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China's Dispute over the Non-Market Economy Status at the WTO

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Anotace

Diplomová práce analyzuje čínský status netržní ekonomiky ve WTO a stále probíhající spor o tento status. První část přibližuje historický a politický kontext přijetí daného statusu a jeho fungování. Rovněž je představen objem obchodu, který je tímto statusem dotčen. Druhá část práce analyzuje odlišné interpretace statusu netržní ekonomiky a sporu o něj ve WTO. Ve třetí části je porovnáno rozdílné zacházení s Čínou jakožto s netržní ekonomikou ze strany Spojených států amerických a Evropské unie.

Abstract

The thesis analyzes China's status as a non-market economy (NME) at the WTO and the ongoing dispute about this status at the organization. Firstly, the thesis introduces the historical and political context of the adoption and functioning of the NME status as well as the amount of trade that the status affects. Secondly, different interpretations of the NME status and of the dispute are analyzed. Finally, the last part compares the treatment of China as an NME by the United States and by the European Union.

Čestné prohlášení

Prohlašuji, že jsem diplomovou práci na téma **China's Dispute over the Non-Market Economy Status at the WTO** vypracoval samostatně pod vedením doc. Mgr. et Mgr. Oldřicha Krpce, Ph.D., a uvedl v ní všechny použité literární a jiné odborné zdroje v souladu s právními předpisy, vnitřními předpisy Masarykovy univerzity a vnitřními akty řízení Masarykovy univerzity a Ekonomicko-správní fakulty MU.

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.....

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The crisis consists precisely in the fact that the old is dying and the new cannot be born.
Antonio Gramsci

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List of Abbreviations

AD	–	Anti dumping
ADA	–	Anti-Dumping Agreement
ADD	–	Anti Dumping Duty
BEA	–	Bureau of Economic Analysis
CAP	–	China's Accession Protocol
CIPE	–	Critical International Political Economy
DSB	–	Dispute Settlement Body
DSM	–	Dispute Settlement Mechanism
EC	–	European Commission
EU	–	European Union
FDI	–	Foreign Direct Investment
GATT	–	General Agremeent on Tariffs and Trade
GATS	–	General Agreement on Trade in Services
IA	–	Investigating Authority
ITO	–	International Trade Organization
ME	–	Market Economy
MES	–	Market Economy Status
NME	–	Non-market Economy
PMS	–	Particular Market Situation
SCM	–	Subsidies and Countervailing Measures Agreement
SOE	–	State-owned Enterprise
TRIMs	–	Agreement on Trade-Related Investment Measures
TTB	–	Temporary Trade Barrier
US	–	United States
USCBC	–	United States–China Business Council

LIST OF ABBREVIATIONS

USDOC	–	United States Department of Commerce
USITC	–	United States International Trade Commission
USTR	–	United States Trade Representative
WTO	–	World Trade Organization

Introduction

On 11 December 2001, China became a member of the World Trade Organization (WTO) making the organization in the words of its then-Director-General Mike Moore "a truly world organization" (WTO, 2001). After its long and complex accession negotiations, China finally agreed to many specific conditions in order to join the WTO. One of these conditions was China's status as a Non-Market Economy (NME) that allows other members of the WTO to apply specific rules when dealing with China, especially different antidumping measurements against Chinese products. The NME status was set up for 15 years in China's Accession Protocol (CAP) in Article 15(a)(ii) vanishing on 11 December 2016. At least that is what China hoped would be the case. This hope was arguably best described by China's ambassador to the WTO Zhang Xiangchen, who said "I have always felt as though there were a clock ticking by my ear, second by second, day by day, and year by year, counting down to the end of Section 15(a)(ii) of CAP" (Xiangchen, 2017, p. 5). However, as the final date was approaching, the United States (US) and the European Union (EU) declared that they do not plan to automatically grant China Market Economy status (MES) and that they will continue to treat China as an NME in their antidumping proceedings. Therefore, one day after the supposed final day of its NME status, on 12 December 2016, China filed a lawsuit against the US as well as the EU at the WTO.

What may seem as a technical legal question of interests for trade geeks at best, is actually one of the most challenging problem not only for the WTO but for the whole multilateral trade regime and international trade in general. The US Ambassador to the WTO, Robert Lighthizer, even called it "the most serious litigation matter that we have at the WTO right now" indicating that a possible ruling in China's favor would be "cataclysmic" for the WTO (US Committee of Finance, 2017, p. 12). China also considers the dispute "the most important live issue in WTO antidumping law" which "concerns the credibility of the dispute settlement mechanism, the integrity of the WTO, and the membership's faith in the multilateral trading system" (Xiangchen, 2017, p. 14). Strikingly, given the importance of the question, it has not so far received a proper attention outside the community of trade experts. Moreover, serious misunderstandings appeared in the debate on this issue raging from wrong dates of China's accession or wrong dates of the expiration of Article 15(a)(ii) to a complete misinterpretation of basic WTO legal documents and antidumping framework.

Although the judicial system of the WTO does not operate at this moment (early 2020) and the cases about China's NME are pending now at the organization (China even withdrew its case against the EU, as I will discuss later), the problem remains to be extremely relevant and it is reasonable to assume that the antidumping practices and legislature – on the WTO level as well as on the nation states level – will continue to evolve

in light of the legal debate about China's NME status. Professor Mark Wu from Harvard Law School pointed out that "the WTO cases on China's market economy status represent but the opening salvo in what will be a multi-stage trade confrontation between China and its trading partners in the coming years" (Wu, 2018, vi) and that "[h]istory will likely judge the debate over China's market economy status as having contributed to the [global trading system's] crisis and the contours of its eventual resolution" (ibid, vii).

The aim of this thesis is to analyze China's NME status at the WTO in its complexity. More specifically, the goals are 1) to engage in the ongoing debate about China's NME status, analyze and structure the differing interpretations taken by various scholars, point out their strong and weak aspects and provide my own perspective on the issue, and 2) to analyze the disputes that China brought to the WTO Dispute Settlement Mechanism (DSM) against the US and the EU and analyze and compare the treatment of China as an NME from the US and the EU in antidumping proceedings. In the whole analysis I focus only on the antidumping aspects of China's NME, as they are the controversial and debated ones, and I leave out other aspects such as China's anti-subsidy treatment regulated by Article 15(b) of CAP and the Subsidies and Countervailing Measures Agreement (SCM).

The research questions are as follows:

1) What does the China's NME status mean and what amount of trade does it affect?
2) Which are the differing interpretations of China's NME status as regard the expiration of Article 15(a)(ii) of CAP?
    a. Which are the strong and weak aspects of these interpretations?
3) How do the US and the EU treat China as an NME in their antidumping proceedings?
    a. How do they differ in their treatment?

The text is structured in the following way: Chapter 1 introduces the historical, political and economic context of the analysis by focusing on China's accession to the WTO and on China's economic performance after joining the organization. Chapter 2 analyzes China's NME status. Due to the complex and rather technical nature of the debate, the antidumping legislation at the WTO is presented first followed by the analysis of the Article 15 of CAP and the amount of trade affected by the NME status. In Chapter 3, I focus on the debate about the expiration of Article 15(a)(ii). I distinguish four different interpretations, which all appeared in the academic literature and analyze the arguments that were put forward to justify them. Chapter 4 takes a look on the treatment of China as an NME by the US and the EU. In each case, the bilateral trade relations are presented first, followed by the overview of the dispute at the WTO DSM. Third respective subsections deal with the conditions of granting the MES and the last ones analyze concrete methods and

calculations of antidumping duties. Finally, the findings for the US and the EU are compared.

Given the complexity of China's NME status, many misunderstandings, which occurred in the literature, and the broad implications of the status for the WTO system, an in-depth analysis may be of use for the academic debate and the future research in the field. In addition, this analysis can also be useful for policymakers and state representatives on national as well as multinational level, who deal with the issue and participate in the formulations of trade and/or development policies. Finally, this text can also serve as an introduction to China's antidumping treatment in the WTO and to the antidumping rules of the WTO in general for those interested in the topic.

1.1 Theoretical Framework, Methodology and Data

This subchapter provides some notes on the broader theoretical framework of the thesis, the used sources and economic data. Although the thesis is not a theoretical one and I do not aim to test a given theory or a hypothesis derived from such a theory, the text is grounded in specific philosophy of social science, which is worth introducing. I rely on the theoretical framework of critical[1] international political economy (CIPE), which stands in a strike contrast to the mainstream approach to study phenomena of international political economy, which we can call "critical rationalism". Critical rationalism is a philosophical perspective going back to Karl Popper, which can be simply understood as assuming that there is a reality "out there" that can be observed and analyzed in an objective way without value judgments and interference by the researcher (Jäger et al., 2016, p. 102). According to this view, the principal objective of social science is to identify causal relations and formulate empirically falsifiable hypotheses about these relations (Cafruny et al., 2016, p. 1). Quite often, quantitative methods are used, and the knowledge produced in such a way

[1] There are numerous meanings that can be ascribed to the term "critical". One can easily see a different usage of the term in, say, the title of Immanuel Kant's book "Kritik der reinen Vernunft", the title of Karl Marx's book "Das Kapital: Kritik der politischen Ökonomie", what Michel Foucault described as "inservitude volontaire" a "indocilité réfléchie", or what Robert Cox had in mind when he distiungished between problem-solving and critical theories. In my understanding, "critical" approach refers to three aspects: 1) being critical to the objective, value-free research, which is able to discover causal relations between certain phenomena and make predictions on their basis, 2) admitting and working with normativity in the research process, and finally 3) using the dialectical method of combining different dimensions of abstraction as described below, which is in the words of Jäger et al. "a key methodological element in the tradition of CIPE research" (2016, p. 109).

is taken as objective, universal and contributing to the achievement of a "better" world (Jäger et al., 2016, p. 108; for a good discussion see Reed, 2011, pp. 1–13).

CIPE, on the other hand, understands social science as a social practice and the main aim of such a practice is not to predict causal links between certain phenomena but to understand them in their complexity by revealing their historical conditionality, social reality, political and economic context and other aspects (Cafruny et al., 2016, pp. 1–3). If we consider the classic dichotomy in the philosophy of social science, the aim of CIPE is to "understand" (Auslegung) rather than "explain" (Erklärung).[2] In addition, as Jäger et al. point out, "CIPE approaches, while methodologically sound and coherent, put their main focus not on the actual methods as such, but rather on the subject matter of analysis" (2016, p. 113).

Generally, the phenomenon studied in such a way is an abstract object. In this case, the NME status of China is such an object. The process (method) of generating scientific knowledge is then based on the move between different levels of abstraction. Jäger et al. explain:

> Although one starts with an abstract concept, in order to better understand a concrete phenomenon or process it will be necessary to use additional abstractions at a more concrete level. These are used to focus on concrete processes and events. Finally, one goes back through the different abstract concepts at higher levels of abstractions and modifies them, or incorporates new aspects, etc. The modified or expanded abstraction is then used to return to the concrete which allows for a broader and [at] the same time more precise understanding. With each move from the abstract to the concrete and back the perspective is enhanced. Although in practice one will have to stop at a certain point, this is potentially a neverending circular research process. It implies that the production of knowledge about reality is never a purely theoretical undertaking, but always related to reality and includes therefore empirical aspects in a broad meaning. This spiral, or ladder, from the abstract to the concrete represents a key methodological element in the tradition of CIPE research […] (Jäger et al., 2016, p. 109).

In this context, it is understood that specific abstractions can only capture certain aspects of reality and therefore more concrete abstractions, empirical facts as well as different interpretations may be seen as complementary to the circular research process

[2] For the clarification of this dichotomy, see Barša (2009, pp. 13–5, 18–23).

described above (Jäger et al., 2016, pp. 111–2). In the case of this text, I focus on 1) historical context of the NME status, 2) economic data, which I take to represent economic reality, 3) overall institutional and legal framework surrounding the NME status, 4) legal discourse and academic debate about the status, and 5) concrete practices of selected political actors (the US and the EU). The interpretative analysis is based on the assumption already expressed by Snyder that "we can grasp the significance of legal ideas and legal discourse best if we understand the assumptions and power relationships that underlie them, shape their development and inform the way they are used in practice" (2001, p. 372).

All the five above-mentioned dimensions reveal a different aspect of China's NME status at different levels of abstraction and together lead to a comprehensive understanding of this status. As Reed describes:

> The investigator reconstructs the meaningful context […], and to do so she draws upon a plurality of theoretical abstractions; these different theoretical tools need not […] add up to a coherent, general, and referential theory of social reality in the abstract. Rather, the investigator combines bits of theory with bits of evidence, and then these theory-fact pairs are brought together into a meaningful whole. This meaningful whole is the deep interpretation that the investigator constructs, and it gives coherence to her case (2011, p. 10).

The knowledge arrived at by the means of CIPE theoretical approach is considered to be a historical product rather than a universally valid conclusion and it inevitably contains normative assumptions and reflections of the author (Cafruny et al., 2016, pp. 1–2). However, this should not lead to the conclusion that research based on CIPE is more normative than other types of research. Rather, CIPE is more open and explicit of theoretical claims about value and purpose of social scientific research given the fact that the theoretical possibility of value-free research postulated by critical rationalism and other positivist traditions is dismissed (Jäger et al., 2016, p. 113). The main differences between critical rationalism and CIPE are summarized in Table 1. Also, the Palgrave Handbook of CIPE has been published recently (2016), edited by Alan Cafruny, Leila S. Talani and Gonzalo P. Martin, which contains many chapters devoted to theoretical, methodological and metatheoretical aspects of CIPE together with examples of concrete CIPE analysis of various topics within the international political economy field, which may be of use for those interested in this theoretical and methodological approach.

	Critical rationalism	CIPE
Ontology	Atomistic, rational actors Law-like regularities Linear or cyclical assumption about history	Complex social reality Context dependent hierarchies and processes History as open-ended and contingent, focus on social change
Epistemology	Positivist Subject-object distinction Truth claims through universally valid knowledge	Post-positivist Reflectivist Understanding of "reality" mediated through abstraction (knowledge as social/historical product)
Analytical strategies	Causal inference Falsification of hypotheses	Conceptualization Ladder of abstraction (iterative), dialectical
Theory	Parsimonious	Complex
Method	Statistical analysis Modelling Content analysis	Historical method Interpretative Discursive
Expectations and purpose of research	Value-free Objective Predictive	Emancipatory Science as social practice

Table 1: Differences between Critical Rationalism and CIPE (source: Jäger et al., 2016, p. 110)

Besides this general theoretical rooting, one more theoretical aspect needs to be clarified. In this text, I do not understand tariffs only in their economic sense as a trade barrier that leads to trade distortions. Rather, I recognize their political aspect as one of the instruments of state's trade defense mechanisms and a tool of trade defense policy. Many authors hold the view that the motivation to implement AD measures are not based solely on economic concerns (Prusa and Skeath, 2001; Baldwin, 2012). The most common explanation of AD duties in economics is to point out to the asymmetry in the incentives of producers and consumers to lobby for protectionists measures. It is believed that AD duties reduce the total surplus in the importing economy because even though they increase the surplus of the producers they also reduce the surplus of consumers and the latter effect offset the former (Lee et al., 2017, p. 4, 14; Messerlin, 2004, p. 108). However, since the producers can organize and lobby effectively for a protection of their industries, the state applies AD duties, which are sometimes even likened to taxes and their usefulness is doubted by many economists (Beattie, 2020; Lee et al., 2017, p. 5). The critique of this explanation would require a separate research paper. It is sufficient to say here, that this view is based on a specific understanding of firms and their goals, which claims that the

ultimate goal of firms is to maximize their profit. Since this text belongs to the field of international *political* economy, I believe it is also appropriate to consider the political aspects of tariffs. In this understanding, the ultimate goal of firms is not to maximize their profits but to control the largest possible segment of the (world) market and gain dominance in this segment/market. States, on the other hand, may want to support the creation of "national champions", especially in strategically important segments of the economy and in those segments with spillover effects. Tariffs can help firms and states in achieving their goal in many ways, e.g. by securing their domestic market so they can grow and achieve the economies of scale without competition or by delineation of specific national and regional markets in the world market. This process is examined in detail, for instance, in the so-called strategic theory of trade (or new trade theory) (see, e.g. Örgün, 2012; see also Williamson, 2018, pp. 436–7; Messerlin, 2004, p. 114–5).

Moving from theoretical framework, the sources I rely upon in this research are primary legal documents such as multilateral agreements and judicial findings of the WTO DSM, products of the academic debate and the legal discourse on China's NME regarding the expiration of Article 15(a)(ii) of CAP, economic data, and finally the legal documents and laws of the US and the EU.

Lastly, I rely on the classical trade data, which are calculated on the basis of the final export and import prices. In other words, I do not use the value-added data even though they can better reflect the actual trade reality. Although there already exists a database providing the value-added data made together by the WTO and OECD, it is still in its beta version. More importantly, sometimes I refer to trade data taken from different sources and relying on classical trade data allows for a proper comparison of these data. It is worth pointing out, however, that the overall perspective can change dramatically if value-added data are taken into account. Morrison, for instance, argues that the US trade deficit with China would be 25% lower in 2009 if calculated on the basis of value-added data (2016, p. 86). The classical trade data therefore show where products are being imported from, but they often fail to reflect who benefits from this trade (ibid., p. 94).

Another related aspect worth mentioning is a lack of available data for a proper analysis of economic effects connected to the China's NME status. This is especially true for concrete AD duties applied against Chinese products and for the way how these duties are calculated. Yalcin et al. claim that "the available academic literature has not much to say on AD effects in the context of China and MES. This is not surprising, as a causal analysis of how a change in China's treatment in AD regulations may affect other countries requires a comparable case or alternatively an ex-post analysis once China has been granted MES" (2016, p. 40). Nonetheless, I believe that the data I refer to complement the analysis and specific arguments in a sufficient way for the purposes of this text.

1. China and the WTO

The purpose of this chapter is to present the necessary historical and economic background for the following parts of the text. Because China's accession to the WTO has arguably been the most significant moment for the organization to date (Wu, 2012, p. 9; Abbott, 1998, p. 1), it has since been studied by numerous authors and one can easily find sources dealing with every possible aspect of the accession.[3] Therefore, I will limit myself only to a brief overview of China's accession to the WTO (first part of this chapter) and I will provide the reader with some statistical data about China's economic performance after becoming a member of the WTO (second part of this chapter).

1.2 Brief Overview of China's Accession to the WTO

China's accession to the WTO can easily be described as the most extraordinary in the history of the WTO and its predecessor the General Agreement on Tariffs and Trade (GATT). As Jeffrey L. Gertler put it: "Each accession to the WTO is a unique event, but China's accession has been particularly noteworthy" (Gertler, 2004, p. 21). China signed the Treaty of Havana in 1948 and GATT's provisional protocol in 1949, thus becoming a founding contracting party to the GATT in May 1949. However, the Nationalist Party then lost the control over China's mainland and fled to Taiwan and the Communist Party of China established the People's Republic of China on 1 October 1949. The Republic of China in Taiwan then notified its withdrawal from the GATT and in November of the same year at the sixth meeting of the GATT, at the suggestion of Dr. Bystricky from Czechoslovakia, the following note was inserted in one of the approved documents: "The Nationalist Government of the Republic of China has notified its withdrawal from the General Agreement with effect from May 5 1950; the Central People's Government of China has not yet defined its position with regard to the General Agreement" (GATT, 1950).

Although Taiwan applied for observer status at the GATT in 1965 and was accepted, this status was removed again in 1971 after the United Nations General Assembly adopted Resolution 2758 (XXVI) claiming that from now on it will recognize the government of the People's Republic of China as the only legitimate government of China. The then-chairman

[3] According to some, there are more than 20,000 scholarly contributions on China's entry into the WTO (Cattaneo and Braga, 2009). For a good overview see e.g. Lam (2009, pp. 64–84); Bhattasali – Li – Martin (2004); Gertler (1998); Jackson (1998); Eglin (1997); Mo (1996); Wong (1996); Changsoo (1996). For an overview in the Czech language, see Fojtíková (2019, pp. 54–69); Sereghyová (2003, pp. 46–9).

of the GATT, Carlos Besa, declared that the GATT would follow the United Nations in essential political matters and invited the representatives of Taiwan to withdraw.[4]

The Communist government in China remained silent about its participation in the GATT throughout this period and formally asked to resume its status as a contracting party to the GATT in July 1986.[5] China argued that because of "historical reasons", the formal relationship between China and the GATT had been suspended and therefore China hoped to regain its contracting party status instead of having to go through the accession negotiations (GATT, 1986). If China had succeeded to regain its initial status, the argument was, it would not have to agree to many non-GATT and GATT-plus concessions as was later the case. In the end, China was not allowed to regain its contracting party status and its accession negotiations proceeded under the Article XXXIII of the GATT, which deals with new memberships.

The China Accession Working Party was established under the GATT in 1987. The initial progress was suspended for more than two years in 1989 after the events at the Tiananmen Square and negotiations were later resumed after the memorandum of understanding on market access was signed by the US and China in 1992. China attempted to conclude the accession negotiations by the end of the Uruguay Round of the GATT and thus become the founding member of the WTO, but to its disappointment this did not happen, and the negotiations continued under the Article XII and XIII of the WTO Charter, after the WTO was established in 1995. At the same time, the Working Party was succeeded by the WTO China Accession Working Party (WTO, 1996) and it expanded its negotiations mandate to include new regulations established under the WTO such as new rules on agriculture, textiles, intellectual property rights and the agenda covered by General Agreement on Trade in Services (GATS) and Agreement on Trade-Related Investment Measures (TRIMs). During its accession, as it is common for all states that wish to enter the GATT/WTO, China held bilateral and multilateral negotiations about the conditions of

[4] Besa asked if there was a wish to take a vote on this issue and since no delegation made such a request, Besa declared that a consensus had been reached to remove Taiwan's observer status. After that, the delegations of Brazil, US, Gabon, Ivory Coast, Zaire (Democratic Republic of the Congo), Greece, South Africa, Spain and Madagascar declared that they do not agree with this consensus (GATT, 1971).

[5] Interestingly, China did not ask the GATT to resume its status in 1971 when the Resolution 2758 (XXVI) was adopted. According to the China's chief trade negotiator from 1992 to 2002, Vice Trade Minister Long Yongtu, the resumption of the status at that time would have been very easy. Nonetheless, the Cultural Revolution was still under way in 1971 and since China perceived the GATT as "a club of rich nations" dominated by developed countries, it refused to join (Lam, 2009, p. 68).

its accession.[6] The two main bilateral negotiating partners were the US and the EU. China concluded the talks with the US on 15 November 1999, after the bombing of the Chinese Embassy in Belgrade in May 1999 brought about political change in the US (Wu, 2012, p. 11), and with the EU on 19 May 2000. The bilateral deal with the US was particularly important as it propelled the conclusion of other bilateral talks (Zhou and Peng, 2018, p. 519). On 18 September 2001, the WTO China Accession Working Party approved the package deal, after all the bilateral agreements between China and its partners were multilateralized and this package was then approved by the WTO's Ministerial Conference in Doha, Qatar, on 11 November 2001. China became the 143rd member of the WTO exactly one month later on 11 December 2001. The accession process lasted for unprecedented 15 years. The accession chronology is summarized in Table 2.

[6] According to the rules of the WTO, the applicant has to negotiate bilaterally with each and every existing WTO member that has requested bilateral negotiations. In China's case, 43 members wished to enter into bilateral negotiations (WTO, 2000). The first to conclude a bilateral agreement with China was Hungary (May 1993) and the last was Mexico (September 2001) (Lam, 2009, pp. 60-1, 66).

Time	Major Progress
1948	China becomes a founding contracting party to the GATT
1949	People's Republic of China established
1950	The Republic of China (the Chiang Kai-shek government in Taiwan) withdraws from the GATT
1965	Taiwan joins the GATT as an observer
1971	UN adopts Resolution 2758 (XXVI); Taiwan's status revoked
1978	Deng Xiaoping launches open-door policy and economic reform
1986	China applies to resume its status as a contracting party to the GATT
1988	First meeting of China Accession Working Party
1989	Progress of the GATT Working Party stalled after Tiananmen Square events
1992	China and the US sign a memorandum of understanding on market access
1995	The WTO succeeds the GATT
1999 Apr.	Chinese Premier Zhu Rongji's US visit over WTO negotiations
1999 May	The US bombed the Chinese Embassy in Belgrade
1999 Nov.	China and the US conclude bilateral WTO negotiations and sign bilateral agreement
2000 May	China and the EU conclude their bilateral WTO accession negotiations
2001 Sept.	Last meeting of China Working Party at the WTO; multilateral negotiations concluded
2001 Nov.	WTO Ministerial Conference in Doha, Qatar, approves China's accession; China notifies its acceptance
2001 Dec.	China becomes the 143rd member of the WTO

Table 2: China's Accession to the GATT/WTO (Source: based on Lam, 2009, p. 64. Some data were omitted, and some added/adjusted by the author)

1.3 China's Performance After the Accession

After its accession to the WTO, China only boosted its already rising economy. I will present some basic data about the Chinese trade in this subchapter, starting with a current overview based on the latest available datasets and showing some long-term trends in Chinese exports and imports in selected segments of economy as well as total exports and imports in the years after China's accession to the WTO. However, the data provided here serve only for the contextualization of the debate about China's NME status and its position in today's global trade. I do not intend to claim that there is a causal link between China's membership at the WTO and its economic performance.[7] I will also present some basic

[7] To prove such a causal link is more difficult that one could expect, see e.g. Rose 2004 and the subsequent debate about his article in Gil-Pareja et al., 2016; Tomz et al., 2007, 2005; Felbermayer and Kohler, 2010, 2006.

data related to antidumping proceedings and China's activities at the WTO DSM, as these provide a necessary context for next chapters.

