.C. § 1677(18)(b) (2006).

¹²⁹ Lee, *supra* note 126, at 495.

In the case of China, the most recent request to be formally removed from the list of countries treated as an NME was submitted in 2006. Having denied the request at that time, the DOC, however, noted that “the era of China’s command economy has receded and the great majority of prices are liberalized”.¹³⁰ In spite of such a general agreement, the DOC was successful in highlighting a plethora of policies, both systemic and institutional, that in its judgement hindered China from graduating from NME status.¹³¹

2. Evolution of the Antidumping Legislations Concerning NMEs in the US

The United States has consistently amended its antidumping regime to stay ahead of agency practices that deal with trading countries classified as NMEs. Once the US Congress adopted a statute which authorised the DOC to apply antidumping laws to NMEs, along with the legislative guidance concerning acceptable methodologies for assessing cost and pricing structure (i.e., by legitimising different surrogate country approaches),¹³² it led the US industries to make the antidumping law their sole remedy when confronted with unfair trade practices from NME countries.

The Trade Act of 1974

In its early stages, the process of applying the US antidumping regime to trading countries classified as NMEs was not prescribed within the domestic laws but was rather implemented through an administrative agency’s actions. The Treasury Department is the agency that looks after domestic trade remedy laws, presently. It also developed and began employing the so-called ‘surrogate country’ methodology as an appropriate antidumping measure to countries described as NMEs during the 1960s.¹³³ However, since the fair market value of a product that is originating in an NME country was not given, an idea was floated to replace the comparable prices and costs from similarly placed third-world countries. This approach was later adopted and subsequently codified by the Congress in the Trade Act of 1974.¹³⁴

¹³⁰ *Antidumping Duty Investigation of Certain Lined Paper Products from the People’s Republic of China – China’s Status as a Non-market Economy*, INT’L TRADE ADMIN., at 77, (Aug. 30, 2006), <https://enforcement.trade.gov/download/prc-nme-status/prc-lined-paper-memo-08302006.pdf> (Last visited Jan. 13, 2019)

¹³¹ Lee, *supra* note 126, at 495.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

The surrogate method, however, proved to be far more cumbersome owing to the instances wherein an appropriate surrogate country did not exist. Simultaneously, the NME manufacturers went on to criticise the methodology for the seemingly arbitrary and unpredictable dumping margins it produced.¹³⁵ The Treasury, too, found it difficult to point out surrogate countries that were willing enough to share reliable price data.

The Trade Agreements Act of 1979¹³⁶

Consequently, in 1975, the Treasury Department formulated an alternate plan by adopting the ‘factors of production approach’.¹³⁷ It expressed a requirement for “the amount of each factor input of the NME in consideration be taken from a market economy country considered to be at a comparable stage of economic development and value those inputs on the basis of prices in a surrogate country”.¹³⁸ The Congress embraced this approach in the 1979 Trade Agreements Act as an alternate measure to be employed in the case of NMEs where there is no appropriate surrogate country to be found.¹³⁹

The Omnibus Trade and Competitiveness Act of 1988¹⁴⁰

The fall of communism in the second half of the 80s and early 90s had led to a sudden surge of transitional economies which were now actively embracing capitalism. The antidumping regime of the United States responded by adopting new antidumping measures to deal with the newly emergent NMEs.¹⁴¹ Through the OCTA of 1988, the Congress finally managed to formally define an NME as a trading country that was determined by the DOC to and does not operate on market principles of the cost or pricing structures, so that sales of merchandise in such country does not reflect the fair value of the merchandise.¹⁴² Furthermore, the Congress moved in the direction of setting standards and protocols that the DOC had to refer to while determining the status of a country as an NME.¹⁴³

The determination of the NME status of a trading country under OCTA is based on a six-tier test which includes the following limbs:

¹³⁵*Id.*

¹³⁶ 19 U.S.C. § 1677(e) (2006).

¹³⁷ Electric Golf Cars from Poland, 40 FR 25, 497.

¹³⁸J. M. SMITH, CONG. RESEARCH SERV., U.S. TRADE REMEDY LAWS AND NONMARKET ECONOMIES: A LEGAL OVERVIEW (2013).

¹³⁹ Lee, *supra* note 126, at 495.

¹⁴⁰ 19 U.S.C § 17 (1988).

¹⁴¹Lee, *supra* note 126, at 495.

¹⁴² 19 U.S.C. § 1677 (18)(A) (2006).