In 2018, China was the biggest exporter of merchandise in the world and the fifth biggest exporter of commercial services (third if we exclude intra-EU trade). At the same time, China was the second biggest importer of merchandise (third if we exclude intra-EU trade) and the second biggest importer of commercial services (third if we exclude intra-EU trade) (WTO, 2019). The share of China on world total merchandise exports in 2018 was 12,77% and its share on total merchandise imports was 10,75%.

Figures 1 and 2 show the massive dominance of manufactures on Chinese exports and imports (94% and 62% respectively). Figure 2 also shows a significant portion of imported fuels and mining products (almost a quarter of total merchandise imports), which indicates high energy demands of the Chinese economy and its dependency on foreign energy sources.

The main destinations for Chinese merchandise exports in 2017 were the US (19%), the EU (16,5%), Hong Kong, China (12,3%), Japan (6,1%) and the Republic of Korea (4,6%). The main importers to China in the same year were the EU (13,3%), the Republic of Korea (9,7%), Japan (9%), Chinese Taipei (8,5%) and the US (8,4%) (WTO, 2019).

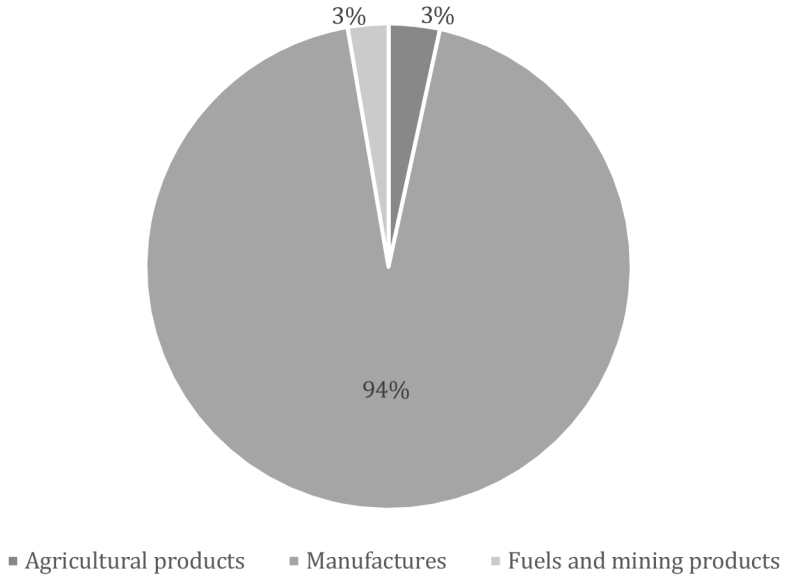

Figure 1: Total Merchandise Exports by Main Commodity Group in 2017 (source: WTO)

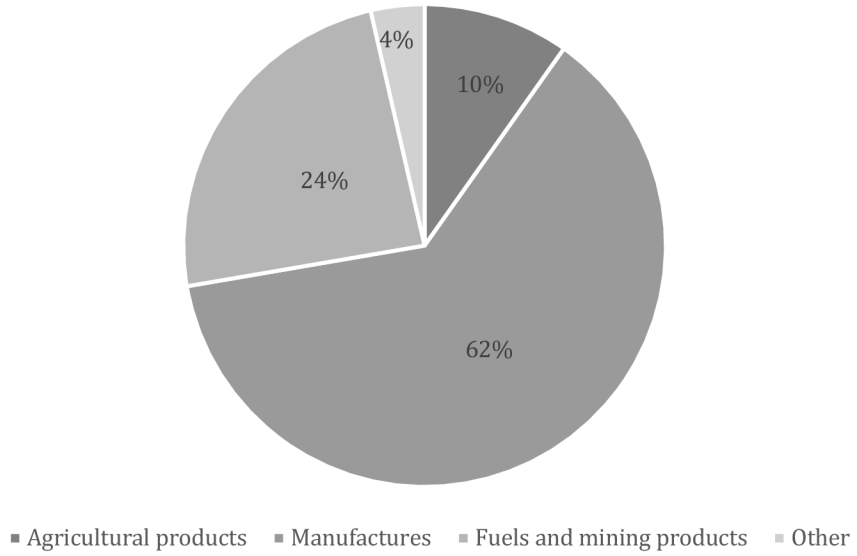

Figure 2: Total Merchandise Imports by Main Commodity Group in 2017 (source: WTO)

In terms of trade in commercial services, China's share on the world total exports in 2018 was significantly lower (4,59%) than its share on merchandise exports and about the same size (9,49%) as its share on total merchandise imports. Figures 3 and 4 present the main services items in 2018 and their shares on total Chinese exports and imports. The main export destination for Chinese services in 2016 was Hong Kong, China (28,8%) followed by the EU (17%), the US (15%), Japan (5,5%) and Singapore (5,5%). The main service importers to China in 2016 were Hong Kong, China (19,6%) the US (19,3%), the EU (16,9%), Japan (6,6%) and Canada (5,8%).

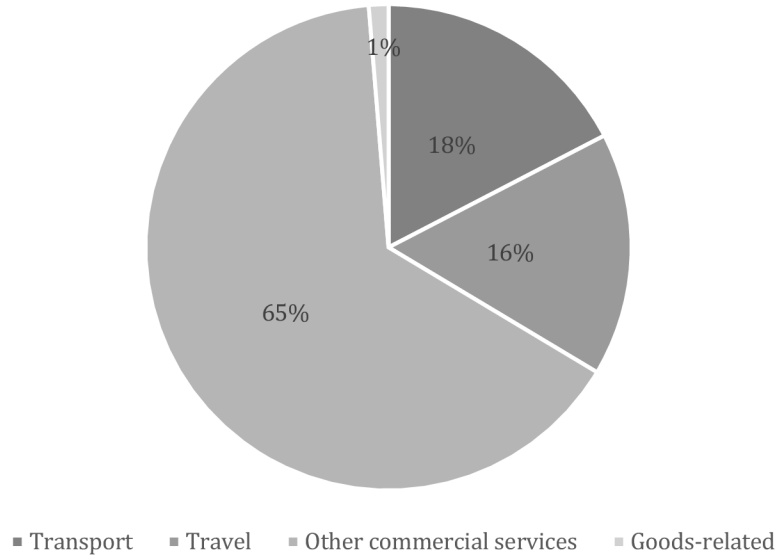

Figure 3: Total Export by Main Service Item in 2018 (source: WTO)

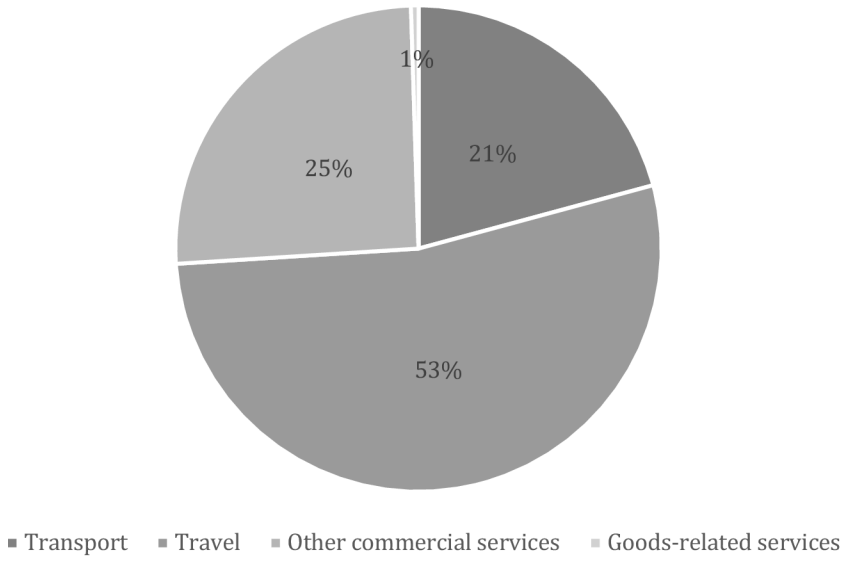

Figure 4: Total Imports by Main Service Item in 2018 (source: WTO)

Given these data, it seems that Chinese economy is still primarily oriented on exporting manufactures as well as on importing them together with fuels and mining products. China exports more than a third of its total exports in merchandise and services to the US and the EU. It imports more than one fifth of its merchandise imports and more than a third of its services imports from the US and the EU.

If we look at long-term data on Chinese exports (Table 3) and imports (Table 4) we can see a similar pattern in different sectors. In exports, the data show either a stagnation (Agricultural products, Iron and steel, Textiles) or slower rise (Total merchandise, Manufactures, Commercial services) before China's accession to the WTO and then a massive rise in the years after the accession up until 2009, the year of the global economic crisis. Nonetheless, China quickly recovered from the crisis[8] and the next year its exports were larger in all except one segment presented in Table 3 than before the crisis.

In imports, a slower rise before China's accession to the WTO is observable in Total merchandise, Manufactures and Commercial services, a stagnation in Agricultural products and Textiles and a decrease in Iron and steel. Similar to the exports, also imports in all segments peaked in 2008 before the financial crisis in 2009 and quickly recovered in all segments except for Iron and steel.

Table 5 presents data about total exports and imports together with trade surplus and their annual percent change in the period after the accession to the WTO (2001–2008). The data shows an evident and rapid rise in each section, especially the booming trade surplus, rising just between 2004 and 2005 by 217,4%. Having said that, it is also important to point out the openness of China's economy after its accession to the WTO. Overall, tariffs have decreased from 42,7% in 1992 to 10,4% 2003. This decrease in tariffs should be connected to concrete China's promises in its Accession Protocol (Rinaldi-Larribe et al., 2009, p. 116).

[8] One of the reasons behind this fast recovery was a massive stimulus package of 550 billion US dollars, which mostly went to the infrastrucal projects and investments and were mainly financed through cheap credit to local governments and enterprises (Overbeek, 2016, p. 322).

	Total merchandise	Agricultural products	Manufactures	Iron and steel	Textiles	Commercial services[9]
1995	148 780	14 997	125 007	5 225	13 918	18 430
1996	151 058	14 944	127 259	3 634	12 112	20 567
1997	182 792	15 732	155 907	4 464	13 828	24 504
1998	183 712	14 314	160 342	3 288	12 817	23 879
1999	194 931	14 209	172 060	2 659	13 043	26 165
2000	249 203	16 384	219 859	4 391	16 135	30 146
2001	**266 098**	**16 626**	**235 822**	**3 152**	**16 825**	**32 901**
2002	325 596	18 796	292 561	3 322	20 562	39 381
2003	438 228	22 158	396 993	4 813	26 900	46 401
2004	593 326	24 121	542 366	13 878	33 428	64 534
2005	761 953	28 711	700 342	19 278	41 050	77 974
2006	968 978	32 542	895 390	32 519	48 678	93 492
2007	1 220 456	38 862	1 136 143	51 531	56 032	124 895
2008	1 430 693	42 258	1 331 388	70 951	65 367	144 677
2009	1 201 612	40 883	1 124 743	23 660	59 824	121 613
2010	1 577 754	51 607	1 476 532	39 565	76 871	177 384
2011	1 898 381	64 613	1 771 858	55 562	94 411	200 294
2012	2 048 714	66 175	1 924 928	53 833	95 450	200 586
2013	2 209 005	70 159	2 077 150	54 689	106 578	205 778
2014	2 342 293	74 476	2 201 686	72 260	111 664	218 086
2015	2 273 468	72 678	2 143 718	63 829	108 934	217 570
2016	2 097 631	75 476	1 965 697	55 321	104 605	208 320
2017	2 263 345	78 438	2 116 384	55 756	109 595	226 389
2018	2 486 695	82 793	2 318 153	62 605	118 526	265 088

Table 3: China's Exports to the World in Million US dollar (source: WTO, 2020c)

[9] There has been a change in data classification so the data for commercial services are comprised from BOP5-S200CS – Commercial services (Services excl. government services) (1995–2004) and BOP6-SOX (2005–2018).

	Total merchandise	Agricultural products	Manufactures	Iron and steel	Textiles	Commercial services[10]
1995	132 084	16 099	104 138	6 878	10 914	24 635
1996	138 833	15 300	109 638	7 243	11 980	22 369
1997	142 370	14 633	109 632	6 663	12 267	27 724
1998	140 237	12 610	113 054	6 489	11 082	26 467
1999	165 699	13 853	132 766	7 495	11 079	30 967
2000	225 094	19 544	169 883	9 689	12 832	35 858
2001	**243 553**	**20 125**	**189 921**	**10 749**	**12 573**	**39 032**
2002	295 170	21 848	236 808	13 599	13 060	46 080
2003	412 760	30 482	328 569	22 034	14 217	54 852
2004	561 229	42 279	428 266	23 387	15 304	72 190
2005	659 953	45 189	493 141	26 341	15 503	83 348
2006	791 461	51 653	579 502	21 618	16 358	100 332
2007	956 116	65 369	677 516	24 145	16 645	128 269
2008	1 132 567	86 807	733 474	27 149	16 289	155 477
2009	1 005 923	76 617	675 172	26 476	14 945	145 139
2010	1 396 247	108 260	894 290	25 054	17 679	192 254
2011	1 743 484	144 724	1 032 932	27 165	18 901	246 779
2012	1 818 405	156 835	1 058 866	22 826	19 810	280 260
2013	1 949 990	165 476	1 135 562	21 443	21 563	329 419
2014	1 959 233	170 708	1 179 177	22 471	20 249	430 856
2015	1 679 564	159 621	1 077 619	19 455	18 970	432 975
2016	1 587 926	154 859	1 029 935	18 265	16 676	449 223
2017	1 843 793	180 901	1 152 039	22 588	17 284	464 133
2018	2 135 748	195 168	1 301 979	24 177	17 881	520 569

Table 4: China's Imports in Million US dollar (source: WTO, 2020c)

[10] There has been a change in data classification so the data for commercial services are comprised from BOP5-S200CS – Commercial services (Services excl. government services) (1995–2004) and BOP6-SOX (2005–2018).

	Total imports		Total exports		Total imports and exports		Trade surplus	
Time	Total	Year-on-year (%)	Total	Year-on-year (%)	Total	Year-on-year (%)	Total	Year-on-year (%)
2001	2 661,5	6,8	2 436,1	8,2	5 097,7	7,5	225,4	-6,5
2002	2 952,0	21,2	3 255,7	22,3	6 207,7	21,8	303,6	34,6
2003	4 128,4	39,9	4 383,7	34,6	8 512,1	37,1	255,3	-16,1
2004	5 614,2	36,0	5 933,7	35,4	11 547,9	35,7	319,5	25,4
2005	6 601,2	17,6	7 620,0	28,4	14 221,2	23,2	1 018,8	217,4
2006	7 916,1	20,0	9 690,8	27,2	17 606,9	23,8	1 774,7	74
2007	9 668,2	20,8	12 180,2	25,7	21 738,3	23,5	2 622,0	47,7
2008	11 330,9	18,5	14 285,5	17,2	25 616,3	17,8	2 954,6	12,6

Table 5: China's Exports and Imports after WTO Accession, US Billion (source: Chinese Ministry of Commerce, translated in Pan, 2015, p. 746)

Notwithstanding the gains in trade China experienced after it became the member of the WTO, it must be stated clearly that many of the accession conditions were harsh, to say the least, and often plainly discriminatory. Pan says that: "[s]uch extraordinary [trade] achievements stand in sharp contrast with the unfair trade environment [China] faces" (Pan, 2015, p. 742). China had to adapt and change a large portion of its trade legislation. Lam even points out that: "China's ratification of other international treaties administered by international organizations, for example those under the auspices of the United Nations, had never before led to such cross-cutting and extensive domestic legislative changes" (Lam, 2009, p. 114). For example, China agreed to the Specific Products Safeguard Mechanism for 12 years after its accession, which basically meant that other WTO members could take special safeguard measures against Chinese exports (Obama administration used this mechanism in the Tyre case in 2009, see Pan, 2015, p. 751). Also, upon its accession, China became a party to the Agreement on Textiles and Clothing, which effectively ended quotas on textiles for all WTO members on 31 December 2004, however, a special safeguard mechanism remained in place until 2008 that would permit WTO members to take action to curb Chinese imports of textile products in case of market disruptions (Gertler, 2004, p. 23). [11]

One of the main factors behind China's intention to join the WTO was its treatment in antidumping proceedings. China's chief negotiator of the accession, Long Yongtu, even

[11] Other accession conditions include cuts of average tariffs for industrial goods from 17% to 8,9% and for US priority agricultural products from 31% to 14% and limit subsidies to agricultural production to 8,5% of the value of farm output. See other accession conditions in Morrison (2016, p. 118), Choukroune (2012, pp. 50–1); Lam (2009, pp. 95–114); Rumbaugh and Blancher (2004); Cheong and Yee (2003).

ranked stricter antidumping rules second among China's priorities at the WTO (Messerlin, 2004, p. 29). China hoped that once it obtains a member status at the WTO, the antidumping procedures would be guided by a concrete set of rules and will decrease substantially given the accession conditions China had agreed to. However, this did not turn out to be true and as Tables 6 to 9 show, China remains in the top 10 countries as a complainant (284 initiations, 223 measurements) and as a respondent (1361 initiations, 1009 measurements) and almost a quarter of all antidumping initiations (23,3%) and more than a quarter of all antidumping measurements (25,9%) target China.

Total	India	US	EU	Brazil	Argentina	Australia	China	Canada	South Africa	Turkey
5833	938	715	515	417	381	351	284	241	232	227

Table 6: Top 10 Reporting Members (Complainants) in Antidumping Initiations 1995-30.6.2019 (source: WTO, 2020b)

Total	China	Republic of Korea	Taipei, Chinese	US	India	Thailand	Japan	Indonesia	Russian Federation	Brazil
5833	1361	438	308	294	238	234	228	212	170	158

Table 7: Top 10 Respondents in Antidumping Initiations 1995-30.6.2019 (source: WTO, 2020b)

Total	India	US	EU	Brazil	Argentina	China	Turkey	Australia	Canada	South Africa
3887	703	484	329	260	259	223	199	166	160	137

Table 8: Top 10 Reporting Members (Complainants) in Antidumping Measurement 1995–30.5.2019 (source: WTO, 2020b)

Total	China	Republic of Korea	Taipei, Chinese	US	Japan	Thailand	India	Indonesia	Russian Federation	Brazil
3887	1009	283	210	189	164	161	144	140	128	108

Table 9: Top 10 Respondents in Antidumping Measurements 1995–30.6.2019 (source: WTO, 2020b)

Moreover, as can be seen in Table 10, the number of US and EU antidumping investigations against China after its accession increased significantly. While in the 1980s, the share of the US antidumping investigations against China was only 4% of the total, the number had grown to 13% in 1990s and then to 27% in 2000s. For EU, the numbers for the same periods are 12%, 14% and 29%.

	All other countries	China	Total	Share against China
US				
1980s	468	17	485	4%
1990s	374	57	431	13%
2000s	230	83	313	27%
Total	**1072**	**157**	**1229**	**13%**
EU				
1980s	106	14	120	12%
1990s	317	53	370	14%
2000s	153	61	214	29%
Total	**576**	**128**	**704**	**18%**

Table 10: US and EU Antidumping Investigations against China (source: based on Prusa, 2017, p. 620)

The amount of antidumping proceedings against China is in a striking contrast with the proceedings against China at the WTO Dispute Settlement Mechanism (DSM). In total, 44 cases were filed against China (23 by the US, 9 by the EU), which is more than against India or Brazil (the two countries China is often associated with in the so-called BIC group), but still significantly less than against the US (155) or the EU (86). China filed 21 lawsuits in total, 16 against the US and 5 against the EU, see Tables 11 to 13. What is worth noting, nonetheless, is China's involvement in 179 cases at the DSM as a third-party observer, which have provided China with valuable experience and information about the DSM mechanisms as well as with an apprehension of its legal tools and rights in it (Choukroune, 2012, p. 49).

	Complainant	Respondent	Third Party
China	21	44	179
US	124	155	156
EU	104	86	206
India	24	32	162
Brazil	33	16	147

Table 11: Involvement at the DSM, Number of Cases (source: WTO, 2020a)

Brazil	Canada	EU	Guatemala	Japan	Mexico	US
1	4	9	1	2	4	23

Table 12: Number of Cases at the DSM Filed against China (source: WTO, 2020a)

EU	Greece	Italy	US
5	1	1	16

Table 13: Number of Cases at the DSM Filed by China (source: WTO, 2020a)

Besides other accession conditions, China agreed to be considered an NME in its Accession Protocol, which effectively enabled other WTO members to discriminate against Chinese products in antidumping proceedings by using different antidumping methodologies. That is one of the reasons, why the number of antidumping proceedings against China did not decrease and why China's hopes for strict antidumping rules remained unheard as the NME status is generally seen as encouraging other countries to use antidumping measures against Chinese imports (Pan, 2015, pp. 752–3; Urdinez and Masiero, 2015). That is why China's ambassador to the WTO called this status "a heavy price China paid for its membership in the WTO" (Xiangchen, 2017, p. 3). I will analyze the NME status of China in the next chapter.

2. China's NME Status

This chapter analyzes the NME status of China. First section introduces the background about antidumping rules in the WTO and the NME methodology. Second section analyzes the Article 15 of CAP. Third subsection tries to identify the amount of trade affected by the NME status and its effects on AD measures.

1.4 Antidumping Rules and Surrogate Country Methodology

Due to the technical nature of antidumping methodologies, let us first have a look at the very basics of dumping and antidumping. Generally, if a company sells its product for a lower price on the export market than on its home market, the international trade jargon calls this activity *dumping*.[12] Interestingly, this practice is not considered illegal in the WTO system (as some falsely claim, e.g. Rémond, 2007, pp. 346–7). The WTO rules do not regulate the actions of companies engaged in dumping; rather, they regulate the counteractions of governments against dumping. In other words, the WTO regulates *antidumping* behavior.[13]

The legal basis for antidumping behavior and possible antidumping measures is nowadays provided by the Article VI of the GATT and the Agreement on Implementation of Article VI of the GATT 1994, generally referred to as the Anti-Dumping Agreement (ADA). The basic functioning of this legal framework can be presented in the following way: Let us assume that a company A sells its product on the home market (country A) for 100 US dollars and exports it to a foreign market (country B) for the price of 90 US dollars. Then, the company B, which is from country B and produces a like-product[14] to the one

[12] The understanding of the concept of dumping is broader, however, as it is shown in this chapter.

[13] The first modern antidumping legislation was adopted in Canada in 1904, followed by New Zealand (1905), Australia (1906), South Africa (1914), the US (1916) and Japan (1920). By the mid-1920s, certain basic criteria for determining prices in antidumping investigations had been established. In 1921, the US law identified these criteria as (i) price on the home market, (ii) export price to a third country and (iii) price based on the cost of production in the country of exportation. All these criteria were based on the assumption that the country of exportation had a market economy. According to the commentators, it is agreed that the US Antidumping Act of 1921 served as the basis for GATT Article VI in 1947 (see more in Snyder, 2001, pp. 375–9).

[14] The definition of the "like-product" is presented in Article 2.6 of ADA: "[like-product] shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the

exported by company A, can file a complaint to the domestic investigating authority in country B. The investigating authority (IA) starts an investigation, collects the information about home market prices in country A and export prices in country B and finds out that the difference between those two prices is 10 US dollars. This is called the margin of dumping and if this margin is greater than zero, it is concluded that dumping is taking place. If the company B can prove an injury due to the dumping actions of the company A, the WTO legal framework allows the country B to impose an antidumping duty (ADD) on the dumped product from the company A. This ADD can be up to the size of the margin of dumping – in our case up to 10 US dollars.

In a case that the company A does not sell its product in the country A, the IA may use the export price to a third country C and compare that with the export price to the country B. If the company A does not export its product to another country, the IA can count the cost of production in the country A, add a reasonable addition for selling cost and profit and compare such price with the export price to the country B.

There are couple of important aspects worth emphasizing. Firstly, the basic method that the IA employs is the price comparison between the domestic price and the export price of the same product (Article VI:1(a); ADA 2.1). If, for some reason, the domestic price is not available, other methods which may be used include comparing export prices to the country of the investigating authority and a third country (Article VI:1(b)(i); ADA 2.2) and comparing the export price to the constructed price of production in the country of origin (Article VI:1(b)(ii; ADA 2.2). The relevant parts of the Article VI:1 of the GATT are as follows:

> "For the purposes of this Article, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another
> (a) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or,
> (b) in the absence of such domestic price, is less than either
> (i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or

absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration".

> (ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit." (GATT, Article VI:1)

The relevant parts of the ADA Article 2 are as follows:

ADA 2.1:

> "For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country."

ADA 2.2:

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

Secondly, only if the complaining company can prove an injury stemming up from the dumping activity of another company, the ADD can be imposed (GATT, Article VI:6; ADA Article 3). Thirdly, this ADD cannot exceed the margin of dumping (GATT, Article VI:2 and VI:3; ADA Article 9.3). This is the basic functioning of the WTO antidumping framework.

Nonetheless, there are some exceptions to this basic functioning. One of the most important and the one which this thesis focuses on, is the so-called surrogate country methodology, which allows IAs to use surrogate country prices for dumping calculations.[15]

[15] In this thesis, I distinguish between a surrogate country methodology and an NME methodology, even though they are basically the same. The only difference, which may be relevant for the discussion about China's NME status, is that the use of the NME methodology is allowed by the NME status of the concrete

There are serious misunderstandings about this concept in the literature and difficulties surrounding its interpretation. For the purposes of this thesis, by surrogate country methodology I mean such sets of investigative approaches that allows IAs to use surrogate country prices in otherwise normally accepted methods of the margin of dumping calculations. In other words, the IA can use all three general methods presented above, but instead of using domestic prices for comparison, it can recourse to surrogate country prices. My understanding of the surrogate country methodology is therefore broader than is often the case and may be disputed by some authors (see e.g. Espa and Levy, 2018, p. 332; the same view to mine is hold by Detlof and Fridh, 2006, p. 6).

The surrogate country methodology is nothing new in the WTO system and its history in the multilateral trade environment dates back to 1955. At that time, Czechoslovakia proposed an interpretative note to the Article VI of the GATT, which would deal with such countries, where the method of price comparison between domestic and export prices is not appropriate due to the significant presence of the state in the economy.[16] The state, the argument goes, distorts domestic prices and marks them useless for price comparison. This debate led to the implementation of the Second Interpretative Ad Note to the Article VI:1 of the GATT.[17] The question of surrogate country methodology was brought up again in dealing with the accession of Poland, Romania and Hungary to the GATT in the late 1960s and early 1970s (Miranda, 2018, p. 71).[18] Each of these states had in its accession

country, whereas the use of the surrogate country methodology is based on the WTO framework and is not necessarily connected with the economic status of the concrete country. Besides this difference, their practical usage is the same.

[16] Interestingly, the first usage of the NME methodology can be found in the US investigation of *Bicycles from Czechoslovakia* in 1960 (see 25 Federal Register, 1960 at 6657), Fur Felt Hoods, Bodies and Caps from Czechoslovakia (see 27 Federal Register, 1962 at 6099) and Jalousie-Louvre-Sized Sheet Glass from Czechoslovakia (see 27 Federal Register, 1962 at 8457). See more in Snyder (2001, pp. 384–6).

[17] A question may arise about the legal status of this note. At the time of its implementation, the GATT basically worked as a diplomatic organization with a collection of ad hoc arrangements and loose and informal rules. Moreover, many of these arrangements were considered to be of advisory nature. However, the note was accepted by the Report of the 1954–55 Working Party on "Other Barriers to Trade" and it was brought into effect by the Protocol Amending the Preamble and Parts II and III of the GATT. This Protocol went into force on 7 October 1957 and the note thus became binding for all GATT members (Snyder, 2001, p. 383).

[18] The NME treatment has its origin in the bilateral trade agreement between the US and the Soviet Union. Since the Soviet Union was to be a party to the International Trade Organization (ITO), its suggested charter included a section about state trading. However, after the collapse of the ITO and after the Soviet Union decided not to join the GATT, the provision about state trading was dropped from the GATT (Dethlof and Fridh, 2006, p. 9).

protocol an NME clause explaining the rules of antidumping and other aspects connected with the NME status as well as the surrogate country methodology rules, which may be applied against them.

Nowadays, the legal basis for the surrogate country methodology is provided by the already mentioned Second Interpretative Ad Note to the GATT Article VI:1 and Article 2.2 and 2.7 of the ADA. The relevant parts are as follows (see full texts in Annex):

The Second Interpretative Ad Note to the GATT Article VI:1:

> "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."

The ADA Article 2.7:

> "This Article is without prejudice to the second Supplementary Provision to paragraph 1 of Article VI in Annex I to GATT 1994."

As can be seen, these legal texts are significantly vague and very difficult to interpret. Take the Second Interpretative Ad Note to the GATT Article VI:1. It is not easy to understand the meaning of phrases such as "take into account", "strict comparison with domestic prices" and "may not always be appropriate". Moreover, the conditions prescribed in order to allow IAs to use the surrogate country methodology are almost impossible to fulfill. The exporting country, against which the surrogate country methodology can be used, would have to have "a complete or substantially complete monopoly of its trade" and "all domestic prices [would have to be] fixed by the [s]tate". Such a country hardly exists, so the question against whom the surrogate country methodology can be used emerges. The reasons behind such harsh conditions are purely historical. This note was adopted to allow GATT members to deviate from the regular calculation of the margin of dumping to address the dumping practices of socialist economies. At the same time, this note is the only legal document in the WTO system at the moment where a reference to the surrogate country methodology can be found (Kaszubska, 2017, p. 3).

At the outset, the situation seems to be quite logical. The WTO system provides some basic rules for antidumping investigations and in the special circumstances described above, it allows the IAs to deviate from these rules by using the surrogate country

methodology. But even after a quick reflection, major difficulties emerge. Do all the prices in the economy have to be distorted, or just the prices of the one (segment of) product? And if one price is distorted, is it possible for other prices not to be? What makes a good substitute? Should all the prices of the like-product from a surrogate country be taken into account? Or an average one? Or one company's prices? What if the companies are reluctant to share their prices and other sensitive data necessary for the investigation? And once again, against whom can this methodology be used given the harsh conditions mentioned above?

As unlikely as it may sound, all the questions except the last one from the previous paragraph are dealt with by individual governments and there are no multilateral rules that they have to follow.[19] Therefore, the concrete method of calculation of the margin of dumping using the surrogate country methodology varies significantly across governments (Detlof and Fridh, 2006, p. 9). That also means that the surrogate country methodology is being used in antidumping proceedings and thus there is a way how to escape the limiting conditions of the Second Interpretative Ad Note.

First way how an IA can use the surrogate country methodology is an NME status of the home country of the company under investigation. Nonetheless, there are no multilateral rules or criteria describing NME conditions and the NME status is nowhere to be found in the WTO legal framework (Nedumpara and Subramanian, 2018, p. 34). NME conditions and the so-called NME methodology (basically surrogate country methodology enabled by the NME status) is usually incorporated in accession protocols and working party reports of concrete members of the WTO. These documents are binding in the WTO legal system, but they do not constitute the basic foundational documents of the system.

If a country does not have an NME status in its accession documents, the surrogate country methodology can be used against it by reference to the above-mentioned ADA Article 2.2 that mentions "particular market situation" (PMS).[20] Article 2.2 does not mention surrogate country methodology per se (it refines and complements Article VI:1(b) of the GATT), however, the usual practice of interpretation within the WTO is based on the Vienna Convention on the Law of Treaties from 1969, especially on Articles 31 and 32 (Fang, 2018, p. 121; Zhou and Percival, 2016, p. 867) that say, besides other things, that "[a]ny agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty" (Article 31.2.(a)) and "[a]ny instrument which was made by one or more parties in connection with the conclusion of the treaty

[19] See some of the obstacles and difficulties connected with the surrogate country methodology in Espa and Levy (2018, pp. 323, 328–30)

[20] Surrogate country methodology can also be used if there are no domestic sales of the given product in ordinary course of trade or if the volume of domestic sales is low (Zhou, 2018a, p. 614).

and accepted by the other parties as an instrument related to the treaty" (Article 31.2.(b)) are relevant for the purpose of the treaty interpretation.[21] The ADA is connected to the Article VI of the GATT not only by its full name, but conclusively in the Article 2.7 of ADA quoted above, which states that the Article 2 of ADA as a whole is "without prejudice" to the Second Interpretative Ad Note to the Article VI:1 of the GATT. Again, some authors falsely claim that the Article 2.2 of the ADA provides the basis for the surrogate country methodology itself and therefore think it is more justifiable to use such methodology (e.g. Kaszubska, 2017, p. 15; compare to De Kok, 2016, p. 533), however, as shown above, the whole situation is more complicated.

The PMS notion has been used by numerous countries for many years. Australia belongs to the most active states in this field (Zhou, 2018a, p. 612), especially against China, which Australia recognized as a market economy in 2005 as a precondition for the negotiation of the China–Australia Free Trade Agreement. According to Zhou and Percival (2016, p. 865–6) the officials from the US and the EU have been conducting consultations with Australian authorities on how the PMS notion can be used in antidumping investigations. In any case, there is no definite interpretation of the PMS. Zhou and Percival tried to propose a coherent interpretation (2016, pp. 878–87) of the PMS based on the question whether the alleged price distortions in the end goods or in the inputs for production actually preclude a proper comparison between domestic and export prices of the final goods. In other words, if there is a concrete situation on the market, such as government interventions or financial assistance, this situation does not constitute the PMS if a proper comparison between domestic and export prices is not precluded (see also Zhou, 2017, p. 359). Although this interpretative approach makes sense, the decision to focus on the proper comparison and not on the price distortions in the first place is not necessarily the only option given the WTO legal framework.

Nonetheless, the fact that the notion of PMS is being used to justify the recourse of IAs to surrogate country methodology does not mean that this matter is not extremely controversial. Several disputes have taken place at the WTO DSM dealing with the antidumping methodology connected with the PMS (see, e.g. EU–Biodiesel (DS473) and EU–Cost Adjustment Methodologies (DS474; DS494)). The functioning and legality of the PMS within the WTO legal system remains blurry and clearly needs to be clarified by the authorities (some hints in this direction exist already, see e.g. Zhou 2018a, p. 632; 2018b; 2017; Joshi, 2018; De Kok, 2016, pp. 530–32; Zhou and Percival, 2016). Given the unclear situation surrounding China's NME status (see below) and the fact that besides China there are no other significant NME countries in the WTO, the controversy about PMS will definitely rise in the upcoming years. I agree with Zhou and Percival that say: "the current debate over the expiry of the NME Assumption under China's WTO Accession Protocol will

[21] See the full text of the articles in Annex.

soon shift to discussions on how the term PMS should be interpreted and applied under the AD Agreement" (2016, p. 866).

There is one particular problem connected with the surrogate country methodology, which is worth mentioning in order to fully capture the diverse techniques of the nowadays antidumping procedures and to illustrate the controversial nature of the surrogate country methodology. That problem is called "the double remedy problem".[22] The double remedy problem arises when antidumping duties (ADD) are applied in connection with countervailing duties (CVD; duties to counter the effect of states' subsidies). Let us imagine a company that sells its product on the home market for 100 US dollars, exports it to a foreign market for 85 US dollars and gets a subsidy for each product of 10 US dollars. In this case, the importing country can impose on such a product an ADD of 15 US dollars (based on the comparison between domestic and export price) and a CVD to counter the effects of the state's subsidy of 10 US dollars. By this procedure, the original price of 85 US dollars is raised up to 110 US dollars. The normal price, however, was restored simply by using the ADD because then the domestic and export prices are the same. The remaining 10 US dollars of CVD is what is called the double remedy. Double remedies can get very technical and they are also very controversial. For example, the logic behind applying both antidumping and countervailing duties is based on the assumptions that the company only uses the state's subsidies for lowering the price of their product and that the full 100% of the subsidy is transferred into the price – both very unsounding assumptions. For a long time, the US and the EU did not apply both antidumping and countervailing duties at the same time, precisely for the reason of inflating the margins, however, the US has changed its practice in 2007, followed by the EU in 2010. There have been several disputes filed at the DSM to deal with the situation and the Appellate Body tried to clarify some of the aspects of the double remedy problems (see, e.g. US–Countervailing and Antidumping Measures (DS449) and US–Antidumping and Countervailing Duties (DS379)), however, this issue is still on the table. Even though the double remedy problems may arise among market economies, they are extremely controversial when combined with the surrogate country methodology, as can be shown on the following example made by Prusa (2017, pp. 630–32).

Let us imagine a company which has the material inputs subsidized by 150 US dollars (300 US dollars versus 450 US dollars), labor costs subsidized by 5 US dollars (40 US dollars versus 45 US dollars) and electricity costs subsidized by 5 US dollars (20 US dollars versus 25 US dollars). In sum, the total costs of material inputs, labor and electricity are 160 US dollars less than their comparable surrogate values (360 US dollars versus 520 US dollars). Let us further imagine that this company sells its product in China (home market)

[22] Interestingly, the double remedy problem is described already by Jacob Viner in his book *Dumping: A Problem in International Trade* from 1923 (p. 270).

for 535 US dollars and exports it for the price of 500 US dollars. If a normal antidumping methodology was used, the ADD in this case would be 35 US dollars (margin of 7%). However, since surrogate country methodology can be used against China due to its NME status (let us assume that this situation takes place before the expiration of certain parts of Article 15, which makes this example uncontroversial), the IA can, for instance, use Thai costs of material inputs, labor and electricity. There are basically no multilateral rules that the IA has to follow in such a case and the final price is counted to be 695 US dollars. That implies an ADD of 195 US dollars (margin of 39%). This is the reason why the surrogate country methodology is so controversial.

Nevertheless, we still did not take into account the CVD. There are certain rules and methods that the IA has to follow here, which are not important for this text.[23] For the sake of simplicity, let us just assume that the IA will have a look at the market benchmark prices (which it is allowed to do) and the market benchmark is the same as the surrogate costs so the IA will determine the size of the subsidy as 160 US dollars. To counter this subsidy, the IA can impose 160 US dollars of the CVD. If both antidumping and countervailing duties are applied, the final price would be 855 US dollars. To repeat, using the standard antidumping methodology, the price would go from 500 US dollars to 535 US dollars. Using the surrogate country methodology in the antidumping investigation, the price would be 695 US dollars. Combining this ADD with the CVD would result in the final price of 855 US dollars. Furthermore, if we assume that the market benchmark prices differ from the one used in the surrogate country (Thai government in our case values the material inputs, labor and electricity the same as China does without the subsidies, i.e. 520 US dollars, but the benchmark can value it on 575 US dollars), the inflation of the duty can be even higher (in this case another 55 US dollars making the final price 910 US dollars).

The reason why the concurrent use of the ADD and CVD combined with the surrogate country methodology is controversial is that the PMS or the NME status of the country already makes the subsidies involved in the antidumping counting. For instance, if a PMS is found due to the distortions of input prices caused by input subsidy and for that reason the surrogate country methodology is used to come up to the price which would be compared to the export price, then the possible margin of a separate CVD would already be captured in the AD margin (Zhou and Percival, 2016, p. 885).[24] Contrary, under the market conditions, the subsidy is likely to affect both domestic and export prices and there

[23] The CVD are regulated by the Agreement on Subsidies and Countervailing Measures (SCM Agreement). The use of CVD against China is analyzed in Ahn and Lee (2016).

[24] See the discussion about double remedy problem and its connection to surrogate country methodology in Kaszubska (2018), Prusa (2017), Beshkar and Chilton (2016)

is a possibility that double remedy does not have to necessarily occur in using both AD and CVD duties (Kelly, 2014, p. 113).[25]

1.5 China's NME status

Given the basic overview of the antidumping rules in the WTO system in the previous subchapter, we can now move to the China's NME status. This status is incorporated in China's Accession Protocol in Article 15 which, in relevant parts, says 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 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.
>
> (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

[25] Paradoxically, Kelly argues that since there is a basic legal framework about the double remedy counting and NME, which can be found in the Appellate Body's decisions and there is no such framework for double remedy counting and market economies, losing the NME status may result in higher duties (Kelly, 2014, p. 122).

> 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.

One can hardly imagine a more ambiguous, confusing and dimmer text. The undisputable interpretation of this article says that there are two basic methodologies that the IAs can use when they deal with China for 15 years after its accession to the WTO. First, the IA can use the Chinese prices and costs if the producer under investigation "can clearly show that market economy conditions prevail in the industry" (subparagraph 15(a)(i)). If the producer cannot clearly show that the market economy conditions prevail in the industry, the IA can use "a methodology that is not based on a strict comparison with domestic prices or costs in China" (subparagraph 15(a)(ii)). In addition, the paragraph 15(d) adds two more conditions. Firstly, once China obtains a market economy status from a certain country, the whole paragraph 15(a) shall be terminated. That means that the IA of such a country cannot use AD methodology based on the Article 15. Secondly, the provisions of subparagraph 15(a)(ii) shall expire 15 years after the date of accession *in any event*. What that means is unclear and at least four distinctive interpretations can be found on this topic in the academic literature (see the next chapter).

What is beyond any doubt is that this Article serves as a sort of supplement to the WTO rules described in the previous subchapter. In other words, any member state can use the methodologies described above and when dealing with China, its Accession Protocol provides specific rules for AD behavior towards China as long as the member state does not grant China a market economy status under its national legislation.[26] As I noted above, there are no multilateral rules for assessing the market economy status of a country and the term "non-market economy" does not have a definition in the WTO documents. It is therefore understandable that China put the goal of acquiring the market economy status on the top of the list of its foreign policy agenda and mounted a vigorous diplomatic campaign to be treated as a market economy by its trade partners (Hufbauer, 2016, p. 26; Pan, 2015, p. 748; Urdinez and Masiero, 2015, p. 160; Rémond, 2007, p. 346). Jinshan (2007, p. 172) even says that this goal has become a matter of national pride for Beijing (see also Rémond, 2007, p. 348; Bellora and Jean, 2016, p. 2). To this day, more than 80

[26] Pan claims that "China is the only [member of the WTO] subjected to such discriminatory treatment" (2015, p. 748), although this is not correct. Vietnam have a similar provision about its NME status in its Accession Protocol (Prusa, 2017, p. 620) and it is not unusual that the surrogate country method is used also in investigations between two market economy countries (Kelly, 2014, p. 113).

countries acknowledged China as a market economy. Among them New Zealand (April 2004), Australia (April 2005), Peru, Chile and all ASEAN countries (Bellora and Jean, 2016, p. 3). China also tried to persuade the US and the EU to change their view, however, both of them are reluctant to give China a market economy status. Due to the unresolved disputes about Article 15 at the WTO, both the US and the EU are still continuing using the methodology allowed by this article. Since there is no WTO decision on this issue yet, China cannot claim that such a practice is against the WTO rules and cannot legally retaliate. As a consequence, China is still facing inflated AD duties – for instance, the US IA applied an AD duty on Chinese mattresses on 1731% in 2019 (Shepardson, 2019). Both the US and the EU exercised the assessment of China's economy several times. The market economy criteria and specific conclusions will be analyzed in the respective chapters below.

Among the main reasons why China should not be treated as a market economy belong a large amount of state-owned enterprises (SOEs) and their leading role in certain key areas such as aerospace, automotive, banking and finance, energy and telecommunications (Yu, 2019, p. 44). Moreover, these SOEs are often subsidized by the government even though they do not generate profits and under the market conditions would have to bankrupt immediately. Brown says that China's SOEs "receive a range of benefits from the Chinese Government, including interest-free financing and free capital infusion" (Brown, 2016, p. 23). Furthermore, Chinese industrial policy in steel and aluminum industries fueled significant capacity expansion over the past years at times of weak and falling demand and contributed to today's severe global overcapacity (Wilson, 2016, p. 19; Tietje and Sacher, 2018, p. 5).[27] Many firms complain about the difficulties they face in China because of the constant failure of the Chinese government to implement the liberalization commitments it had taken upon the WTO accession (Rémond, 2007, p. 354). Among other concerns about market orientation of the Chinese economy are poor intellectual property rights protection, discriminatory innovation policies, mixed record on implementing WTO obligations and extensive use of industrial policies (Morrison, 2016, p. 83) as well as subsidies, tax breaks, preferential loans, investment restrictions, export restrictions on raw materials and technology transfer requirements imposed on foreign firms at the microeconomic level (Morrison, 2016, p. 108).

On the other hand, many authors (see, e.g. Lu and Jiao, 2019, pp. 52–4) point out that China is approaching the standards of a mature market economy. For instance, Yu argues that the number of SOEs has shrunk after China's accession to the WTO. At that time, SOEs

[27] According to the EU Commission, the steel overcapacity in China has been estimated at around 350 million tonnes, which is almost the double of the EU's annual production. China also had almost 10 million tons of excess aluminum capacity in 2016, double the amount from 2011, especially due to subsidized energy, which represents up to 40% of the aluminum production cost (EU Commission, 2016a, p. 2).

accounted for two thirds of China's economy. Today, the number is around 40%. (Yu, 2019, p. 44). In addition, SOEs in China undergone a significant restructuring and reportedly more than 90% of them became corporations or shareholding companies. The government identified only several sectors of the economy where the state should dominate (Morrison, 2016, p. 109).[28] Furthermore, private companies in China generated one half of China's total corporate tax, 60% of China's GDP and accounted for 70% of China's technology innovations in 2018. Private firms also constitute 90% of China's total number of firms and they provide more than 80% of China's urban employment. There are around 34 million private firms in China today and every day around 18 thousand new companies register to start their business (Yu, 2019, p. 44). However, some authors claim that the recent trend in Chinese economy is the opposite and the state acquires more influence at the expense of the private sphere (Lardy, 2018, 2014). Despite such claims, China constantly improves in the World Bank's Doing Business report, which evaluates states' business environment. China ranked 93 in 2017, 78 in 2018, 46 in 2019 and 31 in 2020 (World Bank, 2017, 2018, 2019, 2020). According to O'Connor, China already has all the legislation necessary for the functioning of any market economy and the focus has now switched to its implementation (O'Connor, 2016b, p. 27).[29]

Nevertheless, it should be stated clearly that although the criteria for giving a country the MES are based on economic performance, the decision to grant a certain country the market economy treatment is purely political. For instance, Russia gained the MES from the US after the attacks on 9/11 for showing solidarity and expressing willingness to fight global terrorism (Pan, 2015, pp. 755–6) and graduated to MES in April 2002. Romania and Bulgaria (both graduated to the MES in 2003) gained MES after showing their support for the war in Iraq (ibid.). Nevertheless, these economies are arguably even more protected and at least in the case of Russia, the market there developed much slower than in China (ibid., p. 751, 756) and there are concrete segments of the economy which are totally under the state's control. Moreover, Russia and China received similar scores by the Heritage Foundation on its Index of Economic Freedom in 2006. Rinaldi-Larribe et al. (2009, p. 117) state: "How could Russia be granted MES after a transition period of only ten years, following 70 years of communist rule? Besides, Russia still heavily subsidizes energy exports, fertilizers, nuclear fuel and chemicals, while protecting its domestic market from

[28] These sectors are autos, aviation, banking, coal, construction, environmental and information technology, insurance, media, metals, oil and gas, power, railways, shipping, telecommunications and tobacco (Morrison, 2016, p. 109).

[29] For a good overview of China's economy see Milanovic (2019, pp. 87–91).

foreign competition".[30] Looking at this problem from a more historical perspective, Table 14 presents some possible indicators of a market economy (used by the US government) and their value for NME countries and MES countries as recognized by the US government in the early 2000s. As can be seen, these indicators do not provide any clue why some countries received market economy treatment and others did not. India, for instance, was considered to be a market economy country, even though the revenues from SOEs and government ownership were much larger than in China. Similarly, India's government spent more and consumed basically the same amount as Chinese government did. To summarize, the above-mentioned factors clearly show that the decision about the MES is not only connected to the economic performance.

[30] Rémond, who examined the EU's decision not to grant China the MES, believes that "to say that the handling of Moscow's demand was to an extent political does not mean that the same is as regards Beijing's" (2007, p. 354). According to Rémond, Russia is a bad comparison example because its export profile, which is heavily dependent on raw materials, is very different from the one of China, which is more diverse and concentrated in manufactured goods. This profile can threaten European firms much more than the Russian can (ibid.). Nonetheless, if this does not show that the decision about granting the MES is more than anything political, I do not know what could.

	NMEs		Recent market economies[31]		Market economies		
Criteria	Vietnam	China	Kazakhstan	Russia	India	Bangladesh	France
Official exchange rate to parallel exchange rate ratio	95	96	90	73	94	84	99
Foreign direct investment, net inflows (% of GDP)	4,14	0,03	1,53	0,11	0,06	0,59	0,02
Revenues from SOEs and government ownership of property (% of total revenues)	4	5	3	4	22	x	x
Government Expenditures (% of GDP)	24	18	25	35	31	14	49
Government Consumption (% of GDP)	6	14	17	16	13	5	23

Table 14: Comparative Data on Some ME Indicators (source: Table taken from Detlof and Fridh (2006, p. 7). Original data from Development Indicators 2000, ADB (2000), Heritage Foundation Index of Economic Freedom (2002))

This is also related to the fact that the NME status itself is more of a technical term and it is not even clear how would a "non-market economy" look like. Is it an economy which is totally governed by a government? Or one where markets exist but only in a limited scope? Does it have its own distinctive positive features or is it an economy that only lacks certain essential aspects of a market economy?[32] Sandkamp and Yalcin (2016, p. 77) claims that:

> Interestingly, MES is legally relevant only in AD proceedings. The term is used to classify countries and hence allocates respective countries to different AD regulations. In this sense, MES represents more of a technical term with the real economic system of respective countries playing a minor role. It has to be emphasized that a country can be

[31] As recognized by the US government in the early 2000s.

[32] See Snyder (2001) for a good discussion on this topic.

> granted MES even when it does not operate a market-based economic system, as long as relevant economic conditions are satisfied.

Given the aforementioned, the NME status is so vague and so loosely connected to any real and measurable economic conditions, that I believe it is appropriate to understand it as a purely political concept, which any member state can embrace as it wants to. It seems to me that in the case of China, the real decisive factors for not granting it the MES, besides economic conditions, are the size of China's economy and its rapid growth, its export profile possibly threatening foreign competition on certain markets and strong lobby structures of these foreign companies on their home countries (Zalan, 2016; The Aluminum Association, 2016). The public opinion also adds to that picture (Rémond, 2007, p. 355; Xu and Tang, 2009, p. 75).