¹⁴³Lee, *supra* note 126, at 495.

“(1) ‘the extent to which the currency of the foreign country is convertible into the currency of other countries’; (2) ‘the extent to which wage rates in the foreign country are determined by free bargaining between labor and management’; (3) ‘the extent to which joint ventures or other investments by firms of other foreign countries are permitted in the foreign country’; (4) ‘the extent of government ownership or control of the means of production’; (5) ‘the extent of government control over the allocation of resources and over the price and output decisions of enterprises’; and (6) ‘such other factors as the administering authority [i.e. Department of Commerce] considers appropriate’.”¹⁴⁴

When concerned with the antidumping methodologies, the OCTA resolved to revise the antidumping laws to allow for the ‘factors of production’ to gain preference in the determination of the normal value of products originating in NMEs, especially in the absence of reliable data demonstrating domestic prices and costs.¹⁴⁵ Despite the statutory change, the DOC’s broad claims of discretion seem to be supported by the long running legislative history of the OCTA. For example, the DOC is expected to determine on a case-to-case basis whether the standard methodology can be employed owing to sufficient availability of information or otherwise a different approach was to be taken as it may deem fit.¹⁴⁶

Developments under the US Department of Commerce

The Market-Oriented Industry (MOI) test was developed in 1992 by the Department of Commerce.¹⁴⁷ Within the MOI test, a respondent exporter could theoretically circumvent the NME treatment by proving that its industry was completely free of State intervention or control.¹⁴⁸ The test for a market-oriented industry encompasses three criteria:

“(1) virtually no government involvement in setting prices or amounts to be produced, (2) typically private or collective ownership of firms in the industry, and (3) market-determined prices for all significant inputs”.¹⁴⁹

¹⁴⁴ 19 U.S.C. § 1677 (18)(B) (2006).

¹⁴⁵ 19 U.S.C. § 1677 (b)(c) (2006).

¹⁴⁶ Lee, *supra* note 126.

¹⁴⁷ *Sulfanilic Acid from the People’s Republic of China*, USITC Publication 2542, at 57 (Mar. 18, 1992), https://www.usitc.gov/publications/701_731/pub2542.pdf. (Last visited Jan. 12, 2018)

¹⁴⁸ Lee, *supra* note 126.

¹⁴⁹ *Chrome-Plated Lug Nuts from the People’s Republic of China*, 57 FR 15, 052 (Apr. 24, 1992).

Consequently, there can be evidence found in the Chinese Accession Protocol paragraphs (a) and (d) of Article 15 that closely mimic the MOI approach. So far, the DOC has mostly lain to rest the claims that any China-wide attempts were being made to have its NME status reconsidered. It also refuted the arguments that acknowledge the presence of a single Chinese industry independent of State control in its reviews and investigations.¹⁵⁰ Furthermore, the DOC also went ahead and assigned an ‘entity-wide’ antidumping rate to any Chinese producer that does not comply with the ‘separate rates’, treating it as a part of a China-wide entity.¹⁵¹ Given the procedural hindrances and the liabilities on the Chinese producers, under this case, the final duty measure is more often than not whatever rate the petitioners allege in their complaints.¹⁵²

3. Laws Concerning the Countervailing Duties to be Imposed on NME Products

For long it has been the DOC’s policy not to apply countervailing duties (CVDs) against imports from NMEs.¹⁵³ Until 2007, the DOC had not reversed its policy to investigate NMEs and apply CVDs.¹⁵⁴ However, in the past few years, there have been numerous investigations that have been carried out by the US DOC against imports from China which are being treated as an NME; some of these products are coated paper, tire products and steel products.

Decision of Courts in 1986 concerning the non-utilisation of CVD laws on NMEs

The DOC, for many years, maintained a stance that government activities in an NME cannot be conferred as a subsidy. The reasoning offered by the DOC behind this stance was that theoretically and practically it was impossible to assess a subsidy in an NME country owing to its centralised planning—as a subsidy, by its very nature, points to an act of disruption within the market forces.¹⁵⁵ The DOC, therefore, recapitulated the systemic problems that accosted them in the previous cases of NMEs as follows:

¹⁵⁰ *Id.*

¹⁵¹ *The US Enforcement and Compliance 2015 Antidumping Manual Chapter 10*, INT’L TRADE ADMIN., <http://ia.ita.doc.gov/admanual/2015/Chapter%2010%20NME.pdf>. (Last visited Jan. 12, 2018)

¹⁵² P. Alagiri, *Reform, Reality, and Recognition: Reassessing U.S. Antidumping Policy Towards China*, 26 L. & POL’Y INT’L BUS. 1068, 1068–69 (1995).