1.1.1. Amount of Trade Affected by China's NME status

It is very difficult to measure the effects of the NME status for a country such as China. The difficulties arise due to the lack of reliable data and also due to the size of Chinese economy, not to mention its (still) rapid growth. It is generally believed that the NME methodology inflates the AD rates and motivates other states to use more AD measurement against China (see, e.g. Zhou, 2018a, p. 612; Lee et al., 2017, p. 4; Bellora and Jean, 2016, p. 2; Zhou and Percival, 2016, p. 864; Sandkamp and Yalcin, 2016, pp. 79–80; Urdinez and Masiero, 2015, p. 169; Jinshan, 2007, p. 175; GAO, 2006; Messerlin, 2004, p. 123).[33] For instance, the US AD margins against China have averaged 154% as compared to an average of 49% for other countries. The EU AD margins against China have averaged 61% as compared to an average of 31% for other countries (Prusa, 2017, p. 620). The IAs tend to resort to the NME methodology when possible, as this methodology gives them the maximum leeway to create large margins (ibid.) Table 15 presents a comparison of certain methods and their average dumping margin for US and EU cases from the late 1990s. As can be seen, the margin of the standard price comparison methodology averaged 3,2% for the US and 22,7% for the EU. The margin arrived at by the NME methodology averaged 40% for the US and 45,6% for the EU. Urdinez and Masiero (2015, pp. 162–70) ran a statistical empirical analysis and showed that a country that considers China to have MES reduces its

[33] One of the reasons for that was nicely pointed out by UNTAD: "It may be noted that for several systemic reasons, the surrogate country concept tends to lead to findings of high dumping. To give an example: producers in the surrogate country will be competing in the market place with the non-market-economy exporters, and it is therefore not in their interest to minimize a possible finding of dumping for their non-market economy competitors" (UNTAD, 2006, p. 12).

AD investigations (the number of AD investigations initiated per year decrease by 57,8% in their model, 78,5% after excluding Argentina and Brazil from the analysis).

Besides the inflationary nature of the NME methodology, another important aspect of this methodology is its unpredictability. For instance, a classic example of the fact that the NME methodology can be used quite randomly are two parallel US antidumping cases against color television receivers from China and from Malaysia between 2003 and 2004. The televisions were essentially identical and used the same internationally available parts. However, no dumping was found in the case against Malaysia, but a margin of dumping of 78% was found in the China's case. The US IA considered China as an NME in this case and used India as a surrogate country for determining the normal value of color television receivers from China. Consequently, Chinese producers had to pay the ADD and lost significant market share to foreign competitors (Rao, 2013, p. 154).

As mentioned above, if Chinese producers can clearly show that market conditions prevail in their industry, the NME methodology cannot be used against them. In this case, there are two different treatment that the producer can get – either the market economy treatment or an individual treatment. Detlof and Fridh argue that a company under the market economy treatment faces ADDs, which are on average 28% lower than the NME ones. Companies that receive the individual treatment faces ADDs, which are on average 15% lower than the NME ones (2006, p. 2). This is another example of the inflating nature of NME methodologies.[34]

	US cases (1995–98)		EU cases (1995–97)	
Methods	Number of cases examined	Average dumping margin (%)	Number of cases examined	Average dumping margin (%)
Price comparisons only	5	3,2	8	22,7
Price comparisons and constructed values	33	14,2	33	24,4
Constructed values	20	25,1	12	25,1
NME methodology	47	40,0	12	45,6

Table 15: AD Methods and Their Average Dumping Margin (source: Messerlin, 2004, p. 124)

To my knowledge, there is no precise calculation of the exact amount of trade affected by the NME status of China to this day. I doubt that an exact calculation (or something similar to that) is even possible given the enormous complexity of the concrete AD

[34] It should also be added that quite often the IAs are not satisfied with the evidence showing that market economy conditions prevail in China (see Hufbauer and Cimino-Isaacs, 2015)

calculations and lack of good comparable data. In order to at least approximate the scope of the NME status, I will present the research results of Chad Bown from the Peterson Institute for International Economics, who has written extensively on the problems related to antidumping, China and the WTO. Bown developed a methodologically rigor approach (see Bown, 2011, 2013), which helped him outline the scope of the NME status effects. However, there are some aspects of Bown's calculations that need to be clarified.

First of all, Bown focuses not only on antidumping but also on other temporary trade barriers (TTBs) such as CVD and safeguards mechanisms. According to his calculations, the share of China's exports to G-20 countries subject to G-20-imposed TTBs was between 2-3% before China's accession to the WTO and then increased up to 7% in 2013 (Bown, 2016a). This accounts for roughly 100 billion US dollars in nominal terms. Figure 5 puts this number in perspective by showing the top 10 exporting countries targeted by G-20-imposed TTBs in 2013. As can be seen, the size of economy affected by TTBs is much larger for China than for South Korea on the second place (14 billions). Similarly, the share of affected economy is almost double the size for China than for South Korea (7,1% compared to 3,9%). Figure 6 presents the shares of G-20 countries on total TTBs imposed on China. In 2013, the US imposed TTBs on 43,2 billion US dollars of Chinese exports (9,4% of the total Chinese exports to the US). The EU imposed TTBs on 27,8 billion US dollars respectively (7,5% of the total Chinese exports to the EU).

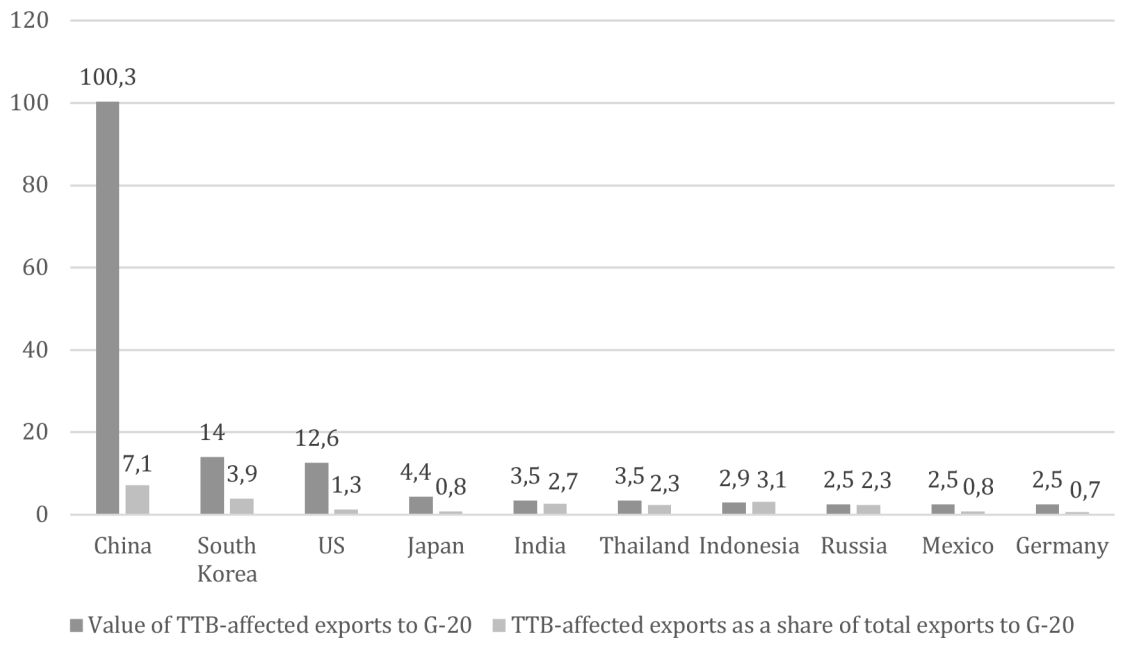

Figure 5: Top 10 Exporting Countries Targeted by G-20-imposed TTBs in 2013 (source: Bown, 2016a)

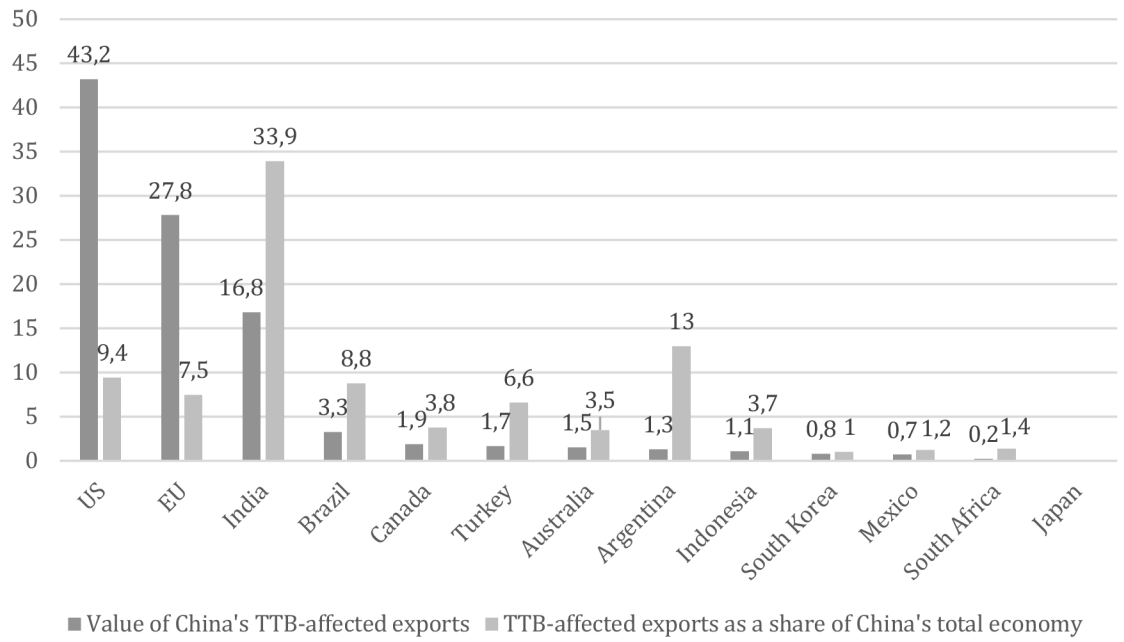

Figure 6: China's Exports Subjected to G-20-imposed TTBs in 2013, by Policy-imposing Economy (source: Bown, 2016b)

This does not mean that once China gets the MES it would unleash Chinese imports of 100 billion US dollars on the world market. Although the AD duties are the most heavily applied TTB across the G-20 countries, still a certain amount of the numbers presented above is constituted by other TTBs. Moreover, the NME status affects the size of the margin of dumping, not the injury determination in AD investigations (not only has to be proved that dumping occurs but also that it injures actors on the domestic market). Bown concludes:

> Granting China MES could affect antidumping investigations covering a substantial amount of Chinese trade. But even a complete revocation of China's NME status is extremely unlikely to unleash an additional $100 billion in pent-up Chinese exports onto global markets. Furthermore, even in the long-run event of a hypothetical WTO dispute, estimates of the lost trade flows associated with any refusal to provide MES are probably much closer to $10 billion—and perhaps even $1 billion—than $100 billion (Bown, 2016a).

Having said that, this is a look on just one side of the story. By saying that the NME status affects the size of roughly 10 US billion dollars of China's international trade, we did not say a word about the consequences for foreign companies competing with these new

additional Chinese imports in respective areas or about the possible effects on unemployment and industry infrastructure. Several pieces of research focused on the effects on granting China the MES by the EU and the predictions will be analyzed in the respective chapter below. I was not able to find any relevant calculations of the effects for the US.

Another aspect which should not be left aside is the very cost of AD investigations. For example, a lighter factory in Wenzhou spent 1 million renminbi (RMB) in responding to the EU's antidumping lawsuit. It is reported that the total costs of litigations may reach as high as hundreds of millions (even billions) RMB every year (Pan, 2015, p. 753). If we add all these other related aspects and costs, the overall economic effects of the NME status can be significant. Finally, the so-called "chilling effect" is not taken into consideration at all in these projections.[35]

[35] The so-called chilling effect is based on the presumption that there are exporters in China who are deterred by the risk of facing an AD investigation and therefore either limit their sales or do not apply higher prices. The evidence for such chilling effect remains scant and mixed, since the only two empirical studies of this effect found contrasting results (Vandenbussche and Zanardi, 2010; Egger and Nelson, 2011). Nonetheless, as observed by Bellora and Jean, "[i]f NME status indeed implies a higher risk of facing an AD case, or tougher expected sanctions when a case is raised, then being granted MES may lift a brake on exports even for products not directly targeted" (2016, p. 2).

3. The Views on China's NME status

In this part of the text, I analyze the legal and academic debate and different arguments concerning the expiration of subparagraph 15(a)(ii). Four different interpretations are considered here. Nonetheless, this classification is not the only one possible and different authors proposed different classifications.[36]

1.6 View #1: Magical Deadline

According to the "magical deadline" (Tietje and Nowrot, 2011, p. 7–8) view, China should automatically receive the MES after the expiration of subparagraph 15(a)(ii).[37] It is believed that although the paragraph 15(d) mentions only the expiration of the subparagraph 15(a)(ii), the rest of the paragraph 15(a) and the chapeau of 15(a) do not provide sufficient space for applying the NME methodology. There are several arguments that the proponents of this view put forward.

First, the chapeau was added later by the US and it was not involved in the previous drafts of CAP. Even in the last draft, the negotiators adopted the word "may" and not the word "shall" which can be found in the final document. Therefore, Rao claims that "a review of the drafts still indicates that the addition of the chapeau could be largely intended to reiterate the conditional options of the importing Member, instead of obligating it to use alternative methodologies" (Rao, 2013, p. 164). Furthermore, the chapeau states that the methodology should be "based on the following rules" explained in subparagraphs 15(a)(i) and 15(a)(ii). Since the chapeau is based on both subparagraphs, it cannot continue to work without the subparagraph 15(a)(ii). The remaining parts of the chapeau become meaningless because "the condition it depends on to be invoked no longer exists" (Rao, 2013, p. 161; see also Zhou, 2017, pp. 350–1; Fang, 2018, p. 116).

[36] Zhou, for instance, distinguishes only two views in the debate – one favorable to China (view #1 in this text) and one against its claims (view #2 in this text) (2017, pp. 348–9). Yalcin et al. distinguishes four different views in a rather confusing way (automatic MES for China, no automatic MES for China, China remains an NME, MES for China) (2016, p. 17). Different and rather speculative interpretations were also proposed. For instance, Fang claims that CAP could be interpreted by different methods than other WTO documents because of its "contractual nature" (Fang, 2018, p. 120).

[37] To read more about this view, see, e.g. Graafsma and Kumashova (2014), Gatta (2014), Nicely (2014), Weijia (2013), Watson (2014), Vermulst et al. (2016), de Kok (2016), Zhenghao (2016), Noel (2016), Yu and Guan (2017).

Second, according to some, the paragraph 15(d) states that "in any event" the WTO members may not use the surrogate country methodology against Chinese exports beyond the 15 years transition period following China's accession to the WTO (Cheng, 2016, p. 30). The expression "in any event" is decisive here and if the NME methodology is used after this deadline, then it would mark the paragraph 15(d) useless and why would the negotiators then decided to adopt it? (Cheng, 2016, p. 30). This is connected with the effective treaty interpretation principle,[38] adopted by the Appellate Body, which "requires us to give meaning to every term of the provision" (see Appellate Body Report on *Canada – Renewable Energy*, paragraph 5.57; see also reports on *US–Gasoline* and *Japan–Alcoholic Beverages*).

Third, there is no legal basis for using the NME methodology against China which can be found in the language of the Accession Protocol after the subparagraph 15(a)(ii) expired. This conclusion is supported by the Report of the Working Party on the Accession of China which, it is argued, constitutes the relevant context for the interpretation of Article 15 (Suse, 2017, p. 959).[39] The chapeau of paragraph 151 of China's Working Party Report mentions the subparagraph 15(a)(ii) instead of the whole paragraph 15(a) when discussing the NME treatment of Chinese exports and therefore "it can be argued that the Working Party's understanding was that the second subparagraph is the true legal basis for the use of NME methodologies" (Suse, 2017, p. 960). Having said that, it should be concluded that those legal texts enabling the use of the NME methodology are no longer active and thus the NME methodology should not be used against China.

Four, there are many statements by officials and institutions representing the US and the EU that should be taken into account when interpreting Article 15. Two reasons were put forward for such an approach. First, these statements provide for the interpretative context as allowed by the Vienna Convention. Second, the Appellate Body explained that the unilateral statements of individual negotiating parties may be useful in determining "the reality of the situation which the parties wished to regulate by means of the treaty and […] for discerning the common intentions of the parties" (see Appellate Body Report, *EC – Chicken Cuts*, paragraphs 283 and 289; see also Suse, 2017, p. 960). When commenting on

[38] The effective treaty interpretation or *effet utile* is one of the fundamental principles of international treaty interpretation. It basically means that the interpreter cannot adopt a meaning that would reduce some parts of the treaty to redundancy or inutility. It has its foundation in the Roman doctrine of *ut res magis valeat quam pereat* (it is better for a thing to have effect than to be made void) (Nedumpara and Subramanian, 2018, p. 25)

[39] As noted above, the Article 31(2)(b) of the Vienna Convention on the Law of Treaties says that "any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty" provides the context for the purpose of the interpretation.

the 1999 US–China bilateral agreement (which later provided the basis for Article 15 of CAP), the US chief negotiator and then US Trade Representative (USTR) Charlene Barshefsky said in February 2000 that "China's WTO entry will guarantee our right to continue using our current 'non-market economy' methodology in anti-dumping cases for fifteen years after China's Accession to the WTO" (Barshefsky, 2000). Similarly, then US Secretary of Commerce William Daley stated that "China has agreed to guarantee our right to continue using our current methodology (treating China as an NME) in antidumping cases for fifteen years after China's accession to the WTO" (in Suse, 2017, p. 961). A statement posted on the website of the White House after the conclusion of the 1999 agreement says that "we will be able to maintain our current antidumping methodology (treating China as an NME) in future antidumping cases without risk of legal challenge. This provision will remain in force for 15 years after China's accession to the WTO" (in Suse, 2017, p. 961). As for the Accession Protocol itself, a note on the USTR's website stated that "[f]or 15 years after China's accession to the WTO, the US and certain other WTO members will continue to have the ability to utilize a special NME methodology for measuring dumping in antidumping cases against Chinese Companies" (in Suse, 2017, p. 962; see other statement in Xiangchen, 2017, pp. 9–11).

Fifth, it is not necessary that China graduates to the MES in the respective national legislations. The members of the WTO can continue to treat China as an NME country for whatever reasons (e.g. political). Nonetheless, the NME status cannot any longer justify the application of the NME methodology in AD calculations (Zhou, 2017, p. 354).

Sixth, the Appellate Body has already interpreted the meaning of the paragraph 15(d) in one case and it observed that:

> paragraph 15(d) of CAP establishes that the provisions of paragraph 15(a) expire 15 years after the date of China's accession (that is, 11 December 2016) [...] paragraph 15(a) contains special rules for the determination of normal value in antidumping investigations involving China. Paragraph 15(d) in turn establishes that these special rules will expire in 2016 (Appellate Body Report EC–Fasteners, paragraph 289).

Fang, for instance, argues that it is oblivious that the Appellate Body referred to the whole paragraph 15(a) and not to the subparagraph 15(a)(ii) (Fang, 2018, p. 109). This seems to imply that the understanding of the Appellate Body is that the whole section 15(a) should expire.

Lastly, the use of NME methodology tends to ignore the development of market economy in China, which is not significantly different from other countries around the world. According to some authors, China either became or is on the right way to become a market economy and/or does not influence the economy in a substantively different way

than others (see, e.g. Cheng, 2016, p. 30; Rémond, 2007, p. 348; Watson, 2016, p. 8; 2014). Some authors also speculate if China is dumping at all and its low prices are not just a consequence of its comparative advantage and cheap labor (see a short overview of these views in Rinaldi-Larribe et al., 2009, p. 115; see also Yalcin et al., 2016, p. 34). Nicely claims that:

> the current NME methodologies [are] being used throughout the world as outdated vestiges of the cold war. They do not take into account sufficiently the fact that the countries we call NMEs – at least the ones that are active members of the global economy and members of the WTO – have thriving market economies. The fact that the state is involved in the economy in these countries is not significantly different […] from the manner in which many governments across the globe influence the market (Nicely, 2014, pp. 160–1).

It is acknowledged by some authors that the only remaining basis for using the surrogate country methodology is the Second Interpretative Ad Note to Article VI:1 of the GATT, as I showed above. Some authors falsely claim that the usage of the surrogate country methodology is prohibited in the WTO system, see e.g. William Watson from the CATO Institute (2016, p. 16, 18, 20, see also Udinez and Masiero, 2015, p. 161; Tietje and Sacher, 2018, p. 8). However, even those authors, who rightly bring attention to the Second Ad Note often claim that the conditions of the note cannot possibly be met and therefore China should be protected against the surrogate country methodology after passing the magical deadline of 12 December 2016 (Rao, 2013, p. 167; Tietje and Nowrot, 2011, p. 11; De Kok, 2016, p. 528). China itself argues that the application of the NME methodology is inconsistent with the most-favored-nation (MFN) principle and the general rules for the antidumping calculation under Article 2 of ADA (see Zhou, 2017, p. 347; Nedumpara and Subramanian, 2018, pp. 22–3). Chinese Ministry of Commerce insisted in one recent antidumping investigation that the "US is obligated to no longer use a surrogate methodology with respect to all antidumping determinations targeting Chinese products after December 11, 2016" (USDOC, 2017, p. 9).

As exhaustive and precise this list of arguments may seem, there are, expectedly, many problems with the "magical deadline" view. First, the fact that the chapeau was added later does not necessarily mean that it only reiterates what was already stated in the previous drafts. Quite contrary, the logical option seems to be that the fact that the US insisted on adding the chapeau makes it likely that it was intended to have some effect (O'Connor, 2016a, p. 4). Furthermore, there is nothing in the text that would imply that the meaning of "based on the following rules" must entail all the stated rules and not on just some of them, if other rules expire (O'Connor, 2016a, p. 3).

Second, the effective treaty interpretation principle is a double-edged weapon, as will also be shown below. In this case, it may be argued that the continuing use of the NME methodology contradicts this principle because it marks the paragraph 15(d) useless. However, the opposite view – such that the paragraph 15(d) prohibits the use of such methodology – marks the rest of the paragraph 15(a) and subparagraph 15(a)(i) useless. Moreover, the interpretation of the respective section of Article 15 by Cheng and others, according to which the WTO members may not use the surrogate country methodology against Chinese exports after 11 December 2016 does not seem to be correct. Not only it is not specifically written in the Accession Protocol and it does not automatically follow the expiration of subparagraph 15(a)(ii), but this view also ignores that there are ways how other WTO members can use the surrogate country methodology even without referring to the China's NME status (as shown in the previous chapter).

Third, it is true that CAP does not specifically mention the surrogate country methodology besides the expired subparagraph 15(a)(ii), however, this does not automatically mean that this methodology is therefore prohibited. Moreover, it has been stated by the WTO Dispute Panel that the paragraph 151 of the Working Party Report is not considered as an integral part of the Accession Protocol and therefore can only be taken into account as an existing condition at the time of releasing the Accession Protocol (see Panel Report in *EU–Footwear*, paragraph 7.181; see also Nedumpara and Subramanian, 2018, p. 33).

Four, the statements by officials presented above, if we accept that they should be given such a weight in interpreting a treaty – it is one thing to provide a context for interpretation and another thing to base our interpretation on these statements – and if we accept that some of them deals with a different agreement (which seems marginal to me given the clear connection between the documents), we can conclude that when read carefully, these statements do not contradict a further use of the NME methodology. What they do claim is that for 15 years, the US and other members of the WTO can use the NME methodology without risk of legal challenge (provided that they follow the agreed rules). This does not automatically imply that after this period, the NME methodology is prohibited.

Fifth, although the approach that China may still be considered an NME country, but this status cannot have any effect on the antidumping proceedings seems appealing, the problem is that the NME status does not have any other real usage besides antidumping (and antisubsidy) proceedings. As was shown above, it was originally created to deal with non-market economies in antidumping investigations and it remains to be closely connected with antidumping to these days (see GAO, 2006, p. 4; Tietje and Nowrot, 2011, p. 2; Washington, 2018, p. 274). Furthermore, I do not think that the strategy of loosening the connection between the NME status and the NME/surrogate country methodology is a clever one. Australia recognizes China's MES and – to China's resentment – is still using the

surrogate country methodology based on the PMS notion (Zhou and Percival, 2016, pp. 887–91). Under this logic, Australia could claim that there is no connection between AD proceedings and the NME status, which is hardly something China would appreciate.

Sixth, the Appellate Body interpretation of paragraph 15(d) was made in a different case and it was clearly *obiter dictum* (not a legally binding part of the decision),[40] and therefore does not constitute a legally binding definition (Kaszubska, 2017, p. 9–10; Fang, 2018, p. 109–10).

Generally, the main problems of this view are that it ignores other documents within the WTO system enabling the use of the surrogate country methodology and that it cannot explain why the remaining sections of Article 15 should be marked meaningless. This seems to be an unreasonably strong interpretation. The surrogate country methodology can be used against China in the AD investigations in accordance with the WTO rules even without CAP (at least in this moment).[41] Actually, it is even commonly used between two market economies (Kelly, 2014, p. 113). Furthermore, there is nothing that would bind us to follow the approach that makes the rest of Article 15 meaningless after the expiration of subparagraph 15(a)(ii).

1.7 View #2: Urban Myth That Seems to Have Gone Global

The radically opposing to the "magical deadline" view is the "urban myth that seems to have gone global" (O'Connor, 2011) view. Simply put, authors holding this view argue that nothing substantial changes after the "magical deadline" of 11 December 2016 and business can continue as usual.[42] Bernard O'Connor is often mentioned as the leading proponent of this view (Washington, 2018, p. 283; Kaszubska, 2017, p. 8; Tietje and Nowrot, 2011, p. 2). He states:

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[40] The classical definition of obiter dictum is "an expression of opinion in regard to some point or rule of law, made by a judge in the course of a judicial opinion, but not necessary to the determination of the case before the court" (Black, 2010, p. 166) Dicta "are not the judicial determinations of the court, they are never entitled to the force and effect of precedents, in the same or other courts, and do not preclude the rendering of a subsequent contrary decision" (Black, 2010, p. 176).

[41] A comparison may be made with Poland, Hungary and Romania. When they acceded to the GATT as NME countries, the authority to use the surrogate country methodology in antidumping investigations was recognized by the respective Working Party Reports as based on Article VI of the GATT. None of the respective protocols contained legally operative language about using the surrogate country methodology (Washington, 2018, p. 289).

[42] To read more about this view, see O'Connor (2016a, 2016b), Miranda (2014, 2016), Stewart et al. (2014), Ruessmann and Beck (2014).

> despite all these affirmations, there is no deadline. There is no provision setting any date in the WTO agreements themselves and there is no deadline in the protocol signed by China when it acceded to the WTO. The idea that there is a deadline is an urban myth that seems to have gone global. It has gone viral even in a world w[h]ere the underlying agreements are freely available to all on the Internet (O'Connor, 2011)

According to the view of O'Connor, the CAP does not automatically guarantee China the MES after 11 December 2016. He argues that "If [China] can establish that it is a market economy then some of the transitional provisions on comparison methodologies will terminate" (O'Connor, 2011). In other words, only "one specific comparison methodology set out in one subparagraph of the Article will expire, in any event, fifteen years after Chinese accession" (ibid.). This does not mean that China will automatically receive the MES.

Moreover, the proponents of this view also argue that the remaining parts of Article 15 – the chapeau, subparagraph 15(a)(i) and remaining parts of paragraph 15(d) provide a sufficient basis for the NME methodology (O'Connor, 2016a, 2011; Washington, 2018, p. 283; Brown, 2016, p. 23). This was referred to as "a contrario" interpretation, which is a reasoning based on argument from the contrary or on a negative reasoning from another argument. In other words, if Chinese producers cannot prove market economy conditions the "a contrario" interpretation means that non-Chinese costs and prices can be used (Nedumpara and Subramanian, 2018, p. 25). Also, the remaining parts of paragraph 15(d) require Chinese producers to prove under national law of the importing country that market conditions prevail in *their industry*. This is clearly an exception in the WTO system, because under normal conditions only the prices of the producer are taken into account (Lee, 2016, p. 11). However, in this case, prices of the industry may be taken into account (O'Connor, 2016a, p. 3). Therefore, the view that says that after the magical deadline, China has to be treated like any other member of the WTO is mistaken. In addition, the Appellate Body arguably concluded that Article 15 of CAP constitutes a differential treatment for China in *EC–Fasteners* case (see the Appelate Body Report, WT/DS397/AB/R, 2011, paragraphs 287, 290).

Similar to the argument presented in the section about the magical deadline view, some argue that there is a clear evidence that China is not a market economy and therefore to insist that all the WTO members treat China as a market economy would be contrary to the purpose of Article 15 (Price et al., 2015, pp. 2–3). This purpose, as can be found, e.g. in the Working Party Report on China's Accession, is to help China to continue its progress towards becoming a full market economy (Washington, 2018, p. 285; Nedumpara and Subramanian, 2018, p. 32). Added to this view, the argument was proposed to read Article 15 together with Article 9 of the CAP, in which China commits that the domestic prices will

be determined by market forces. Both provisions are understood as having a reciprocal nature and since China has not removed price distortions, the importing countries do not have to be obliged to take these prices into account (Kaszubska, 2017, p. 8).

As in the previous case, there are several difficulties connected with this view. First of all, as already mentioned above, loosening the ties between the NME status and NME methodology is not a convincing strategy. I agree with O'Connor that China does not automatically obtain the MES, however, if Chinese prices cannot be omitted in antidumping investigations, this conclusion does not deal with the real problem.

Second, although I agree that the remaining parts of Article 15 still continue to exist and they point at some hints about using an alternative methodology, it is hardly the case that the NME methodology can be used as nothing has ever changed (see Kaszubska, 2017, p. 9). Not only is that nowhere to be found in the Accession Protocol, but more importantly, this would mark the expired section of Article 15 useless. As shown above, this strongly contradicts the effective treaty interpretation principle. Simply put, if the situation remains the same after the expiration of the subparagraph 15(a)(ii), why was that subparagraph ever considered relevant? And why was it included in the Accession Protocol at all?

Third, arguments pointing to the economic conditions seem to be misleading. As I shown in the previous chapter, the NME status is not *truly* connected with economic performance or concrete market situation. Moreover, it is not clear why certain economic conditions should matter for a legally binding treaty interpretation. As for the connection between Article 15 and Article 9, there is nothing that would force us to understand these two provisions as being of a reciprocal nature.

Generally, the implication of this view that marks the expired section useless even before its expiration indicates that also this interpretation is too strong. However, two implications seem to be correct – remaining parts of Article 15 continue to be active[43] and China can be treated differently on their basis than other WTO members in the future.

1.8 View #3: Shift of Burden of Proof

The "shift of burden of proof" view can be understood as a sort of middle ground between the two views analyzed above. It is also the view that the US and the EU adopted in their disputes with China considering China's NME status (see First Written Submission by the EU, 2017; and Third Party Submission of the US, 2017). As will be shown below, the EU even changed its domestic antidumping regulations so they are in accordance with this interpretative approach.

[43] Messerlin notes that "[i]t is almost impossible to eliminate a provision included in a country's protocol of accession" (2004, p. 124).

According to this view, after 11 December 2016 a shift of the burden of proof took place. Before this deadline, other WTO members could suppose that China is an NME country and Chinese producers had to prove otherwise if they wanted to gain a different treatment. After the deadline, this proof has to be made by the other WTO members' IAs. If they can prove that NME conditions prevail in Chinese industry under consideration, they can continue to treat these Chinese products as coming from an NME country and therefore use the NME methodology (Miranda, 2014). It is unclear whether this possibility is based on the remaining parts of Article 15 or on the multilateral WTO legislation. Besides this shift in the burden of proof, nothing changes after 11 December 2016 (Joshi, 2018, p. 203). The EU explained this view in its First Written Submission to its case with China (DS516):

> [I]f there is no evidence of either market economy conditions or non-market economy conditions, the investigating authority cannot, on the basis of the new Section 15, apply a methodology that is not based on a strict comparison with domestic prices or costs in China. Second, if there is some evidence of market economy conditions (and no evidence of non-market economy conditions), the investigating authority also cannot, on the basis of the new Section 15, apply a methodology that is not based on a strict comparison with domestic prices or costs in China. Third, in weighing some evidence of market economy conditions against some evidence of non-market economy conditions, there is now no China-specific rule in Section 15 placing the burden of proof on Chinese exporters (2017, paragraph 110).

The reasons for this shift of burden of proof can be found either in the remaining sections of the CAP or they can be based on the WTO legal documents which allow for using the surrogate country methodology as shown previously in this chapter (Tietje and Nowrot, 2011, p. 10; Telep and Lutz, 2018, pp. 700–1; Fang, 2018, p. 112). The argument concerning the remaining section of Article 15 was already presented above and the shift of burden of proof is based on this interpretation of the remaining parts of the paragraph 15(d). The first sentence of this paragraph says that "[o]nce 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 [...]". The third sentence says: "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". These provisions can be read as placing the burden of proof on the importing country and not on China, as was proposed by the US (see Third Party Submission of the US, 2017, Attachment

1, paragraphs 8.5.5–8.5.6). This reading would mean that the expired subparagraph 15(a)(ii) required China to demonstrate the market economy conditions (Telep and Lutz, 2018, p. 701).

One can easily find many misunderstandings in the debate about this view connected with the views and arguments already presented above. For instance, Fang claims that after the expiration of subparagraph 15(a)(ii), the whole Article 15(a) is terminated, and China must be treated in the same way as other WTO members. I have already discussed the shortcomings of this view. However, his arguments against the shift of burden of proof view seems to be based on a bad understanding of the WTO documents. Arguably, Fang (2018, pp. 116–8) believes that the only option for using the surrogate country methodology against China was mentioned in its Accession Protocol, but as was presented above, there is a way – at least for now – which has been used extensively by some members of the WTO and it is not based on the Accession Protocol at all. Tietje and Nowrot (2011, p. 10) acknowledge that there is a shift of burden of proof after the expiry of subparagraph 15(a)(ii) and the surrogate country methodology based on the respective WTO documents can be used against China, however, the respective document for them is only the Second Ad Note to the article VI:1 of the GATT. Since to meet the conditions of the Second Ad Note is almost impossible, the surrogate country methodology cannot be used any further.[44] Nonetheless, this approach completely misses the PMS notion discussed above.

This shift of burden of proof view is able to escape the counterintuitive consequences of the previous view according to which there is no change after 11 December 2016. Now there is a change, something significant happened, however, the NME methodology can still be used, and China can still be treated differently than other WTO members. Nevertheless, the problem of this view is that there is nothing to be found in the Accession Protocol that would actually provide the basis for the shift of burden of proof (Zhou and Peng, 2018, pp. 512–3). Even the reading of the remaining parts of the paragraph 15(d) suggested by the US is speculative and not really convincing. The inverted interpretation

[44] The Appellate Body commented on the Second Ad Note in its Report on *EC–Fasteners*: "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" (paragraph 285, footnote 460, emphases added). It is very unclear what the phrase "lesser forms of NMEs" actually means and it arguably only makes the situation around Article 15 more confusing. Whichever the case, it must be remembered that once again this description is obiter dictum (Tietje and Nowrot, 2011, p. 10).

according to which China has to prove that market economy conditions prevail is at least as probable as the suggested reading (Fang, 2018, p. 112). O'Connor argues: "The first and third sentences of Article 15(d) make clear that it is China which must establish that it has become a market economy (for the whole economy or for particular industries or sectors of the economy) and that the standard to be met in that evaluation is as set out in the law of the importing WTO Member" (2016a, p. 2).

It is clear that by proposing this interpretation, the US and the EU are trying to improve the situation of China in the WTO system. Although the NME methodology can still be used and it can still be based on the Accession Protocol (which is crucial if the other legislation concerning PMS notion and Second Ad Note will be clarified in the future), now the US and the EU have to prove that the specific company/industry/sector does not operate on market economy conditions. If they fail to do so, they cannot use the NME methodology based on the Accession Protocol. This seems to be a big change. Nevertheless, the reasons for this view are not one hundred per cent convincing.

1.9 View #4: Something Remains

According to the "something remains" view, which is being hinted at by Nedumpara and Subramanian (2018, pp. 21–34), the remaining parts of Article 15 provide a sufficient basis for using *some* alternative methodology. Therefore, similarly to the second and third view examined above, China is not entitled to automatically obtain the MES and it is not correct to claim that the surrogate country methodology is prohibited from the magical deadline onward. Tables 16 and 17 present the possible scenarios under this view according to subparagraphs 15(a)(i) and 15(a)(ii).

Scenario I: Chinese exporter clearly shows that ME conditions prevail in the industry.	Outcome: Mandatory use of Chinese domestic costs and prices.
Scenario II: Chinese exporter cannot clearly show that ME conditions prevail in the industry.	Outcome: The IA is not bound to use Chinese domestic costs and prices. What the IA should do is not very clear. However, a reference to the chapeau of Section 15 would imply that the surrogate methodology could be applicable.

Table 16: Scenarios under Article 15(a)(i); source (Nedumpara and Subramanian, 2018, p. 24)

Scenario I: Chinese exporter cannot clearly show that ME conditions prevail in the industry.	Outcome: The IA may use a method which is not based on Chinese domestic costs and prices. In other words, the IA can use third country prices/surrogate prices or constructed value.

Table 17: Scenario under Article 15(a)(ii); source (Nedumpara and Subramanian, 2018, p. 24)

What distinguishes this view from the second view is that under this interpretation, there is a substantial change, which took place on 11 December 2016. Up until then, the IAs could use the NME methodology according to the established rules and without the risk of legal challenges. After this date, it is not clear what the IAs can do, but the possibility for a differential treatment is definitely open. If we take the chapeau into account, this chapeau states that a methodology "not based on a strict comparison with domestic prices and costs in China" may be used based on the rules expressed in subparagraphs 15(a)(i) and 15(a)(ii). As already mentioned above, this reading is based on a non-exclusive understanding of the phrase "based on the following rules" (Nedumpara and Subramanian, 2018, p. 27). In other words, if one rule expired, the other is still active nonetheless. The question, then, is what this methodology actually entails. It may entail the surrogate country methodology, which disregards Chinese prices and costs totally, or it may refer to a different possible methodology that somehow uses Chinese prices and costs but do not *strictly* compare them to the export prices, e.g. uses Chinese prices and costs as a starting point and then adjusts them in a certain way. In any way, this would provide for the change, which would explain the magical deadline in the Accession Protocol.

Contrary to the shift of burden of proof view, according to this view, no shift of burden of proof takes place. China still has to prove that market economy conditions prevail in a certain industry and if it is able to prove so, it has to receive a market economy treatment (Nedumpara and Subramanian, 2018, p. 32; O'Connor, 2016a, p. 3). It is not the responsibility of other WTO members to prove that market economy conditions prevail in respective Chinese industries.

This interpretation is arguably the least elaborated; however, it is successful in avoiding the biggest shortcomings of the other views as they were analyzed in the previous sections. It is true that according to the "something remains" view, it is not clear what methodology the IAs can employ and that poses its most serious shortcoming. However, this must be decided by the respected authorities at the WTO. From my perspective, the important aspect of this interpretation is that there will always be a room for a differential treatment of Chinese exports, and this can be significant in the future. Perhaps now the easiest way how to disregard Chinese prices is to point out to the PMS notion or perhaps even to the Second Ad Note, but these documents apply to every member of the WTO and we can thus suppose that there will be a higher pressure to clarify their meaning and

regulate them according to common rules. If this happens, it can be much more difficult to disregard domestic prices in AD investigations. However, this option will always be provided for the AD investigations against China by its Accession Protocol according to this view. In this sense, the vagueness of this interpretation can actually be useful in the future for China's counterparts.

1.10 Concluding remarks

After examining the four views on China's NME status, we can draw a line between the first two and the last two views. The first two views do not seem to be convincing. They both fail to follow very important principles of international treaty interpretations, namely the effective treaty interpretation principle. The first view seems to overlook the remaining parts of Article 15 or marks them useless without proper reasoning. Moreover, there is nothing in the Accession Protocol that would automatically give China the MES and even when we choose to ignore those parts of the Accession Protocol that arguably provide basis for the continuation of the discriminatory treatment against China (which is controversial to do), there are other WTO documents that allow the use of surrogate country methodology and therefore other ways how the IAs can disregard Chinese prices.

The second view deals with some of the problems of the first view, however, its biggest problem is that it cannot explain what has actually changed on 11 December 2016. We cannot simply ignore the fact that a specific date is mentioned in the Accession Protocol, even more so if the remaining parts of the texts become confusing because of this expiration.

The last two presented views seem more convincing. Although there is no proper basis for shifting the burden of proof, it is probably not in contradiction with the Accession Protocol and the remaining WTO legislation, at least until an authoritative interpretation is provided by the Appellate Body. Personally, I believe it is a good compromise, which improves China's position but at the same time allows other members of the WTO to defend themselves against unfair trade practices. The last view is even better from this point of view for its generality, which makes it more difficult to argue against it and perhaps also poses its greatest shortcoming. However, the fact that "something remains" in the Accession Protocol can be very important in the future. However, it must be stated clearly that these two views preserve a discriminatory treatment of China in the WTO.

One thing about Article 15 and the expiration of subparagraph 15(a)(ii), that, I believe everyone who delved into its interpretation, can agree on, is a comment made by Nicely: "upon closer scrutiny it becomes clear that whoever negotiated the language did a poor job" (2014, p. 161).

4. China's Dispute(s) over the NME status

As I discussed in the previous chapter, none of the WTO documents and not even the CAP specify concrete methods and practices that the IAs should use in their AD investigations. This is true not only in terms of normal AD proceedings between two market economies, but especially in terms of the surrogate country methodology/NME methodology.[45] That is why the concrete methods, principles, practices and criteria vary significantly among the WTO members.

This chapter analyzes the disputes China has filed against the US and the EU over its NME status at the WTO. It is true that there are other countries that continue to treat China as an NME, for instance Canada, Mexico and Japan, and in this sense the analysis of China's NME status is incomplete. Nonetheless, there are certain observations that justify the focus only on the US and the EU. Firstly, China has filed the cases to the WTO DSM only against these members. Secondly, both the US and the EU have significant trade relations with China and given their size in the global economy and global trade, they both have great impact on global trade and subsequently on the multilateral trade regime governed by the WTO. Lastly, they are both among the most active users of AD measures against China (Puccio, 2015, p. 25).

This chapter therefore analyses the US–China dispute (DS515) and the EU–China dispute (DS516). In each case, the overall trade relations are examined to provide the necessary context for the analysis. Then the overview of the dispute is presented. Next, I focus on the criteria determining the NME status of a country, and finally I analyze the concrete AD methods and practices that the IAs of the US and the EU use in dealing with China. The last section compares the findings.

1.11 US–China NME Dispute (DS515)

1.1.2. Overview of the Trade Relations

The trade relations between the US and China rose significantly in the last decades.[46] The total trade was just 2 billion US dollars in 1979, while it was more than 737 billion in 2018 (Morrison, 2016, p. 83; USTR, not-dated), which makes China the largest US trading partner. According to the US–China Business Council (USCBC), United States Trade

[45] This situation is nevertheless framed by the need of the importing WTO members to notify the used methodologies to the WTO's Committee of Antidumping Practices and to the Committee on Subsidies and Countervailing Measures (Choukroune, 2012, p. 53)

[46] For a brief historical overview see Hur (2018, pp. 395–401).

Representative (USTR) and United States Census Bureau (USCB) data, China is nowadays the third largest goods and services export market for the US producers (after Canada and Mexico) and the US exports to China account for more than 7% of overall US exports (USTR, not-dated). In the last decade (2009–2018), the growth in the total US goods export to China was 72,2% (exports of goods to the rest of the world rose by 57,2% in the same period). In 2018, the total US goods exports to China accounted for more than 120 billion US dollars. The most exported goods to China in 2018 were Aerospace products and Parts (16,1 billion), Semiconductors and Components (8 billion), Oil and Gas (7,2 billion), Motor Vehicles (6,3 billion) and Navigation and Measures Instruments (6,1 billion).[47] China is also an important market for US agriculture exports (the fourth largest). The export of agricultural products to China totaled 9,3 billion US dollars in 2018 and the leading export categories were Soybeans (3,1 billion), Cotton (0,9 billion), Hides and Skins (0,6 billion) and Pork and Pork Products (0,57 billion) (USTR, not-dated; USCB, not-dated).

As for the US services exported to China, the growth in the last decade (2009–2018) was 265,5% (exports of services to the rest of the world rose by 48.7% in the same period). In 2018, the total US services exports to China accounted for more than 57 billion US dollars (up 2,2% or 1,3 billion as compared to 2017). Among the most exported services to China in 2017 were Travel (18,9 billion), Travel (education) (12,8 billion), Industrial Processes (4,6 billion), Passenger Fares (2,5 billion) and Management and Advisory Services (1,9 billion). For China, the US is the fifth biggest import partner (USCBC, 2019, p. 12).

In terms of China's exports to the US, China was the largest supplier of goods imports to the US in 2018. The total goods imports from China were more than 540 billion US dollars (up 6,7% or 34 billion as compared to 2017). US imports from China accounted for more than 21% of overall US imports in 2018 (USTR, not-dated). The top goods import categories were Electrical Machinery (152 billion), Machinery (117 billion), Furniture and bedding (35 billion), Toys and Sport equipment (27 billion) and Plastics (19 billion) (USTR, not-dated).

Not only is China an important market for US agriculture exports, but it is also the third largest supplier of agricultural imports to the US. In 2018, the total agricultural imports from China totaled 4,9 billion US dollars. Among the leading categories were Processed Fruit and Vegetables (1,2 billion), Fruit and Vegetable Juices (0,39 billion), Snack Food (0,2 billion), Spices (0,17 billion) and Fresh Vegetables (0,16 billion) (USTR, not-dated).

[47] US goods exports to China declined in 2018 by 7% compared to 2017. This is arguably the result of the current trade tensions between the US and China (USCBC, 2019).

As for the imports of services, they totaled 18,4 billion in 2018 (up 5,5% or 963 million US dollars as compared to 2017). The US imports services from China mainly in the Transport, Travel and Research and Development categories (USTR, not-dated).

Figures 7 and 8 present the data about US exports and imports of goods and services, Figure 9 puts these data together and adds the overall trade balance. According to the US Department of Commerce (USDOC), the US goods exports to China supported more than 600,000 jobs and the services exports supported more than 300,000 jobs in 2015 (latest data available) (USTR, not-dated).

Putting the data together, we can observe several trends in the US–China trade relations. Probably the most noticeable is the growing trade deficit of the US with China, which totaled more than 378 billion US dollars in 2018. Although the total US goods exports to China were down in 2018 if compared to 2017, China still remains one of the most important export markets for the US. This view is reinforced when exports of services is taken into account as we can see that the US services exports to China grow every year. Moreover, the US is importing more goods and services from China every year (with the exception of goods import in 2016). In this sense, the approach adopted by the Trump administration to lower trade deficit with China does not produce results so far, although it may take more time for us to be able to observe changes in trade data.[48] It is also worth pointing out that the trade deficit does not necessarily have to be bad for the US. Not only is the deficit arguably much lower if the counting is based on more precise value-added data, and it is not clever to look at just one trade relation between two countries (the US has trade surpluses with different trade partners), but it should also be noted that China is the largest creditor to the US and uses most of its current account surplus generated by the trade surplus with the US to re-purchase American treasury bills, bonds and assets (Yu, 2019, p. 36), which helps to keep the US interest rates low (Morrison, 2016, p. 83). Therefore, the trade deficit poses a much more complicated question and it should not be understood as good or bad *per se*.[49]

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[48] See more about the current trade issues between the US and China in Sutter (2019, p. 2) and Yu (2019).

[49] Yu argues that the trade surplus is not even good for China due to the related import inflation induced by the trade surplus. China's central bank requires Chinese firms to sell their US dollars earned from trade surplus to the central government for RMB which means that more RMB will flow into the market. For instance, if a Chinese firm sells 150 billion US dollars to the central government for RMB under exchange rate 6,7 between RMB and USD, there will be flow of around 1,000 billion RMB into the first commercial bank. If we take into account the multiplier effect and we assume the reserve ratio of 20%, the flow will be five times higher. Given that China's money supply M2 is roughly 180 trillion RMB, this would generate an inflationary pressure of about 3%. According to Yu, this gives the Chinese government a strong incentive to reduce the US–China trade surplus (Yu, 2019, pp. 36–7).