¹⁵³ 19 U.S.C. § 1671(a) (2006).

¹⁵⁴ D. Ahn & J. Lee, *Countervailing Duty Against China: Opening a Pandora’s Box in the WTO System?*, 14 J. INT’L ECON. L. 329, 329–68 (2011) [hereinafter Ahn].

¹⁵⁵ Lee, *supra* note 126, at 336.

“We believe a subsidy (or bounty or grant) is definitionally any action that distorts or subverts the market process and results in a misallocation of resources . . . In NMEs, resources are not allocated by a market. With varying degrees of control, allocation is achieved by central planning. Without a market, it is obviously meaningless to look for a misallocation of resources caused by subsidies. There is no market process to distort or subvert . . . It is a fundamental distinction—that in a NME system the government does not interfere in the market process but supplants it that has led us to conclude that subsidies have no meaning outside the context of a market economy”.¹⁵⁶

Even though the imports from the NME countries grew significantly, the alternative of employing CVD law was never raised in actuality. Rather, the US Congress shifted its attention to other trade remedy measures to deal with this complexity.¹⁵⁷ The US Congress, in the Trade Act of 1974, went on to amend Section 205 of the Antidumping Act of 1921 and managed to put forth rules that counter the unfair competition from NME countries.¹⁵⁸ Furthermore, the US Congress worked towards the enactment of a special ‘market disruption’ rule, as described in Section 406 of the Trade Act of 1974, which protects US industries from the harm caused by countries of Communist origin.¹⁵⁹ Similarly, the US Congress did not amend any CVD provisions concerning NMEs as represented under the Trade Agreement Act of 1979, one in which only general US CVD laws (not the ones pertaining to NMEs) were heavily revised.¹⁶⁰

The DOC’s policy reversal in 2007

In its ruling with respect to the Coated Free Sheet Paper from China, the DOC was seen reversing its established practice to let off the NMEs from the US CVD law after realising the challenges of providing a definite measure for subsidies in a market that was distorted by the State.¹⁶¹ The DOC went on to describe the differences between the Chinese economy in its present format and the Soviet-style economies in the case of Georgetown Steel wherein the imported Chinese paper was found to be subsidised.¹⁶² Even though the US International Trade

¹⁵⁶ Carbon Steel Wire Rod from Czechoslovakia: Final Negative Countervailing Duty Determination, 49 FR 19, 370-71 (May 7, 1984).

¹⁵⁷ Lee, *supra* note 126.

¹⁵⁸ 19 U.S.C. 4 § 773(c) (1930); 19 U.S.C. § 1677b(c) (1982).

¹⁵⁹ *See*, 19 U.S.C. § 2436 (1974).

¹⁶⁰ Lee, *supra* note 126.

¹⁶¹ Coated Free Sheet Paper from the People’s Republic of China: Amended Preliminary Affirmative Countervailing Duty Determination, 72 FR 60645 (Apr. 9, 2007).

¹⁶² Georgetown Steel Co. v. United States, 801 F.2d 1308 (Sept. 18, 1986).

Commission failed to make an affirmative material injury determination as required by this case, the following CVD petitions were a success, resulting in over sixty CVD orders on Chinese merchandise.¹⁶³

Lawful Application of Countervailing Duties to the Non-Market Economies in 2012¹⁶⁴

In the year 2012, the US Congress replied both to the WTO Appellate Body and the Court of Appeals for the Federal Circuit (CAFC) by passing the H.R. 4105 in response to their decisions.¹⁶⁵ As stated earlier, the NMEs have the potential of being subjected to CVDs, thus, referring to the ruling in 2011, the US refused to authorise DOC to employ CVDs on imports from NME countries. Furthermore, the US law was amended to address ‘doubt count’ of NMEs in a fashion that was to address the Appellate Body’s decision that found US to be inconsistent in its practice under Article 19.3 of the SCM Agreement –wherein the US did not investigate and avoided double remedies which potentially arose from the simultaneous imposition of antidumping duties and CVD on the same products that were imported from China.¹⁶⁶