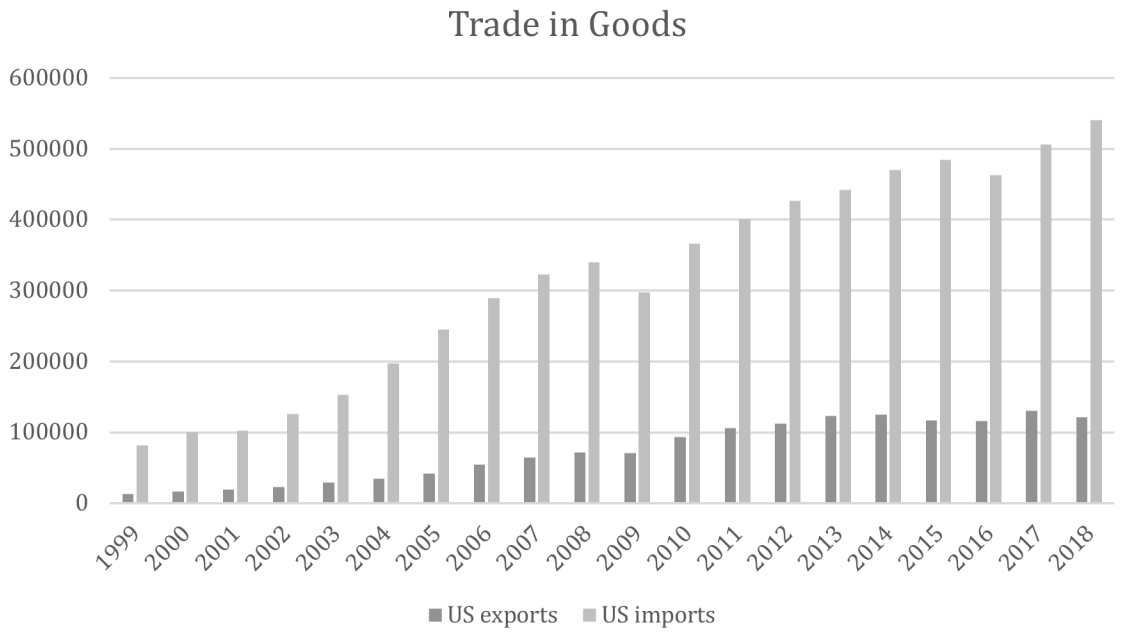

Figure 7: Trade in Goods between the US and China, Seasonally Adjusted, US Millions (source: BEA, 2020, author's calculation)

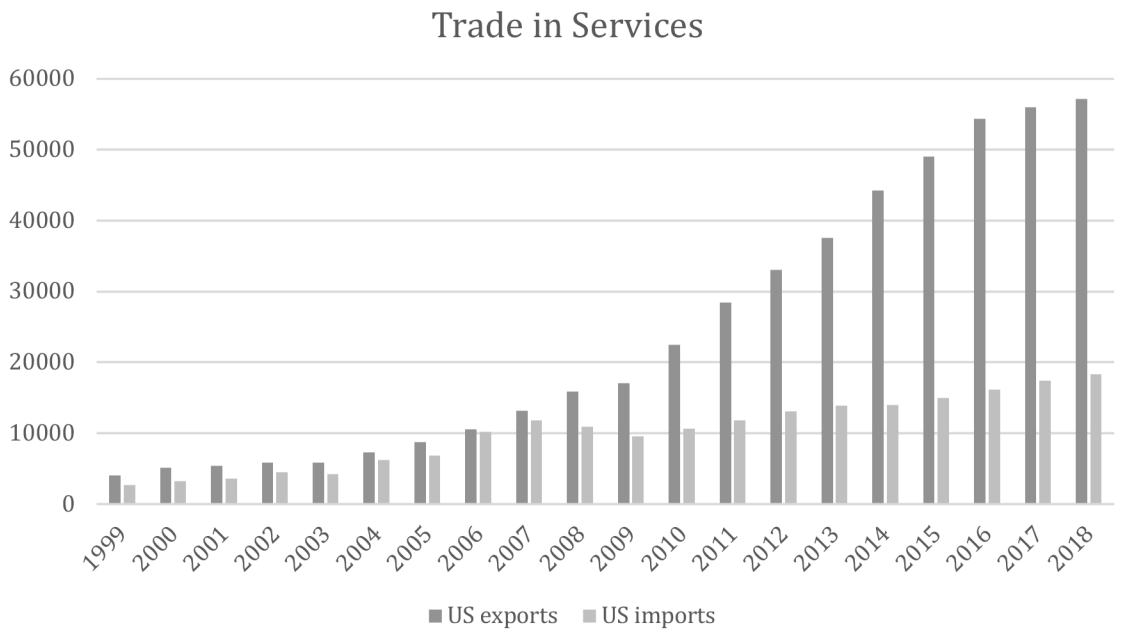

Figure 8: Trade in Services between the US and China, US Millions (source: BEA, 2020, author's calculation)

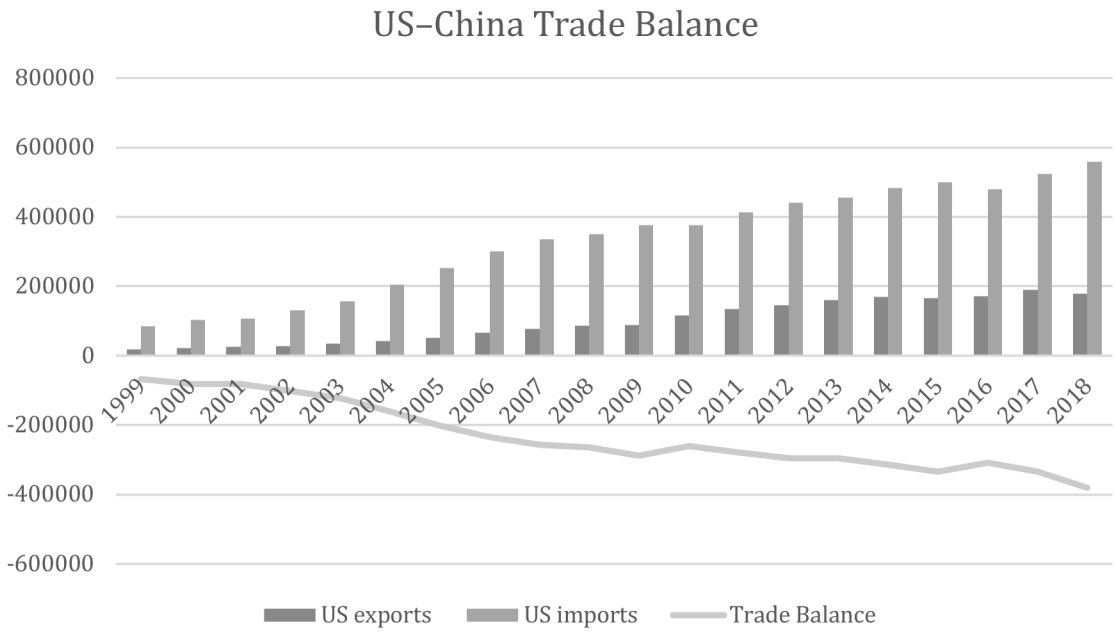

Figure 9: US–China Trade Ballance, US Millions (source: BEA, 2020, author's calculation)

1.1.3. Overview of the Dispute

China requested consultations at the WTO DSM with the US on 12 December 2016 and later requested additional consultations with the US on 3 November 2017 after the first round of consultations took place in February 2017. The dispute is registered as *DS515 United States – Measures Related to Price Comparison Methodologies*. In its request for consultations, China claimed that the US uses the NME methodology in AD investigations against China, which appears to be inconsistent with articles 2.1, 2.2, 9.2, 18.1 and 18.4 of the ADA, articles I:1, VI:1 and VI:2 of the GATT 1994 and article XVI:4 of the Marrakesh Agreement. Australia, Canada, Japan, Russian Federation, Mexico and the EU requested to join the consultations. In total, 14 documents of communication were submitted together with 2 requests for consultations. However, China decided not to pursue its case against the US further and therefore the panel was not assembled in this dispute. Table 18 summarizes the key facts about the dispute.

Complainant	China
Respondent	US
Agreements cited: (as cited in request for consultations)	Art. 2, 2.1, 2.2, 5.2, 5.3, 7.1, 9.2, 9.3, 11.1, 11.2, 11.3, 18.1, 18.4 ADA Art. I:1, VI:1, VI:2 GATT 1994 Art. XVI:4 Agreement Establishing the WTO
Consultations requested	12 December 2016
Last development	China requested additional consultations with the US on 3 November 2017
Current status	In consultations from 12 December (pending)

Table 18: Key facts: DS515: United States – Measures Related to Price Comparison Methodologies (source: WTO, 2020a)

1.1.4. US Requirements for the ME Status

The US has classified China as an NME since 1981 (Morrison, 2019, p. 1). The institution that is responsible for assessing the NME status of a country in the US is the US Department of Commerce (USDOC). Besides China, there are ten more countries assigned the NME status by the USDOC – Belarus, Georgia, the Kyrgyz Republic, Armenia, Azerbaijan, Moldova, Tajikistan, Uzbekistan, Vietnam and Turkmenistan.[50] Several countries have had their NME status changed to MES by USDOC, such as Poland (1993), Russia (2002) and Ukraine (2006) (Morrison, 2019, p. 1).

The US identifies as an NME country "any foreign country that the administrative authority determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise" (US Tariff Act, 1930, paragraph 18 (A)). Table 19 presents six factors that the administrative authority needs to consider in its evaluation of other countries' economy status based on Tariff Act, 1930, section 771(18)(B). This determination applies to the economy as a whole, not to individual industries or companies, which can ask for a differential individual treatment, although they usually do not receive it (Xu and Tang, 2009, p. 70).

The first factor considers the extent to which the currency of the foreign country is convertible into the currency of other countries. Usually the exchange trade regime and capital account restrictions are examined. In the last assessment of China's NME status (2017), the USDOC concluded that China has moved to a more flexible, unified exchange rate, an open current account and somewhat open capital account, the government continues to develop its FOREX markets and internationalize its currency. However, China still maintains instruments of control over the valuation of the RMB through the central

[50] Cuba would probably be added to the list should the embargo be removed (Williams, 2018, p. 437)

parity rate-setting process and FOREX market interventions and it continues to maintain approval requirements for all major capital account transactions, including investment, borrowing, and cross-border account holding (USDOC, 2017, p. 12).

(i) the extent to which the currency of the foreign country is convertible into the currency of other countries
(ii) the extent to which wage rates in the foreign country are determined by free bargaining between labor and management
(iii) the extent to which joint ventures or other investments by firms of other foreign countries are permitted in the foreign country
(iv) the extent of government ownership or control of the means of production
(v) the extent of government control over the allocation of resources and over the price and output decisions of enterprises
(vi) such other factors as the administering authority considers appropriate

Table 19: Factors to be Considered by the Administrative Authority in Evaluating Other Countries' Market Economy Status (source: Tariff Act of 1930).

The second factor looks at the extent to which wage rates in the foreign country are determined by free bargaining between labor and management. The "free bargaining between labor and management" refers to the existence of a labor market where workers and employers are free to bargain over the terms and conditions of employment. The USDOC found that while China has expanded legislation that protects workers' legal rights, serious restrictions on collective bargaining remain. For instance, workers have no legal right to strike or organize independently and therefore they do not have any meaningful freedom of association. Moreover, the trade unions are controlled by the government and this relationship inhibits unions from acting as true advocates of workers' rights. Serious distortions of the supply side of the labor market can also be found in China due to restrictions on labor mobility (USDOC, 2017, pp. 30–1).

The third factor takes into account the extent to which joint ventures or other investments by firms of other foreign countries are permitted in the foreign country. In other words, the foreign investment regime (its legal and institutional framework) and government's interventions that prevent foreign investments are examined. The USDOC concluded that although China has opened its economy to foreign direct investments (FDIs) in many respects, the foreign investment regime continues to shield Chinese enterprises from competition, particularly those of them that the Chinese government is trying to cultivate as market leaders. In 2017, China continued to rely on a foreign investment catalogue to encourage foreign investments in certain sectors of the economy, while restricted or prohibited them in others. Furthermore, China continues to be ranked by the OECD as one of the most restrictive FDI regimes in the world (USDOC, 2017, p. 32,

39). In addition, China still imposes significant barriers to foreign investments such as equity limits, local partner requirements, opaque approval and regulatory procedures, technology transfer and localization requirements and others (USDOC, 2017, p. 51).

The fourth factor examines the extent of government ownership or control of the means of production. This is based on the assumption that excessive government ownership or control of the means of production undermines the functioning of market economy and if economic actors cannot make decisions based on supply and demand, the prices and costs become distorted. The USDOC found that the Chinese government continues to exert significant ownership and control over the means of production, as demonstrated by the role and prevalence of state-owned and state-invested enterprises. The average size of these enterprises remains large when compared with private companies and their relative "economic weight" in China's economy is substantial in comparison with relevant sectors in other major economies. The government also intervenes extensively to shield such enterprises from the consequences of economic failure, facilitates mergers and acquisitions to achieve government, not enterprise, objectives, and enables the rise of large enterprise groups under government ownership and control. Moreover, the Communist Party reserves the right to make personnel appointments and participates in corporate decision-making through Party Committees. Also, the Chinese government exercises significant control over land (another key means of production). There is no private land ownership, rural and urban land markets are segmented, and the government remains the final arbiter on how land is used and valued. Individuals, firms, and other entities may own land-use rights, but there are limits on the scope and tenure of these rights in both rural and urban areas (USDOC, 2017, pp. 115–6).

The fifth factor considers the extent of government control over the allocation of resources and over the price and output decisions of enterprises. Usually, the industrial policies, regulation of prices, and regulation of the financial system and banking sector are examined under this factor. The USDOC concluded that the extent of Chinese government control over the allocation of resources is significant and far-reaching (USDOC, 2017, p. 178).

Under the sixth factor, the USDOC can address any additional issue relevant to its consideration of the market economy status. This can include the state's instrumental use of law, limitations of law in labor dispute resolution, the use of land, bankruptcy law, antimonopoly law and administrative licensing and regulation. In its last assessment of China's status, the USDOC looked at China's legal system, the institutional role of the Communist Party in the legal system, the extent to which individuals and firms are afforded the opportunity to have meaningful independent input into administrative rulemaking or challenging administrative decisions, and at corruption (USDOC, 2017, p. 181). The USDOC came to the conclusion that the Chinese legal system is designed and operates to be subordinate to the Communist Party of China and the Party has the power

to shape judicial activities on a large scale. The courts are ultimately accountable to the Party. Companies cannot effectively challenge administrative rules and procedures and corruption continues to pose a serious concern and distorts rule-based outcomes between market actors and the government (USDOC, 2017, p. 195).

Based on the previous factors, the USDOC concluded in 2017 that China remains an NME country under the US law because "the state's role in the economy and its relationship with markets and the private sector results in fundamental distortions in China's economy" (USDOC, 2017, p. 4). The USDOC thus reaffirmed its previous decisions about China's economy status. Strangely, the USDOC decided in 2007 that it will apply its countervailing legislation to Chinese economy because it had undergone sufficient economic reform as to enable the USDOC to identify and countervail subsidies (Choukroune, 2012, p. 53). This decision is quite controversial because in NME countries, where the state is significantly present in the economy, counting certain state's activities as subsidization could mean that the state is effectively subsidizing itself. It is also controversial to consider China as an NME country in AD investigations but as operating enough on market principles in CVD investigations. In addition, the USDOC often initiates both AD and CVD investigations for the same products and issues separate AD and CVD duties (Morrison, 2019, p. 1; Watson, 2016, p. 24), which can result in the problem of double remedy as described above. The USDOC test itself was also criticized extensively. Watson, for instance, claims that "[t]he way the test has been used in the past only highlights its absurdity" (2016, p. 22).

1.1.5. US Antidumping Methodologies

This section looks at the US determination of dumping margins. In the case of the US, the USDOC is the IA responsible for AD investigation. Generally, the USDOC compares the export price with the domestic price. If for whatever reason the domestic price cannot be used, the most preferred method used by the USDOC to calculate the margin of dumping is the so-called construction-value approach (Lee, 2016, pp. 4–5; GAO, 2006, p. 6). This basically means that the USDOC determines how much of each factor of production is needed to produce the good and then values each input using the information from the home market (Prusa, 2017, p. 627). For example, if the product came to the US market from South Korea, the USDOC would look at the prices of electricity, labor, raw materials etc. in South Korea and put them together with a markup for selling, general and administrative expenses and profits. Such a constructed value is then compared with the export price and the USDOC determines if dumping occurs.

If the producer is considered to be from an NME country, surrogate country prices shall be used for determination of the normal value. That means that the USDOC will 1) identify and quantify the factors of production used by the NME producers, 2) identify

market prices for each factor in a surrogate country, 3) multiply volume times cost for each factor, and 4) add the results, together with a reasonable margin for selling, general and administrative expenses, and profit (based on a surrogate country financial data), to produce a constructed normal value. This "normal value" is then compared with the export price to the US (GAO, 2006, p. 9).[51]

The surrogate country should be chosen according to the similarity to the NME country. The USDOC looks at the stage of economic development in the country based on the World Bank's measurements of gross national income on a purchasing power parity basis. The USDOC has recently identified Bulgaria, Brazil, Ecuador, Romania, South Africa, Thailand and Mexico as being similar to China according to this criterion (Morrison, 2019, p. 1; Telep and Lutz, 2018, p. 696). India is the most common country used as a surrogate to China (Sandkamp and Yalcin, 2016, p. 79; IBA, 2010, p. 13; GAO, 2006, p. 8). From the list of similar countries, the USDOC seeks to identify a country that manufactures products similar to the targeted products made by the NME under investigation. Then the significant producer of such a product is chosen (Morrison, 2019, p. 1; Yalcin et al., 2016, p. 22). Besides that, there is no other instruction telling the USDOC how exactly to create the surrogate country value. The only other requirement is that the USDOC must base the evaluation "on the best available information" (Williams, 2018, pp. 441–2).

Policy bulletin 04.1 tries to clarify some of the aspects of the USDOC determinations. It notes that the list of countries comparable to the NME country is created at first. Then, it is examined which countries are producers of the comparable products. Identical products qualify as the comparable products and other possible comparable products are best determined on a case-by-case basis. After that, the significant producers are identified. The significant production is judged according to the "characteristics of [the] world production of, and trade in, comparable merchandise" (Import Administration Policy Bulletin 04.1). Often, the USDOC understanding of significant producer means significant net exporter, but the standards vary from case to case and therefore no fixed standards are adopted (ibid.). Finally, the USDOC selects from the remaining countries according to five considerations about their data.[52] Nonetheless, the bulleting concludes that there will be exceptions to this process if it is found inappropriate in concrete cases (ibid.)

[51] It is worth pointing out that such an approach in an AD investigation will effectively eliminate the effects of subsidies in the NME country since not-subsidized prices and costs are taken into account. This makes the use of both AD and CVD duties on products from an NME country even more controversial (Prusa, 2017, pp. 627–8).

[52] The five considerations are: 1) does the data represent period wide price averages, 2) are the prices provided specific to the input in question, 3) are the prices the net of taxes and import duties, 4) are the prices contemporaneous with the period of review, and 5) are the data publicly available (Import Administration Policy Bulletin 04.1).

Country-wide AD rates are usually imposed against all imports of such a product. If a company wants to receive individual AD rates, it can ask the USDOC for an individual evaluation and if it passes a certain test, it can then receive individually determined AD rates (GAO, 2006, pp. 9–11). A company can also avoid the country-wide NME treatment if it can establish that its *industry* as a whole is based on market economy conditions. The USDOC developed its own approach to determine the market economy conditions of an industry in 1992 known as the "market-oriented industry" (MOI) test. This test has three criteria: 1) there can be no government involvement in setting prices or amounts to be produced, 2) there must be private or collective ownership of firms in the industry, and 3) all significant inputs must have their prices determined by the market (Lee, 2016, p. 5). It is unclear at the moment, how this process will function under the presumably adopted shift of burden of proof view in terms of Article 15 interpretation.

If the USDOC determines that dumping has occurred, the US International Trade Commission (USITC) must find out if this dumping cause or threatens to cause material injury to a domestic industry (such as declining profits or market share).[53] If this finding is positive, the USDOC issues an order imposing AD duty that should countervail the effects of dumping (Morrison, 2019, p. 1) and instructs the Customs and Border Protection to apply these duties. Both the USITC and the USDOC publish their decisions in the *Federal Register* (GAO, 2006, p. 6).

To summarize, there are not many rules governing the USDOC AD investigations of the NME countries. The USDOC must meet three requirements in its determination – look at the factors of production and their value, base its determination on best information available and choose the surrogate country which is at a level of economic development comparable to the NME country and at the same time it is a significant producer of comparable merchandise (Williams, 2018, p. 460).

Although this all may sound simple in theory, there are actually many difficulties connected with such value calculations. These difficulties can already be seen on the famous Polish golf carts case from 1977, which stands at the very beginning of using the construction-value methodology. In the early 1970s, the Polish manufacturer Pezetal started exporting its Melex golf carts (named after Pezetal's predecessor Melex) to the US. While Melex only exported eight golf carts to the US in 1970, by 1974 Pezetal had 19% of the market share in the US. American companies, including Harley Davidson, complained that the Polish golf carts were dumped and sold below cost in the US market. These complaints resulted in the AD investigation against Pezetal. Strangely enough, Poland did not have golf courses and therefore it did not have domestic golf cart sales. The golf carts

[53] Usually, the USDOC makes a preliminary evaluation of dumping and then the USITC determines if injury to domestic industry occurs. If these results are positive, both the USDOC and the USITC do precise calculations.

were produced in Poland solely and exclusively for the US market. The US Treasury Department, which was then responsible for AD investigations, decided to use Canadian prices to determine the foreign market value of golf carts. However, the Treasury only had data for carts which were similar to golf carts and while working on the investigation, the only Canadian manufacturer exited the business. The Treasury together with Customs Service officials then decided to visit Pezetal plants in Mielec and reviewed the company's books and pricing information. However, one of the officials at that time noted that the books were "more of the Charles-Dickens-and-quill-pen school of accounting" (in Nedumpara and Subramanian, 2018, p. 15) and the data could not be taken seriously. Finally, the Treasury used surrogate prices for production inputs based on Spanish price levels and added some amounts for overheads and profit. These steps were followed to approximate what the Pezetal's manufacturing costs and prices would have been had it been operating in a market economy of comparable development. The Polish golf carts case marks the beginning of using the construction-value approach together with surrogate country prices (Nedumpara and Subramanian, 2018, pp. 14–5).

Leaving historical and rather anecdotical examples aside, there are serious problems even nowadays. For instance, not all the producers of the same product sell their product for the same price in the US. Since calculating the dumping margin for all of them would be extremely time consuming for the USDOC, only a few exporters (so-called mandatory respondents) are selected and the USDOC calculates their dumping margins, which then it weights and uses the averages as the rate for all the producer. Usually, the USDOC choses the two largest exporters and deny most applications to be a voluntary respondent (Williams, 2018, p. 440). Given that sometimes the USDOC has to dismiss one of these exporters due to numerous circumstances, the AD rates for all the exporters are based on a single company's numbers (Williams, 2018, pp. 440–1).

The evaluation of the economic comparability and of the significant producer status is also controversial. Williams presents some of the problems in an investigation about honey-dumped imports to the US:

> Should Nicaragua's 560 tons of honey count as significant production? Does it matter that Nicaragua also produced 11,000 tons of a red dye made from a process extremely similar to that used to produce honey? What if Moroccan honey is not edible but rather almost solid and used only for medical purposes? What if the information on the cost of beekeeper suits and glass bottles in Pakistan comes from a website entitled 'Aliens ARE AMOng uS!?!?!!' or, more realistically, cannot be easily authenticated because it comes from a website that is only in Urdu or Pashto? (Williams, 2018, p. 443)

The value-construction approach is also criticized for not being based on clear rules. Some authors argue that the USDOC can determine the normal value as it wants to (Watson, 2014; Piskorski, 2005).[54] Furthermore, this approach (as all other approaches) leads to higher AD rates for NME countries, as can be seen on Table 20.

Product and year	China-Wide Rate	China Separate Rates	ME Rates
Corrosion-resistant steel, 2016	210	None	3–92
Certain cold-rolled steel, 2016	266	None	71
Certain polyethylene terephthalate resin, 2016	126	105–118	8–19
Certain uncoated paper, 2016	149	84	2–222
Melamine, 2015	363	None	173
Non-oriented electrical steel, 2014	408	None	7–205
Certain crystalline silicon photovoltaic products, 2014	165	27–78	12–28
Certain coated paper, 2010	136	8	20
Magnesia carbon bricks, 2010	236	128	58
Narrow woven ribbons, 2010	248	124	4

Table 20: Sample of U.S. AD Rates Imposed on Chinese and ME Products (source: USDOC Press Releases, taken from Morrison, 2019, p. 2)

[54] Williams presented a quite elaborate attempt to base the methodology used by the USDOC on clear rules (2018, pp. 456–61).

1.12 EU-China NME Dispute (DS516)

1.1.6. Overview of the Trade Relations

As in the case of the US–China trade relations, also the trade between China and the EU rose significantly in the last decades. The total trade exchange in 2018 was 690 billion EUR, which makes China the second largest trade partner for the EU after the US. The EU is the largest trade partner for China. The share of China in EU total trade in goods has almost tripled since 2000 (EUROSTAT, 2019). China was the second largest partner for EU exports of goods (11%), preceded by the US (21%) and followed by Switzerland (8%), Russia (4%) and Turkey (4%) (Eurostat, 2019). China was the largest partner for EU imports of goods (20%), followed by the US (13%), Russia (8%), Switzerland (6%) and Norway (4%) (ibid.; see also EUROSTAT, not-dated).

In 2018, the total EU exports to China accounted for more than 263 billion EUR – 211 billion EUR in exports of goods and 52 billion in exports of services. The EU exports more manufactured goods (84%) than primary goods (12%). The most exported manufactured goods were Machinery and vehicles (53%), Other manufactured products (18%) and Chemicals (13%).

As for the imports, the total EU imports from China accounted for 427 billion EUR – 395 billion EUR in imports of goods and 32 billion in imports of services. The EU also imports more manufactured goods (97%) than primary goods (2%). The most imported manufactured goods were Machinery and vehicles (53%), Other manufactures products (39%) and Chemicals (5%).[55] See Figures 10 and 11 for trade in goods and trade in services since 2002 and 2010 respectively. Figure 12 presents the overall EU exports and imports together with the total trade balance.

[55] This casts some doubts on the economic trade models that predict trade exchange between two countries in products, which are intensive in different factors of production.

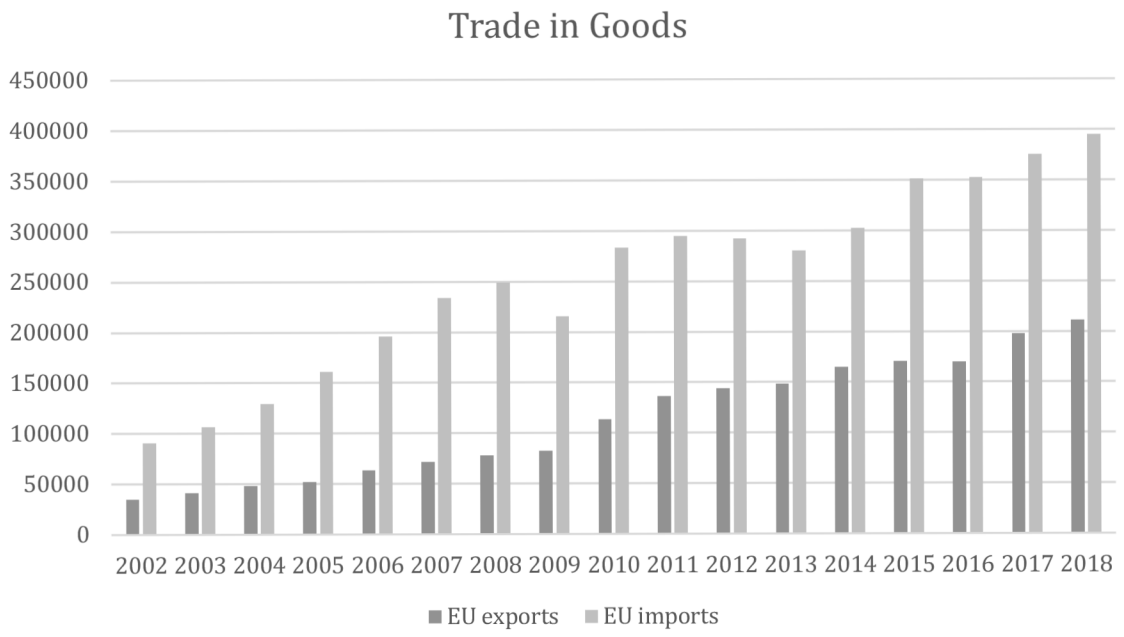

Figure 10: EU-China Trade in Goods, Euro Millions (source: Eurostat)

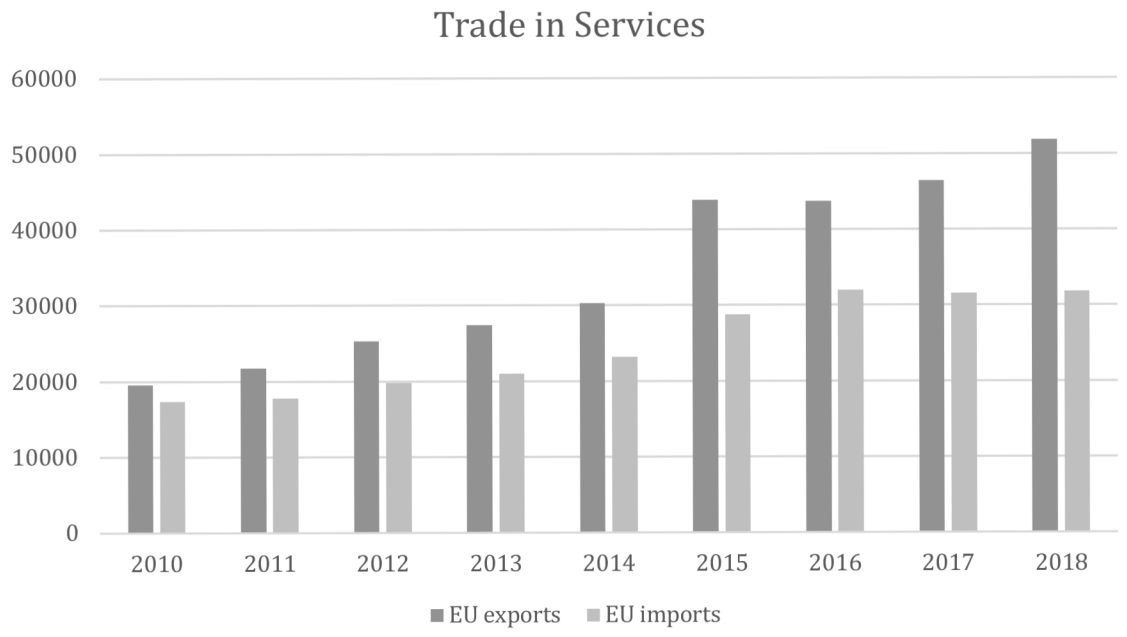

Figure 11: EU–China Trade in Services, Euro Millions (source: Eurostat)

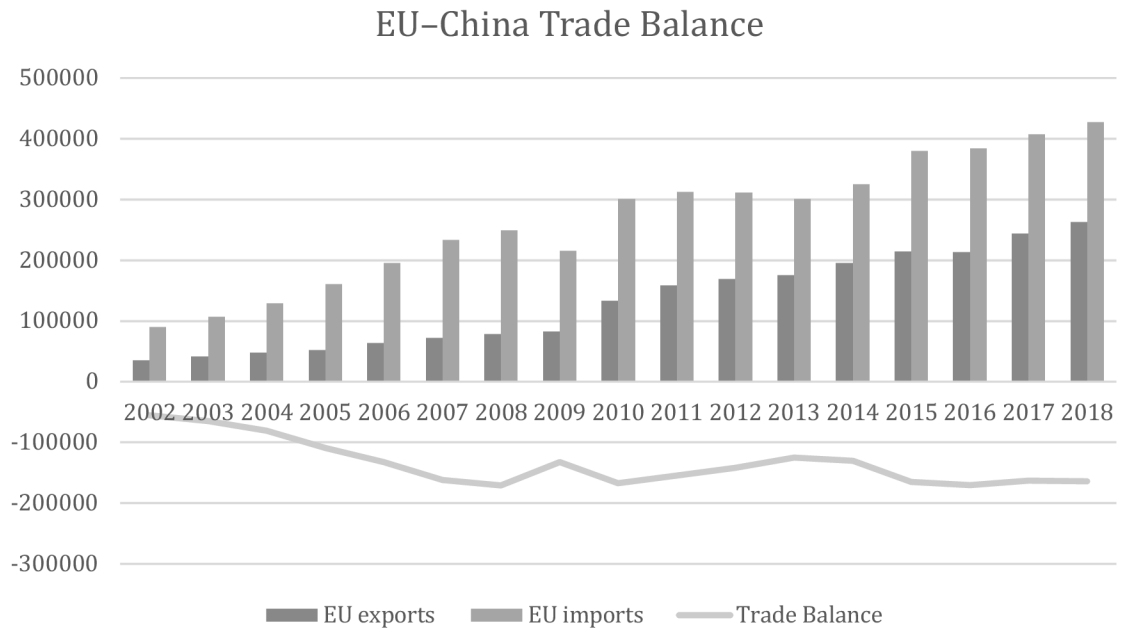

Figure 12: EU–China Trade Balance, Euro Millions (source: Eurostat)

In 2018, the EU had trade surpluses in Raw materials (6,9 billion EUR), Other products (6 billion EUR), Chemicals (5,4 billion EUR), Energy (5,3 billion EUR) and Food and drink (4,5 billion EUR) and trade deficits in Machinery and vehicles (97,4 billion EUR) and Other manufactured products (115,5 billion EUR).

Taking the perspective of the EU's member states, the three largest exporters to China in the EU were Germany (more than 93 billion EUR), the United Kingdom (more than 23 billion EUR) and France (more than 20 billion EUR). Germany held the highest share for China in its total extra-EU exports (see Table 21 for details).

As for the EU's member states imports, the three largest importers from China in the EU were the Netherlands (more than 85 billion EUR), Germany (more than 75 billion EUR) and the United Kingdom (more than 53 billion EUR). The Czech Republic held the highest share for China in its total extra-EU imports (see Table 22 for details).

In total, only three member states (Germany, Finland and Ireland) had trade surplus in trade in goods with China in 2018. The largest deficits were held by the Netherlands, the United Kingdom and Italy (see Table 23 for details).

Unfortunately, the EU provides statistics on trade in services starting only in 2010. Nonetheless, even on those data we can observe a growing trade surplus in services with China, although not that large as in the case of the US. The overall trade deficit in 2018 was more than 163 billion EUR for the EU and it has been quite stagnant since 2015. Even

though the EU imports grew in this period, so did the EU exports. The trade deficit will likely decrease when the United Kingdom leaves the EU. In 2018, the United Kingdom had a trade deficit with China of almost 30 billion EUR. If we take this out, the total trade deficit of the EU with China would be somewhere around 130 billion EUR (similar to the value of trade deficit from 2006). Given the importance of the EU for China's global trade, we can conclude that the EU has a healthier trade relation with China than the US does based on the common indicators used for such assessment.

	EUR million	% of China in extra-EU-28 exports
Germany	93 715	17,3
United Kingdom	23 365	10,7
France	20 850	10,3
Italy	13 169	6,5
Netherlands	11 123	7,1
Belgium	6 989	6,5
Sweden	6 556	11,5
Spain	6 275	6,4
Ireland	4 612	6,6
Austria	4 260	9,5
Denmark	3 798	10,5
Finland	3 578	13,6
Czech Republic	2 188	8,1
Poland	2 115	4,9
Hungary	1 501	7,8
Slovakia	1 352	11,8
Greece	901	5,7
Bulgaria	748	8,5
Portugal	658	4,7
Romania	645	4,2
Slovenia	531	6
Luxembourg	222	10,2
Lithuania	189	1,6
Estonia	185	4
Latvia	152	3,4
Croatia	133	2,8
Cyprus	64	2,1
Malta	32	3

Table 21: EU-28 Exports of Goods to China by Member State, 2018 (source: Eurostat, 2020, online data code: DS-018995)

	EUR million	% of China in extra-EU-28 imports
Netherlands	85 280	28,7
Germany	75 467	20,6
United Kingdom	53 320	19,8
Italy	30 780	17,7
France	29 374	16,7
Spain	22 551	16,5
Poland	17 972	26
Belgium	15 126	11,2
Czech Republic	13 175	35,5
Sweden	7 672	17,6
Hungary	6 450	24,9
Denmark	6 119	23,5
Austria	5 450	14,8
Romania	4 406	21
Ireland	3 599	11,4
Greece	3 593	13,4
Slovakia	2 867	17,9
Portugal	2 350	12,9
Finland	2 131	10,7
Slovenia	1 778	15,2
Bulgaria	1 317	15
Lithuania	864	8,8
Croatia	816	15,3
Estonia	691	18,2
Latvia	491	11,9
Luxembourg	464	18,6
Cyprus	388	10,1
Malta	207	13,9

Table 22: EU-28 Imports of Goods from China by Member State, 2018 (source: Eurostat, 2020, online data code: DS-018995)

Germany	18 248
Finland	1 448
Ireland	1 013
Malta	-175
Luxembourg	-242
Cyprus	-324
Latvia	-339
Estonia	-506
Bulgaria	-569
Lithuania	-675
Croatia	-682
Sweden	-1 116
Austria	-1 191
Slovenia	-1 247
Slovakia	-1 515
Portugal	-1 692
Denmark	-2 321
Greece	-2 692
Romania	-3 761
Hungary	-4 949
Belgium	-8 137
France	-8 525
Czech Republic	-10 987
Poland	-15 857
Spain	-16 276
Italy	-17 611
United Kingdom	-29 955
Netherlands	-74 157

Table 23: EU-28 trade balance of goods with China by Member State, 2018, in EUR million (source: Eurostat, 2020, online data code: DS-018995)

1.1.7. Overview of the Dispute

China requested the consultation at the WTO DSM with the EU on 12 December 2016. The dispute is registered as *DS516 European Union – Measures Related to Price Comparison Methodologies*. The consultation focused on certain provisions of the EU NME methodology in AD investigations against China. China claimed that the measures taken by the EU appear to be inconsistent with articles 2.1 and 2.2 of the ADA and articles I:1 and VI:1 of

the GATT 1994. Vietnam, Australia, Canada, Japan, Russia, the US and Mexico requested to join the consultations.

On 9 March 2017, China requested the establishment of a panel, which was established on 3 April 2017. Australia, Bahrain, Brazil, Canada, Colombia, Ecuador, India, Indonesia, Japan, Kazakhstan, Korea, Mexico, Norway, Russia, Saudi Arabia, Chinese Taipei, Tajikistan, Turkey, the United Arab Emirates and the US were involved as third parties in the panel. On 29 June 2017, China requested the Director-General to compose the panel and that happened on 10 July 2017. On 8 December 2017, the Chair of the panel informed the dispute settlement body that the beginning of the panel's work had been delayed due to a lack of available lawyers in the WTO Secretariat. On 26 November 2018, the Chair informed the dispute settlement body that in the light of the complexity of the legal issues covered in this dispute, the panel expected to issue its final report to the parties during the second quarter of 2019.

However, on 7 May 2019, China requested the panel to suspend its proceedings in accordance with the Article 12.12 of the Dispute Settlement Understanding. The reasons behind this decision are unknown (see some speculative account in Zhou and Nöel, 2019, pp. 423–4). On 14 June 2019, the panel informed the dispute settlement body that it grants China's request and suspends its work. The authority of the panel shall lapse after 12 months of the suspension of its work. The panel's findings will remain confidential.

In total, 13 documents were submitted in this dispute. Table 24 summarizes the key facts about the dispute.

Short Title	EU – Price Comparison Methodologies
Complainant	China
Respondent	EU
Third Parties (original proceedings)	Australia, Bahrain, Brazil, Canada, Colombia, Ecuador, India, Indonesia, Japan, Kazakhstan, Republic of Korea, Mexico, Norway, Russian Federation, Saudi Arabia, Taipei, Chinese, Turkey, United Arab Emirates, US
Agreements cited (in request for consultation)	Art. 2.1, 2.2 ADA Art. I:1, VI:1 GATT 1994
Agreements cited (in panel request)	Art. I:1 GATT 1994 Art. 2.1, 2.2 ADA Art. VI:1 GATT 1994
Consultations requested	12 December 2016
Panel requested	9 March 2017
Panel established	3 April 2017
Panel composed	10 July 2017
Last development	The panel informed the DSB of its decision to suspend its work on 14 June 2019
Current status	Suspended (the panel shall lapse after 12 months of suspension)

Table 24: Key facts: DS515 European Union – Measures Related to Price Comparison Methodologies (source: WTO, 2020a)

1.1.8. EU Requirements for the ME Status

On 20 December 2017, the EU has amended its antidumping law in a reaction to the expiration of subparagraph 15(a)(ii) of the CAP. For this reason, the following analysis will focus on both the old and the new legislation in order to fully capture the EU–China dispute over the NME status. Nevertheless, some specific provisions of the old EU rules will be omitted, such as specific exceptions and differential treatments, due to the fact that they are not active anymore. The new AD legislation of the EU is yet to be tested for its compatibility with the WTO law. Some authors, however, claim that the new methodology will likely be refused by the WTO (see, e.g. Suse, 2017, p. 951; Shadikhodjaev, 2018, p. 896, 900; Tietje and Sacher, 2018, p. 17; a different view is offered by Kaszubska, 2017). The EU, on the other hand, is convinced that the new methodology is "fully respecting the EU's international obligations in the legal framework of the WTO" (EU Commission, 2017a).

The old AD legislation regarding the ME status of a country in the EU was based on Article 2.7 of the Regulation (EU) 2016/1036 of the EU parliament and of the Council of 8

June 2016 on protection against dumped imports from countries not members of the EU ("Basic Regulation"). According to the Article 2.7(a) of this document, the EU distinguished between two groups of NME countries. In the case of the first group (Albania, Armenia, Azerbaijan, Belarus, Georgia, Kyrgyzstan, Moldova, Mongolia, North Korea, Tajikistan, Turkmenistan, Uzbekistan) the prices for AD investigations could be determined with reference to the price of a surrogate ME country or the price from such a third country to other countries. The surrogate country was supposed to be "as similar as possible" to the country under AD investigation (Shadikhodjaev, 2018, p. 887).

The Article 2.7(b) introduced a softer approach to China, Vietnam and Kazakhstan (and possibly other NME member states in the WTO). If a producer from such a country can prove that market economy conditions prevail in his industry, he could get a market economy treatment. The conditions for market economy conditions were set out in the Article 2.7(c) (see Table 25). The producer had to meet all five criteria, otherwise its request was rejected (Shadikhodjaev, 2018, p. 888). Therefore, the burden of proof was based on the NME producers and it was quite difficult to be obtained – only 41 cases out of 248 cases (17%) between 2006 and 2015 received the market economy treatment (Shadikhodjaev, 2018, p. 888) and no Chinese exporter was able to receive the market economy treatment since 2012 (Zhou and Peng, 2018, p. 518).

(i) decisions of firms regarding prices, costs and inputs, including for instance raw materials, cost of technology and labor, output, sales and investment, are made in response to market signals reflecting supply and demand, and without significant State interference in that regard, and costs of major inputs substantially reflect market values
(ii) firms have one clear set of basic accounting records which are independently audited in line with international accounting standards and are applied for all purposes
(iii) the production costs and financial situation of firms are not subject to significant distortions carried over from the former NME system, in particular in relation to depreciation of assets, other write-offs, barter trade and payment via compensation of debts
(iv) the firms concerned are subject to bankruptcy and property laws which guarantee legal certainty and stability for the operation of firms
(v) exchange rate conversions are carried out at the market rate

Table 25: The ME Conditions of the EU according to the Old EU Rules (source: EU "Basic Regulation")

The amended EU legislation abolishes the concept of NME countries and provides a "country-neutral" alternative according to which all costs and prices "significantly distorted" by a government need to be substituted in AD investigations (Article 2.6(a)). The significant distortion is specified in Article 2.6(b). The significant distortion occurs when "the reported prices of costs, including the costs of raw materials and energy, are not the result of free market forces as they are affected by substantial government

intervention" (Article 2.6(b)). In assessing the existence of significant distortions, the impact of one or more of the following aspects should be examined: 1) the market in question is to a significant extent served by enterprises which operate under the ownership, control or policy supervision or guidance of the authorities of the exporting country, 2) state presence in firms, allowing the state to interfere with respect to prices or costs, 3) public policies or measures discriminating in favor of domestic suppliers or otherwise influencing free market forces, 4) the lack of or the discriminatory application or inadequate enforcement in relation to bankruptcy, corporate or property law, 5) wage costs being distorted, and 6) access to finance granted by institutions which implement public objectives or otherwise not acting autonomously from the state.

Since its accession to the WTO, China has made several requests to the EU in order to get the MES but never succeeded.[56] In the last examination of Chinese economy, which the EU Commission released in late 2017, the Commission states that "[t]he overall picture that emerges concerning the framework in which economic activity takes place in China is one where the State continues to exert decisive influence on the allocation of resources and on their prices" and "[t]he analysis shows that the allocation and pricing of the various factors of production is influenced by the State in a very significant manner" (EU Commission, 2017b, p. 3). Besides other factors, the EU Commission report focuses mostly on distortions in the factors of production such as land, energy, capital, labor and raw materials and other inputs, and also on distortions in selected sectors like steel, aluminum, chemical and ceramic sectors.[57]

There are several studies that try to examine the possible economic effects of granting China the MES (the effects of not using the surrogate country methodology in AD investigations against Chinese producers, respectively). Their results differ significantly due to the great variation of assumptions on which the researchers based their calculations. A proper econometric analysis of the effects is missing (Yalcin et al., 2016, pp.

[56] China's request from 2003 was rejected in 2008. The EU Commission acknowledged that "considerable progress" has been made, however, China still did not meet all the criteria under the EU law. The same conclusion was reached in 2011, when the EU Commission concluded that China maintained significant market distortions, restrictions on imports and exports, subsidies input, fixed domestic prices and has not established a financial market (Kaszubska, 2017, pp. 4–5). In 2013, China informed the EU Commission that it did not wish to continue in this dialogue. De Kok points out that although the EU often stressed the technical nature of the MES requirements, it has also shown a discretionary application of its criteria in the cases of Russia (2002) and Ukraine (2005). Moreover, the anticipated graduation of Vietnam to MES in the context of the free trade agreement between the EU and Vietnam, despite Vietnam satisfying only one of the five criteria, confirms the political nature of granting the MES (De Kok, 2016, p. 523; see also Puccio, 2015, p. 25; IBA, 2010, p. 15).

[57] The complete report has more than 460 pages.

14, 38–9). According to the EU Commission, the abolishment of the NME methodology would reduce the AD duties by 30 percentage points, which would raise the targeted Chinese imports by 18–28% and caused a loss of 117 800 to 175 600 jobs in the EU in the long run (Shadikhodjaev, 2018, p. 893). Yalcin et al. claim that the average AD duty would fall by 17–28 percentage points (2016, p. 5). Moreover, there is no evidence of a fall in AD initiations against China when it receives the MES (Sandkamp and Yalcin, 2016, p. 81).

As for the effects on the EU employment, the EU institutions often refer to the research made by Scott and Jiang in 2015 (Sandkamp and Yalcin, 2016, p. 84). According to their results, treating China as a ME country would endanger between 1,7 million (0,8%) and 3,5 million (1,6%) jobs in the EU and it would reduce the output of the EU by up to 228 billion EUR per year or differently a 1–2% reduction of EU GDP (Scott and Jiang, 2015, p. 1). See Tables 26 and 27 for the results of their calculations. Nonetheless, Scott and Jiang made some strong assumptions in their research design, which may not be realistic. For instance, Sandkamp and Yalcin point out that only a small portion of imports is affected by AD duties. In 2014, only 2% of total imports of 325 billion EUR was affected, which would amount to 6,5 billion EUR. The estimated drop effect in the output of the EU of 228 billion EUR thus seem unrealistic (Sandkamp and Yalcin, 2016, p. 84). Yalcin et al. also point out that assessing the economic effects of granting the MES to China solely based on the impact of change in AD duties is insufficient and other aspects should be taken into account, such as China's strategic behavior in the WTO or further economic and political relations of the EU with third parties, especially with the US (2016, p. 38).[58]

Another study was done by Bellora and Jean, who concluded that changing China's status would boost China's exports to the EU by 3,9% to 5,3% in volume (13 billion EUR to 18 billion EUR). Factoring in the removal of the present chilling effect the imports boost might be 7,4% to 21% in volume (25 billion EUR to 72 billion EUR). Domestic output losses would be, according to their calculations, relatively small (up to 0,06% disregarding the chilling effect and 0,32% when taking the effect into account). However, the losses would be significant in absolute terms (3,9 billion EUR and 23 billion EUR, respectively). Finally, dropping the lesser duty rule (see below) would not have a significant effect on these impacts (Bellora and Jean, 2016). In any case, the authors also reaffirm that "[a]ssessing the potential economic implications of changing China's status in EU's policy requires many simplifying assumptions; the results should be interpreted bearing in mind the limitations and specific focus of such an exercise" (Bellora and Jean, 2016, p. 14).

[58] See other arguments against the calculations made by Scott and Jiang in Yalcin et al. (2016, pp. 38–9). Scott and Jiang defend their assumptions in (2015, pp. 2–3, 6).

	Low Impact		High Impact	
Sectors	**Jobs at risk**	**Jobs at risk as a share of industry employment**	**Jobs at risk**	**Jobs at risk as a share of industry employment**
Agriculture, forestry and fisheries	75 700	0,8%	151 400	1,6%
Mining and quarrying	6 600	0,8%	13 000	1,6%
Manufacturing	779 300	2,4%	1 558 700	4,8%
Food products, beverages and tobacco products	41 600	0,9%	83 200	1,7%
Textiles, wearing apparel, and leather products	187 000	7,8%	374 000	15,5%
Wood and products made of wood and cork, except furniture; articles of straw and plaiting materials	16 000	1,4%	31 900	2,9%
Paper and paper products	7 400	1,1%	14 900	2,3%
Printing and recording services	10 000	1,1%	19 900	2,2%
Coke and refined petroleum products	1 500	0,7%	3 100	1,5%
Chemicals and chemical products	19 600	1,4%	39 100	2,9%
Basic pharmaceutical products and pharmaceutical preparations	4 200	0,5%	8 500	1,1%
Rubber and plastics products	29 000	1,8%	58 000	3,7%
Other nonmetallic mineral products	15 400	1,1%	30 800	2,2%
Basic metals	21 800	1,7%	43 400	3,4%
Fabricated metal products, except machinery and equipment	58 900	1,6%	117 800	3,2%
Computer electronic, and optical products	143 900	9,2%	287 900	18,3%
Electrical equipment	49 400	3,5%	98 700	7,1%
Machinery and equipment, n.e.c.	44 700	1,5%	89 600	3,1%
Motor vehicles, trailers, and semi-trailers[59]	17 700	0,6%	35 400	1,2%
Other transport equipment	10 000	1,1%	20 000	2,2%
Furniture; other manufactured goods	92 500	4,1%	185 000	8,2%
Repair and installation services of machinery and equipment	8 700	0,7%	17 500	1,5%
Utilities	29 600	0,9%	59 200	1,8%
Construction and construction works	31 600	0,2%	63 300	0,4%

Wholesale and retail trade	252 600	0,9%	505 300	1,7%
Transport services	83 600	0,8%	167 300	1,6%
Accommodation and food services, and travel	73 800	0,8%	147 700	1,6%
Communication services	38 200	0,6%	76 400	1,2%
Finance, insurance and real estate	61 900	0,8%	123 700	1,5%
Management, legal, accounting, professional, technical, and employment services	87 500	0,8%	174 900	1,6%
Public, social, personal, and educational services (including households)	225 000	0,3%	450 000	0,6%
Total[60]	1 745 400	0,8%	3 490 900	1,6%

Table 26: Jobs at Risk in EU by Industry if EU Grants MES to China (source: Scott and Jiang, 2015, pp. 19–20

[59] Includes motor vehicles parts.

[60] Subtotals may not add up to totals due to rounding. The low-impact scenario assumes granting the MES to China would increase manufacturing imports from China by 25% over the next three to five years relative to their base level in 2011; the high-impact scenario assumes a 50% increase in imports from China.