Therefore, this legislation was held to be WTO consistent and legalised the application of countervailing duties on the NMEs. This statute also validated the already existing CVD orders that were in place and further tried to address the double remedy findings of the WTO.¹⁶⁷

IV. RESTRUCTURING THE EXISTING INTERNATIONAL ECONOMIC AND LEGAL ENVIRONMENT CONCERNING THE TREATMENT OF NMEs

A. Reactions of China’s Main Trading Partners post-December 2016

1. European Union

Alternative NME Methodologies and their Consistencies in Ensuring Continuous Special Treatment of China

¹⁶³ As per the WTO statistics (last visited July 10, 2017), from 1995 to 30 June 2016, a total of 69 countervailing measures were enforced against China. 36 out of those 69 were enforced by the United States.

¹⁶⁴ *Summary of a Bill to Apply the Countervailing Duty Provisions of the Tariff Act of 1930 to Nonmarket Economy Countries, and for Other Purposes*, HOUSE COMM. ON WAYS & MEANS, <https://www.congress.gov/bill/112th-congress/house-bill/4105/text>. (Last visited Jan. 25, 2017).

¹⁶⁵ 19 U.S.C. §§ 1671, 1677(f)(1) (2006); *see*, US- Countervailing Duties, *supra* note 28.

¹⁶⁶ US- Countervailing Duties, *supra* note 28.

¹⁶⁷ *Id.*

If the EU finally agrees with China's removal from the list of NMEs, it may seek to adopt 'mitigating measures' to counterpoise the effects of state intervention on Chinese prices. Hence, the chances of such actions resulting in the disregard of the domestic price to determine the normal value are quite high.¹⁶⁸ Article 2.2 of the 'Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union' (the EU Basic Regulation), provides for just two conditions in which the domestic price may be ignored to be constructed or substituted by the export price to a third-party country:

- “(i) ‘When there are no or insufficient sales of the like product in the ordinary course of trade in the domestic market of the exporting country’;
- or
- (ii) ‘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 proper comparison’...”¹⁶⁹

Article 2.2 of the EU Basic Regulation states that the constructed normal value is supposed to be “the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits”.¹⁷⁰ Article 2.2.1.1 goes a step further to specify that the “costs shall normally be calculated on the basis of the records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration”.¹⁷¹ Moreover, any practice that disregards the domestic prices and subsequently constructing normal values shall remain resonant with these rules.¹⁷²

The EU falls back significantly in the 'ordinary course of trade' route to defend the construction of the normal value, especially when there are regulations on the price of a major input product. For the convenience of constructing the normal value, the original price of the major input product is ignored and is deemed to be replaced by the internationally recognised market price. This is known as the 'cost adjustment practice' and was notably employed in the case of Russia while

¹⁶⁸ Noel, *supra* note 9.

¹⁶⁹ Commission Regulation 2016/1036 of June 8, 2016, Protection Against Dumped Imports from Countries Not Members of the European Union, 2016 O.J. (L. 176/21), art. 2.2 [hereinafter EU Regulation].

¹⁷⁰ *Id.*

¹⁷¹ *Id.*, art. 2.2.1.1.

¹⁷² Noel, *supra* note 9.

sanctioning dual pricing system for gas.¹⁷³ This system depends on whether the same input is meant to be exported or to be consumed in the domestic market.¹⁷⁴ In the latter case, it should be set lower than the world market prices. However, influential States result in lower costs for the domestic industries thereby resulting in higher competitiveness. These cost adjustment measures exemplified the way in which the EU can summon exceptions as recorded in Article 2.2 to counterbalance the effects of State interventions on domestic prices, even though it is not clear what forms the ‘mitigating measures’ could take.¹⁷⁵

The Practice of Cost-Adjustment

The very first step that is sought to determine if the sales on the domestic front of the market are ample is to determine if such sales volume form at minimum 5% of the sales volume of the product that is under EU’s scrutiny, as pursuant to Article 2.2 of the EU Basic Regulation. With respect to the representative sales, the Commission probes whether the product they have is a product obtained in the ‘ordinary course of trade’. It achieves the same by rivalling the prices on the domestic front along with the cost of production. While undergoing this test, the Commission usually seeks to probe if the costs relating to the production and sale of the product under scrutiny are “reasonably reflected in the records of the parties concerned”.¹⁷⁶

Further, while forming the normal value, the EU authorities have been seen to disregard the cost of raw material that is incurred by the producers subjected to investigations, and often on these grounds, it fails to reflect the cost associated with the production realistically.¹⁷⁷

Particular Market Situation

There are other circumstances that also allow the room to disregard domestic prices, i.e., “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 proper comparison”,¹⁷⁸ and holding that the ‘particular market situation’ in China is a direct consequence of the state’s interference in the market. The concept of

¹⁷³ *Id*

¹⁷⁴ *Id*.

¹⁷⁵ *Id*.

¹⁷⁶ Council Regulation No. 661/2008 of July 8, 2008 imposed a definitive duty on imports of ammonium nitrate originating in Russia followed by an expiry review pursuant to Article 11(2) and a partial interim review pursuant to Article 11(3) of Council Regulation No. 384/96 of December 22, 1995.

¹⁷⁷ Noel, *supra* note 9.

¹⁷⁸ *Id*.

‘particular market situation’ is something that is yet to be interpreted by the WTO Dispute Settlement Body. However, it is argued that it finds its origin from the term ‘market’ laising, one that is not covering all forms of interferences by the State. The word ‘market’ in it refers to “an area or arena in which commercial dealings are conducted”.¹⁷⁹With respect to the anti-dumping procedures, the sole purpose of which is to determine the pricing behaviour for a specific product under consideration, the relevant market is formed where commercial transactions related to the concerned product have to be conducted. Hence, the ‘particular market situation’ refers to the market of the product that is related to the anti-dumping investigation. Furthermore, as far as the conduct of commercial transactions is concerned, it is argued that the State intervention may have an influence on the market situation.¹⁸⁰

Article 2.2 of the EU Basic Regulation makes it starkly clear that the existence of a ‘particular market situation’ cannot be the sole justification to disregard domestic sales until and unless it has a direct bearing on price comparability. So even confessing to granting a subsidy to the domestic industry would not lead to a ‘particular market economy situation’, as it shall instead be justified by showing an effect on export and domestic prices to the same degree. Alternatively, it could be putforward that the price effect of subsidisation must be adifferentialin order to justify the disregard of the domestic scales. Consequently, in matters relating to thedomestic subsidy, the investigating authority is mandated to assess exactly what amount of it has been channelled through the domestic price, and what amount of it has been channelled through the export price in order to successfully determine whether subsidisation can affectthe price comparability or not.¹⁸¹

Finally, even ifthe EU makes a case for subsidisation leading to ‘a particular market situation’, the ADA prohibits an investigating authority to disregard the costs incurred by the concerned producers.¹⁸²

Neglecting the Actual Costs Endured by the Concerned Producers:

As mentioned above, Article 2.2.1.1. of the EU Basic Regulation sanctions that:

“costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the

¹⁷⁹*Market*, Oxford Dictionary of English 1084 (3rd ed. 2000).

¹⁸⁰Noel, *supra* note 9.

¹⁸¹*Id.*

¹⁸²*Id.*

exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration”.¹⁸³

The investigating authority is mandated to use the cost data as stated in the records of the concerned exporter or producer under scrutiny. This is a logical transition as the alternative to constructed normal value is justified only if the sales do not reflect the usual commercial norms “(in which case the purpose of construction is to determine what would have been the price if the product concerned had been sold under ‘normal’ terms and conditions)”¹⁸⁴, or if, for instance, the export price and the domestic price are not comparable “(in which case construction should serve to render the domestic price fit for comparison with the export price)”.¹⁸⁵

The cost data can be disregarded if they don’t “reasonably reflect the costs associated with the production and sale of the product under consideration”. The European Union has a very general and wide interpretation of this exception. Also, as it has been pointed out earlier, this provision clearly excludes the data which reflects the costs incurred by the producers. The same has been confirmed even by the Panel in their report on the ‘European Union – Anti-dumping Measures on Biodiesel from Argentina’.¹⁸⁶

2. United States

Anti-Dumping Regime Ensuring the Subsisting Special Treatment of China

Antidumping Practices Analogous to China’s Protocol of Accession:

Putting the legal debate regarding China’s Accession Protocol on one side, there are several reasons to derive that the expiration of paragraph 15(a)(ii) shall not make a difference to remedial actions taken for trade purposes against China for all its practical purposes, as with or without Article 15(a)(ii), the Accession Protocol still imitates the US dumping laws and practices in its current form.¹⁸⁷ United States was one of the few countries that had a definite NME criterion even at the time of China’s accession to the WTO. While the US law allows room for the gradual transformation of an NME trading country into an ME, it till date treats China as an NME owing to its failure in passing the specified tests. Having said that, the US, as described in paragraph 15(a) of China’s Protocol of Accession, permits the

¹⁸³ EU Regulation, *supra* note 169.

¹⁸⁴ Noel, *supra* note 9.

¹⁸⁵ *Id.*

¹⁸⁶ Panel Report, *European Union – Anti-dumping Measures on Biodiesel from Argentina*, WTO Doc. WT/DS473/R (adopted Oct. 6, 2016).

¹⁸⁷ Lee, *supra* note 126, at 495.

standalone producers and whole industries to contest whether the Department ought to use some or all their domestically produced data to assess prices and costs in its dumping investigations.¹⁸⁸

Although it may no longer be feasible for the US DOC to fall back to paragraph 15(a)(ii) to justify the use of its NME methodology, but it may be able to continue to use the data from surrogate countries for the purpose of dumping investigations; quite akin to measures adopted before China's accession to the WTO, as long as China fails to establish the fact that it is an ME.¹⁸⁹

Effective Entry Wide-Rates and the Industry-Wide Tests:

Article 15 of China's Accession Protocol is strongly embedded in the market-oriented industry approach as formulated by the US DOC. The conditions differ vastly for the producers originating from China as opposed to those functioning within the ME putting the additional burden on the former to demonstrate that they work within market conditions.¹⁹⁰ Even though the MOI approach is still to be codified within the US law, investigation agencies in the US can still refer to the Protocol of Accession to apply the same until the antidumping laws are altered.

The US has continued to meet Chinese products with differential treatment by employing separate rates since the 1980s. The automatic application of anti-dumping duty may be ceased if the country is granted ME status. However, even in that situation, the DOC may resort to applying an entity-wide rate if the corresponding companies or industries become unresponsive to requests for quality and value information and questionnaires issued by the DOC.¹⁹¹

Different Alternative Methodologies Available for the Usage of Constructed and Surrogate Pricing

Notwithstanding China's Accession Protocol to the WTO, the DOC can avoid Chinese companies' domestic prices. The DOC may arrive at a conclusion that "the specific market situation in the country of export cannot allow a legitimate comparison between the constructed export price and the export price".¹⁹² This fact emboldened the investigators and allowed them to leverage alternatives to the obligatory strict comparison.¹⁹³

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ Lee, *supra* note 126.

¹⁹² 19 U.S.C. § 1677 b(a)(1)(C)(iii) (2006).

¹⁹³ Lee, *supra* note 126.

For example, one can arrive at an approximation of the domestic prices, by putting together the cost of production as stated by the producer, plus the gross estimated profit. Although being consistent with the ADA of the WTO, the usage of third country data to estimate prices and constructed values leads to unnaturally high estimates of normal domestic values and as a result, antidumping margins are inflated when imposed.¹⁹⁴ It is worth noting that the DOC considered this method post-Russia's graduation from NME to ME status in 2002.¹⁹⁵

Possibility of Double Remedies Even After Losing the NME Status

In the event that an importing country follows investigations with respect to antidumping and countervailing duties against its imports to employ a surrogate value, it could result in a double remedy situation. Notwithstanding the fact that domestic subsidy has the potential to affect the normal value and the export prices of the goods, the usage of a third-party surrogate data for determining the prices or costs in antidumping investigations would eventually fail to assess the impact of the subsidy upon the normal value of investigated companies. Simultaneously, the antidumping duty sees an increase concerning the subsidy amount that once artificially brought down the export prices.¹⁹⁶ As the CVD for all theoretical purposes is equal to the amount of subsidy, the surrogate methodology again suffers a drawback as it counts the subsidy twice when calculating the right amount of CVD to be applied.¹⁹⁷

Under China's Accession Protocol, the use of surrogate country prices was automatically sanctioned to the investigators by the NME methodology. Naturally, this led to an expanse of double remedy solutions against Chinese imports, resulting in trade grievances with China.¹⁹⁸ However, neither China's position as an NME nor its Accession Protocol is required for double remedy actions against them. It is quite common for surrogates to be used to calculate normal values even in cases against MEs. Often such a case occurs when the normal value is reflected by the company's data although it does not fully match with the export price data; or cases wherein the trade authority chooses to disregard company's normal value data.¹⁹⁹ Hence, even while dealing with MEs in antidumping cases, the sole

¹⁹⁴ *Id.*

¹⁹⁵ *Inquiry into the Status of the Russian Federation as a Non-Market Economy Country under the U.S. Antidumping Law*, INT'L TRADE ADMIN. (June 6, 2002), <http://ia.ita.doc.gov/download/russia-nme-status/russia-nme-decision-final.htm>. (Last visited Jan. 13, 2019)

¹⁹⁶ Lee, *supra* note 126.

¹⁹⁷ Ahn, *supra* note 154, at 14.

¹⁹⁸ US - Countervailing Duties, *supra* note 28.

¹⁹⁹ Lee, *supra* note 126.

dependency on partial ‘facts available’ often compels the authorities to use data from a surrogate country.²⁰⁰

Countervailing Measures Ensuring the Subsisting Special Treatment of China

Permanent authorisation of countervailing measures with the help of non-market economy methodology given under China’s Protocol of Accession

In order to shield producers of other Members of WTO from Chinese subsidised products, two remedy rules were supplemented to China’s Accession Protocol. First, the accession protocol designates subsidies to state-owned-enterprises (SOEs) in China as automatically specific under the WTO Subsidies and Countervailing Measures (SCM) agreement, as long as state-owned enterprises are the predominant recipients of such subsidies or state-owned enterprises receive disproportionately large amounts of such subsidies.²⁰¹

Following close comes the second remedy, the very first and solitary WTO provision that overtly allows alternative benchmarks to be used in determining CVDs. Paragraph 15(b) of the Accession Protocol allows the use of NME methodology by the importing member to identify and assess the Chinese subsidies. More significantly, unlike certain provisions relating to antidumping under paragraph 15 that are subject to the December 2016 deadline, paragraph 15(b) remains permanently incorporated. Consequently, the US DOC can employ the NME methodology in its CVD determination irrespective of China’s economy, as long as it concludes that persisting conditions in China’s market have the potential to pose a hindrance in its way, while domestic cost and prices act as appropriate benchmarks.²⁰²

Reliance on the Appellate Body Decision by Resorting to the Anti-Subsidy Remedies

The Appellate Body in the United States-Definitive Anti-Dumping and Countervailing Duties on Certain Products from China held that the state owned commercial banks in China are to be considered as ‘public bodies’, and the loans given by them are to be taken as ‘subsidies’.²⁰³ The Appellate Body also upheld the US DOC’s move to refuse to accept interest rates in China as the standard for

²⁰⁰ B.D. Kelly, *Market Economies and Concurrent Antidumping and Countervailing Duty Remedies*, J. OF INT’L ECON. L. 105, 123 (2014).

²⁰¹ Article 10.2, China’s Accession Protocol.

²⁰² Lee, *supra* note 126.

²⁰³ US- Countervailing Duties, *supra* note 28.

Renminbi-denominated loans as it was considered to be inconsistent with the provision. The Appellate Body pointed out that:

“We see no inherent limitations in Article 14(b) (SCM Agreement) that would prevent an investigating authority from using as benchmarks interest rates on loans denominated in currencies other than the currency of the investigated loan, or from using proxies instead of observed interest rates, in situations where the interest rates on loans in the currency of the investigated loan are distorted and thus cannot be used as benchmarks.

In fact, to read Article 14(b) as imposing such limitations on the selection of a benchmark would potentially frustrate the purpose of that provision, as no suitable benchmarks could be identified in situations where the interest rates on loans in a given currency were distorted by government presence or influence in the market and no loan in that currency exists in other markets. We further note that, as already discussed above, the possibility of resorting to a proxy under Article 14(b) is consistent with the use of the conditional tense: “would pay” and “could actually obtain on the market”.

In the absence of an actual comparable commercial loan that is available on the market, an investigating authority should be allowed to use a proxy for what ‘would’ have been paid on a comparable commercial loan that ‘could’ have been obtained on the market.”²⁰⁴

Looking at the strength that governments exercise in financial markets through various interventions, this ruling may accord a long-term disadvantage to Chinese exporters in cases pertaining to CVD. The likelihood of CVDs with the usage of benchmark interest rates shall be extremely high in the future. Simultaneously, the Appellate Body has cited its findings in U.S.-Softwood Lumber IV, after subsequently arriving at a point where it decided to look for a further scope in Article 14 of the SCM Agreement for the purpose of assigning a cross-border benchmark.²⁰⁵ An investigation agency or authority may employ a benchmark that is separate from private prices of the goods originating from the country in question, where substantial evidence reveals the distortion of private prices as a result of the dominant role of government in the market as has been mentioned in Article 14(d) of SCM Agreement.

²⁰⁴*Id.*

²⁰⁵Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WTO Doc. WT/DS257/AB/R (adopted Jan. 19, 2004)

Notwithstanding the Appellate Body's observation that "it is price distortion that would allow an investigating authority to reject in-country private prices, not the fact that the government is the predominant supplier per se",²⁰⁶ it also identified cases where "the government's role as a provider of goods is so predominant that price distortion is likely and other evidence carries only limited weight".²⁰⁷ The Appellate Body went on to establish a limitation on the use of such benchmarks, requiring that their use must "relate or refer to, or be connected with, the prevailing market conditions in that country, and must reflect price, quality, availability, marketability, transportation and other conditions of purchase or sale, as required by Article 14(d) of SCM Agreement".²⁰⁸ However, even then it was maintained by the Appellate Body that the usage of these alternative methods might only be available to countries depending on the facts and circumstances of the case and therefore denied issuing any specific rules or instructions regarding the same.²⁰⁹

B. Conclusion

It can be inferred from the US and EU based research that all the problems relating to China's ME status could have been handled quite well with the help of the ADA and other WTO agreements itself, and there shouldn't be any tricky issues relating to price comparability while calculating the anti-dumping margins.²¹⁰ The author is of the view that the truth behind all these EU and US based anti-dumping and countervailing laws alongside their relevant practices is not to achieve the proposed end of resolving the issues related to price comparability, but to exploit the NME methodology by continuing China's status as an NME for trading purposes.

V. FINAL CONCLUSION

This research seeks to influence the expanse of existing literature on China's Protocol of Accession to the WTO by highlighting the disputed use of NME methodology even after the December 11, 2016 deadline, as none of the provisions of the Accession Protocol make it obligatory for the Members to afford an ME status to China after the aforementioned date. Rather, it puts the onus on the Chinese exporters to prove that there is an existing ME in either the whole of China or the specific sector to which their business belongs. If the producers or exporters are unable to prove the existence of an ME, then the Members can

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ Lee, *supra* note 126.

²¹⁰ Memorandum, *supra* note 130.

continue treating China as an NME. Ideally, the investigating authorities of both the US and the EU would like to consider that China is not an ME *in toto*; however, the investigating authorities still have the power to grant the ME status to only certain industrial sectors which have no government control or interference.

Moreover, it has been observed that the US already justifies its treatment of China as an NME on the factual grounds that China satisfies their six-limb test established for the determination of an NME trading partner. The overt use of subsidies granted by the government in China along with the high level of governmental intervention in the economy are the major reasons behind them still not being granted MES. So, there is no need for the US to change or modify their already existing domestic antidumping regime after the expiry of Article 15 (a) (ii) of the China's Protocol of Accession. Even under the current circumstances wherein a trade war between the United States and China is ongoing, it's highly unlikely that United States would willingly grant MES to China. Such refusal makes a nation progressively subject to blame for intervention in their markets, diminishing that nation's powers to deny any dumping duties and other forms of penalties, which is precisely what United States under its current regime is aiming to achieve.

Furthermore, the key points to note in relation to anti-dumping measures are that: first, the ADA doesn't have the authority to sanction the policies of the government, and its purpose is to keep the pricing decisions of commercial businesses in check; second, the ADA also doesn't have any role to play in the event of state interference unless it's a case wherein the State is responsible for setting all the prices. So, the EU can, therefore, take action under the SCM Agreement as per their concerns regarding the distortions caused by extensive subsidisation in China; and lastly, the augmentation and elaboration of anti-dumping laws to tackle the state interference as done by the EU is not the safest route as it could recoil against them later-on if other trading partners of EU also use a similar methodology against them.

Hence, the author is certain that the way ahead with this NME methodology would be a difficult one to navigate. Under the current trade regime of the US it is highly unlikely that China would be accorded MES, and the EU choosing a conciliatory path would also result in some more implications, which primarily includes hitting back the opposing subject country by imposing unreasonable trade tariffs on imports coming into their commerce. Therefore, this controversial topic could only be given a positive direction, if not settled for good, by the WTO DSB once they hear the disputes already brought in by China against the US and the EU regarding the measures related to the price-comparison methodologies.