		Low impact[61]		High impact	
Rank	**Country**	**Jobs at risk**	**Jobs at risk as a share of total country employment**	**Jobs at risk**	**Jobs at risk as a share of total country employment**
1	Germany	319 700	0,8%	639 200	1,7%
2	Italy	208 100	0,9%	416 200	1,9%
3	United Kingdom	193 400	0,7%	386 800	1,5%
4	France	183 300	0,7%	366 800	1,5%
5	Poland	145 100	1,0%	290 100	1,9%
6	Spain	136 600	0,7%	273 300	1,5%
7	Romania	100 100	1,2%	200 100	2,5%
8	Netherlands	52 000	0,7%	104 000	1,4%
9	Czech Republic	46 900	1,0%	93 900	2,0%
10	Portugal	45 700	1,1%	91 400	2,1%
11	Hungary	40 500	1,1%	80 900	2,2%
12	Bulgaria	38 000	1,3%	76 100	2,7%
13	Austria	31 900	0,8%	63 700	1,6%
14	Greece	30 700	0,8%	61 300	1,5%
15	Belgium	30 700	0,7%	61 300	1,4%
16	Sweden	30 400	0,7%	60 700	1,4%
17	Slovakia	24 400	1,1%	48 800	2,1%
18	Finland	19 400	0,8%	38 900	1,6%
19	Denmark	18 900	0,7%	37 800	1,5%
20	Ireland	13 700	0,8%	27 500	1,5%
21	Lithuania	11 100	1,0%	22 100	1,9%
22	Slovenia	9 000	1,0%	18 000	2,0%
23	Latvia	6 300	0,8%	12 600	1,7%
24	Estonia	5 200	1,1%	10 500	2,1%
25	Cyprus	2 400	0,6%	4 800	1,3%
26	Malta	1 200	0,9%	2 400	1,8%
27	Luxembourg	1 000	0,6%	2 000	1,2%

Table 27: Jobs at Risk if EU Grants MES to China, by Country, Ranked by Number of Jobs at Risk (source: Scott and Jiang, 2015, p. 22)

1.1.9. EU Antidumping Methodologies

The first AD legislation in the EU was adopted in 1968 and although it already mentioned the possibility of using the surrogate country methodology, the methodology was formally adopted in the EU law in 1979 (De Kok, 2016, p. 518). Similar to the US and to the WTO rules, the proof of dumping is only a necessary but not a sufficient condition for starting the AD investigation. A material injury, which can mean a loss of market share, financial losses or having to lay off employees, has to be proved as well. Furthermore, the broader "union interest" must be considered. That means that the potential negative impacts of offsetting the dumped products by AD duties on EU consumers and industries, for example higher prices of consumer and intermediate goods, may not outweigh the benefits to the protected domestic firms (Yalcin et al., 2016, p. 8).

If a producer from the EU have sufficient evidence to prove that a foreign exporter is dumping its products and this causes the material injury, the EU producer can file a complaint to the EU Commission, which is the IA for the EU. The EU Commission can also do that on its own initiative (Yalcin et al., 2016, p. 8). The basic AD methodology used in investigations of ME countries is a simple comparison of export prices to domestic prices of the exporter as was described above.

As regards the NME AD methodology, the EU calculates the normal costs and prices based on the normal costs and prices in a surrogate country. The surrogate country should be selected in "a reasonable manner",[62] however, the choice is often dictated by the willingness of the surrogate country's producers to participate in the investigation and disclose details of their production costs and margin to the EU Commission (Bellora and Jean, 2016, p. 3). The mostly used surrogate country for China in the EU AD investigations is the US (Sandkamp and Yalcin, 2016, p. 79; IBA, 2010, p. 13; Detlof and Fridh, 2006, p. 2). Depending on the products considered, also Canada and South Africa (steel industry), Turkey and India (solar panels and glasses) and even the EU itself (chemical sector) were used as surrogates for AD investigations (Bellora and Jean, 2016, p. 3).

The new EU rules did not change any significant aspect of the way how AD duties are calculated. The main update concerned the NME criteria and their evaluation and thus the main differences were already presented in the previous subchapter. If "significant distortions" are found, the prices and costs for the AD investigation can be based on 1) cost of production and sales prices of a surrogate country with similar levels of economic

[61] The low-impact scenario assumes granting the MES to China would increase manufacturing imports from China by 25% over the next three to five years relative to their base level in 2011; the high-impact scenario assumes a 50% increase in imports from China.

[62] The wording in the old EU methodology said: "a not unreasonable manner". According to Shadikhodjaev, this change in wording appears to impose a higher threshold for proper surrogate data (2018, p. 899).

development, or 2) undistorted international prices, costs and benchmarks. In other words, the EU can still use the surrogate country methodology based on its new rules.

One of the new aspects of the amended EU legislation is that if two or more countries provide for appropriate surrogate countries for the AD investigation, the preference should be given to a country "with an adequate level of social an environmental protection" (Article 2.6(a); see also Tietje and Sacher, 2018, p. 9). The EU Commission is therefore trying to tackle the social and environmental dumping. Notwithstanding, the choice of a surrogate country with higher social, labor and environmental standards will likely increase the AD duties and this aspect of the new EU legislation can even lead to higher duties than those under the old NME methodology (Shadikhodjaev, 2018, p. 898).

Another new aspect in the EU AD methodology is the possibility to consider international prices and benchmarks as relevant for the AD investigations. This aspect has already been tested in a certain way in the WTO DMS case *EU–Biodiesel (Argentina)*, in which the EU disregarded the prices of input materials of Argentinian biodiesel and instead used the average reference prices of raw materials from the Argentine Ministry of Agriculture.[63] Argentina had filed a case to the WTO DSM, and it was later appealed. The Appellate Body stated that the EU had not been allowed to use surrogate prices in this case. However, the Appellate Body did not restrict the EU in using surrogate prices or international prices in general (as it is falsely claimed by De Kok, 2016, p. 539). The Appellate Body stated:

> We do not see, however, that the first sentence of Article 2.2.1.1 [of ADA] precludes information or evidence from other sources from being used in certain circumstances. Indeed, it is clear to us that, in some circumstances, the information in the records kept by the exporter […] may need to be analyzed […] including […] sources outside the "country of origin" (Appellate Body Report, WT/473/AB/R, 2016, paragraph 6.71).
>
> This, however, does not mean that an investigating authority may simply substitute the costs from outside the country of origin for the "cost of production in the country of origin". Indeed, Article 2.2 of the ADA and Article VI:1(b)(ii) of the GATT 1994 make clear that the determination is of the "cost of production [...] in the country of origin". Thus, whatever the information that it uses, an investigating authority has to ensure that such information is used to arrive at the "cost of production in the country of origin". Compliance with this obligation

[63] See the analysis of the case in Zhou (2018a, especially pp. 615–29).

> may require the investigating authority to adapt the information that it collects (Appellate Body Report, WT/473/AB/R, 2016, paragraph 6.73).

This was later reaffirmed in the *EU–Biodiesel (Indonesia)*, which dealt with essentially the same situation (see Panel Report WT/DS480/R, 2018, paragraphs 7.1, 7.25–26, 7.30–33; see also the Panel Report WT/DS488/R, 2019). It is unclear, however, what the recourse to the "cost of production in the country of origin" means, because in a different case, the Appellate Body stated that "the investigating authority is not required to adjust for differences in costs between the NME producers under investigation and the analogue country producer where this would lead the investigating authority to adjust back to the costs in the Chinese industry that were found to be distorted" (Appellate Body Report, WT/DS397/AB/RW, 2016, paragraph 5.207). Since the using of surrogate costs and prices is based on the assumption that the domestic costs and prices cannot be used in an AD investigation due to the fact that they are distorted, the interpretation of the legal situation is rather blurry. Zhou even claims that "[t]he Appellate Body seems to have deliberately exercised judicial economy […] to allow some time for it to consider this overlapping issue" (Zhou, 2018a, p. 626).[64]

Furthermore, the shift of burden occurs in the new EU AD legislation (in line with the interpretational approach to Article 15 of CAP as analyzed in the previous chapter of this text). According to the new rules (Article 2.6(c)), the EU's producers have to prove that their Chinese counterparts are dumping their products. However, the EU Commission should regularly examine the market conditions of concrete countries and industries and provide the information for its producers on which they can base their requests for AD investigations. In this way, the EU Commission plans to assist its industries in filling the requests for AD investigations. The EU Commission states: "The Commission will draft specific reports for countries or sectors where it will identify distortions. As is the case today, it will be for the EU industry to file complaints, but they can rely on such reports by the Commission to make their case" (EU Commission, 2016a, p. 5).

Finally, the EU also decided to limit or even abolish its long tradition of using the so-called lesser-duty rule. According to this rule, the EU calculates the margin of dumping and also the margin of injury in an AD investigation and then places the AD duty on the basis of that margin which is smaller. For instance, in the measures imposed on hot rolled coils from China, the dumping margin was 102% and the injury margin was 19%, which was the final level of the AD duties (EU Commission, 2016a, p. 3). The lesser-duty rule goes

[64] Shadikhodjaev, for example, argues that since international prices and external benchmarks can be used in CVD calculations, the same should be allowed in the AD context in order to preserve the overall consistency of the WTO legal system (2018, p. 902).

beyond the WTO obligations and most of the WTO members do not exercise this type of self-restraint. For example, in the case of cold rolled steel products in 2015, the US imposed an AD duty of 266% while the equivalent duty of the EU was 21,1%. Similarly, the US imposed an AD duty of 133% on steel rebars in 2012, while the EU imposed 22,5% of AD duty in 2016 (EU Commission, 2016a, p. 4). According to the EU Commission, the lesser-duty rule puts additional pressure on EU industries and workers and in the face of the new situation with the expiry of the subparagraph 15(a)(ii) of CAP should be abolished or limited (Kaszubska, 2017, p. 16).

To conclude, the main differences between the old and the new AD methodology legislation of the EU could be summarized in a following way. First of all, the new methodology is "country-neutral" and does not operate with the NME status anymore, which is significant in relation to the expired subparagraph 15(a)(ii) of CAP. Thus, the criteria set for establishing the market economy conditions are not similar to the ones that were used against NME countries and more importantly, it is not necessary to prove the existence of all the criteria anymore. The list is also not exhaustive. Another big difference is that the new methodology tries to take into account the social and environmental aspects of dumping. Moreover, the burden of proof shifted from the NME (China) exporters to the EU producers, even though the EU Commission will assist them in examination of the market conditions. The EU can also resort to international prices and benchmarks.

Nonetheless, the dumping calculation itself has not changed much (Shadikhodjaev, 2018, p. 895). Actually, based on the EU Commission calculations, if the previous NME AD duties had been arrived at by using this new methodology, they would have been only 3,86 percentage points lower on average (EU Commission, 2016b, p. 40). Tietje and Sacher concludes that : "[f]rom a political point of view, it seems that the EU attempted to find a similar way of essentially continuing its previous practice under the [surrogate country methodology]" (2018, p. 17; similar claim is made by Zhou, 2018a, p. 631; and Zhou and Nöel, 2019, pp. 418–20).

1.13 The comparison of the US and the EU regarding China's NME

Based on the discussion above, this section summarizes the main findings and compares the US and the EU as regards China's NME status in AD investigations. As mentioned above, the US continues to use the NME concept in its AD legislation and sets out six criteria that a country needs to fulfill in order to get the MES. The most often used AD method in investigations against an NME country is a construction-value approach. Country-wide AD duties are usually imposed on all imports of the dumped product.

The EU abolished the NME concept in its new AD legislation and its current AD legislation is country-neutral. If the EU concludes that a certain industry does not operate

on market principles, it can resort to specific AD methodologies. The most often AD method in investigations against such industries is the surrogate country final price comparison. Also, the comparison of the export price and international prices or benchmarks will probably be used in the future AD investigations. AD duties imposed by the EU are usually product or sector specific.

Although the treatment of China from the US and the EU is quite similar in many respects, there are some differences between them that it is worth to point out. First of all, even though both the US and the EU seem to adopt the "shift of burden of proof" interpretative view as regard Article 15 of CAP, the US did not amend its AD legislation while the EU did. As Kaszubska put it: "the deadline of 11 December meant that administering authorities in various countries had to choose either to preserve the status quo—i.e., continue disregarding Chinese prices while conducting anti-dumping investigations—or to adopt a new methodology" (2017, p. 12; see also Washington, 2018, p. 265). The US chose the first path, the EU the second.

The US criteria determining a MES differ from those of the EU, however, they can lead to similar results in reality since the sixth criterium of the US is "such other factors as the administering authority considers appropriate" and the EU offers a list of aspects to be assessed but this list is not exhaustive and can be changed in concrete investigations.

Another difference is in the choosing of the surrogate country for an AD investigation. The US considers the stage of economic development according to the World Bank data and from a list of countries with the similar level of economic development identifies those that manufacture products, which are similar to the products under the AD investigation. The US has recently identified countries, which can be used in AD investigations against China, such as Bulgaria, Ecuador, Romania, South Africa, Thailand and Mexico. The EU chooses the surrogate country in "a reasonable manner" and often its choice is based on the willingness of the producers to share their data about costs of production, prices and margins. In addition, if there are more countries available for serving as a surrogate for the AD investigation, the EU can take into account their social and environmental protection. The countries used as surrogates in AD investigations against China were Canada, South Africa, Turkey, India and the EU itself. From this we can conclude that the US is more restrictive in choosing the surrogate country for its AD investigations although it does not take into account the level of social and environmental protection.

The counting methods also differ. The US considers the factors of production and their amount in the product under investigation and then looks at the prices of these factors in a surrogate country and constructs the value on their basis. The EU simply compares the surrogate final prices to the export prices. Furthermore, the EU can also resort to international prices and benchmarks. One major difference in these approaches can be found in terms of possible effects of Chinese producers on world prices. If Chinese producers have a dominant role on the world market of the product under consideration

(perhaps due to subsidization or other state's interference), it is imaginable that the Chinese prices will depress prices on the world market (or in the surrogate country). This is less of a concern for the US, since it recalculates the prices on the basis of the factors of production, however, it can be important for the EU, which simply uses the final surrogate prices (Prusa, 2017, p. 633; EU Commission, 2016a, p. 2).

Another difference is in the determination of injury stemming from dumping. While the US considers the injury only connected to the domestic producers (competitors to the imported products), the EU also considers broad "union interests" and brings other producers and consumers to the consideration. Although this has not been used significantly in the past, it can have an impact. For instance, in 2015, when opening an interim review of duties on solar panels, "the Commission invoked the fact that excessively high antidumping duties could result in reduced competition among European producers and would therefore be against Community interests" (Bellora and Jean, 2016, p. 3).

Overall, the EU tends to apply lower and less AD duties against China than the US (Yalcin et al., 2016, pp. 22–6; Bellora and Jean, 2016, p. 4; Messerlin, 2004, p. 115). Considering the cases initiated between 2002 and 2016, the average US AD rate against China is 162% (maximum 430%) whereas the average EU AD rate is 43% (maximum 91%) (Bellora and Jean, 2016, p. 4). However, the available data are from the period when the EU lowered its duties in accordance with the lesser-duty rule and it remains to be seen if the rejection of this rule will have a significant impact on the size of its AD duties.

Finally, the case against the US at the WTO DSM did not proceed after two initial consultations, while the case against the EU proceeded to the panel establishment. Given the current context of the WTO DSM, both disputes remained unsolved. Table 28 summarizes the main differences.

It can be concluded that both the US and the EU enjoy a quite substantial degree of spontaneity in their AD investigations, especially in terms of China. As mentioned above, some authors even claim that the IAs can determine the comparable price to the export price as they want to and the rules guiding their decisions are perhaps informative at best. Moreover, the decision about market economy conditions made by the US and the EU is not based on any quantifiable indicators, which even further increases the element of arbitrariness of the decision process (Pan, 2015, p. 755).

Another important similarity between the US and the EU are the trade relations with China. Both have a significant trade deficit in trade of goods and a surplus in trade in services with China. Both have an overall trade deficit with China, which is bigger and more of a concern for the US. One aspect differs between the US and the EU in this sense, and that is the One Belt One Road infrastructure initiative, which may end up deepening the connections between China and the EU, as one of the roads of the initiative ends there and some EU member states (e.g. Italy, Hungary) have already expressed their interest in the initiative (Bendetto, 2019, p. 2).

	EU	US
NME concept	Abolished	Still in use
MES criteria	Non-exhaustive list; focus on industry and/or country	Six criteria; focus on country
Surrogate country requirements	"a reasonable manner"; takes into account also social and environmental protection	Similar economic development; significant producer of a similar product
Calculating methods	Comparison of export prices to final surrogate prices	Construction-value approach (factors of production from the NME producer + prices of such factors in a surrogate country)
Dumping injury may affect	Competing producers, other producers, consumers	Competing producers
Average AD rates	43%	162%
Maximum AD rates	91%	430%
Lesser duty rule	Applies; intends to limit/abolish	Does not apply

Table 28: Main Differences in AD Treatment of China between the EU and the US

Conclusion

The aim of this thesis was to analyze China's NME status. Based on the CIPE theoretical framework and methodology, I focused on several aspects of this status, specifically on 1) historical context of the NME status, 2) economic context 3) overall institutional and legal framework surrounding the NME status, 4) legal discourse and academic debate about the status, and 5) concrete practices of the US and the EU.

The first two chapters seek to answer the first research question that is "What does the China's NME status mean and what amount of trade does it affect?" As was presented, China's NME status is rather a technical term based on political calculations than an economic concept related to economic realities. Its main purpose is to enable other WTO members to use differential treatment against China in their AD investigations. More specifically, the NME status allows for disregarding Chinese prices in these investigations. It was included in CAP due to the US pressure on China during their bilateral negotiations about China's accession to the WTO and explicitly stated in subparagraph 15(a)(ii) of CAP. The current legal status of the NME status is unclear given the unresolved disputes at the WTO and differing interpretations of the expiration of subparagraph 15(a)(ii).

As for the amount of trade affected by the status, the available calculations are scarce and not really precise. There is a consensus about the inflationary nature of the NME status in AD investigations. According to the Bown's findings, the amount of Chinese trade affected could be somewhere between 10 to 100 billion US dollars, probably closer to the former. However, Bown does not take into account possible chilling effects and costs of AD investigations.

From the EU perspective, there are several studies that try to examine the effects of granting China MES or treating it as a normal market economy. According to the EU Commission, the abolishment of the NME methodology would reduce the AD duties by 30 percentage points, which would raise the targeted Chinese imports by 18–28% and caused a loss of 117 800 to 175 600 jobs in the EU in the long run. However, the EU institutions often refer to another study, according to which granting China MES would endanger between 1,7 million and 3,5 million (0,8% and 1,6% of the total, respectively) jobs in the EU and it would reduce the output of the EU by up to 228 billion EUR per year or differently it would lead to a 1–2% reduction of EU GDP. Different study concluded that changing China's status would boost China's exports to the EU by 3,9% to 5,3% in volume (13 billion EUR to 18 billion EUR). Factoring in the removal of the present chilling effect the imports boost might be 7,4% to 21% in volume (25 billion EUR to 72 billion EUR). Domestic output losses would be relatively small (up to 0,06% disregarding the chilling effect and 0,32% when taking the effect into account). However, the losses would be significant in absolute terms (3,9 billion EUR and 23 billion EUR, respectively). Notwithstanding, it should be

noted that all the available econometric studies are based on certain (strong) assumptions and their relevance should be critically reflected. Nonetheless, at least outlining the scope of the effects based on the best available data and rigor methodology can help us better understand what is at stake.

The third chapter seeks to answer the second research question that is "Which are the differing interpretations of China's NME status as regard the expiration of Article 15(a)(ii) of CAP?" and its subquestion "Which are the strong and weak aspects of these interpretations?". I identified four different interpretations of the expiration of subparagraph 15(a)(ii), namely the "magical deadline" view, the "urban myth that seems to have gone global" view, the "shift of burden of proof" view, and finally the "something remains" view. The first two views are binary opposite to each other; the first one argues that China should receive MES automatically after the expiration and the surrogate country methodology/NME methodology cannot be applied against China after the expiration. The second view claims the opposite. Both interpretations seem to fail to follow very important principles of international treaty interpretations, namely the effective treaty interpretation principle. The "shift of burden of proof" was adopted by the US and the EU as a response to the expiration of subparagraph 15(a)(ii). According to this view, the expiration simply means that from now on, the US, the EU and other WTO members have to prove that NME conditions prevail in Chinese industry/segment/overall economy in order to continue the use of the surrogate country methodology. This view is able to avoid many of the shortcomings of the first two views, however, the textual basis for it is nowhere to be found in CAP. In any case, I believe it represents a good compromise until an authoritative interpretation is available. The "something remains" view claims that CAP still provides a basis for differential treatment of China and China still bears the burden of proof. However, it remains considerably vague about the options that the IAs can use in their AD investigations.

The fourth chapter analyses two disputes that China brought to the WTO DSM against the US and the EU. This chapter seeks to answer the final question "How do the US and the EU treat China as an NME in their antidumping proceedings?" and its subquestion "How do they differ in their treatment?". As presented, the US continues to use the NME status in its AD legislation and sets out six criteria that a country needs to fulfill in order to get the MES. The most often used AD method in investigations against China is a construction-value approach, which basically means that the US considers the factors of production and their amount in the product under investigation and then looks at the prices of these factors in a surrogate country and constructs the value on their basis. Country-wide AD duties are usually imposed on all imports of the dumped product.

The EU abolished the NME concept in its new AD legislation and its current AD legislation is country-neutral. If the EU concludes that a certain industry does not operate on market principles, it can resort to specific AD methodologies. The most often used AD

method in investigations against such industries is the surrogate country final price comparison, which means that the EU simply compares final prices of the surrogate country with the export prices. Moreover, the comparison of the export price and international prices or benchmarks can be used. AD duties imposed by the EU are usually product or sector specific.

Although the treatment of China by the US and the EU in their AD investigations is quite similar, there are some differences analyzed above. Besides the already mentioned (the US continues to use the NME concept, the EU does not; differences in calculating methods), differences can be found in the way how surrogate countries are selected and which are selected the most (the US for the EU investigations, India for the US investigations), who can be injured by dumping activities of foreign companies (competing producers in the US investigations, competing producers together with other producers and consumers in the EU investigations) and the AD rates (average 43% for the EU, 162% for the US). More concrete analysis is presented in the respective chapters.

It may be suggested that since China withdrew its case against the EU and decided not to proceed with its case against the US, it is not relevant to spend time discussing this matter any more. However, the importance of China's NME status remains relevant as ever. Due to the ambiguity about the PMS notion in WTO documents, the NME methodology provided by CAP offers an effective way how the US, the EU and others may deal with cheap Chinese imports in the future. It is reasonable to suspect that sooner or later, the PMS notion will be clarified by the authorities in the WTO and the chances for a more restrictive legal interpretation are high. Furthermore, although we can only speculate about the reasons behind China's decision to withdraw its case against the EU, it is very likely that China will pursue it again once the Appellate Body revives its functionality (Zhou and Noël, 2019), given the discriminatory treatment it enables. If China wins this dispute, it could then ask for the right to retaliate with duties of its own. Having said that, China's NME status and its AD treatment still present a major point of departure among the WTO members and will remain highly relevant in the upcoming years. I think I do not exaggerate by saying that the impact of these issues on global economy, trade and international development will be determining. For these reasons, the analysis of the views on China's NME status seems to be more than relevant.

A question, which goes far beyond the scope of this analysis, is the position of China in the WTO and in the economic multilateral order in general. Since other WTO members can still treat China differently and – at least according to many authors – CAP still provides the basis for a discriminatory treatment of China within the WTO system, one can only speculate if China will remain silent about its position in the organization. We have already seen China's attempts to create a parallel institutional structure with institutions such as New Development Bank, Asian Infrastructure Investment Bank or Shanghai Cooperation Organization, and with projects and arrangements such as One Belt One Road Initiative or

Contingent Reserve Arrangement. Since the WTO faces numerous serious problems at the moment and there are voices concerned about the very future of the organization, it is imaginable that China will attempt to establish its own institutional framework for its needs in international trade be it on a regional or even on an international level. In addition, it remains to be seen how important the international trade will be for the future development of China since the expanding Chinese middle class will be able to create a sufficient demand for Chinese goods and services.

Appendix

1.14 Article 15 of China Accession Protocol

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 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.

1.15 Article VI GATT 1994 and Interpretative Note Ad Article VI from Annex I

Article VI

Anti-dumping and Countervailing Duties

1. The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry. For the purposes of this Article, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another

(a) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or,

(b) in the absence of such domestic price, is less than either

(i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or

(ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.

Due allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability.*

2. In order to offset or prevent dumping, a contracting party may levy on any dumped product an antidumping duty not greater in amount than the margin of dumping in respect of such product. For the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1.*

3. No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation, including any special subsidy to the transportation of a particular product. The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly, or indirectly, upon the manufacture, production or export of any merchandise.*

4. No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to anti-dumping or countervailing duty by reason of the exemption of such product from duties or taxes borne by the like product when destined for consumption in the country of origin or exportation, or by reason of the refund of such duties or taxes.

5. No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization.

6. (a) No contracting party shall levy any anti-dumping or countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping or subsidization, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry.

(b) The CONTRACTING PARTIES may waive the requirement of sub-paragraph (a) of this paragraph so as to permit a contracting party to levy an anti-dumping or countervailing duty on the importation of any product for the purpose of offsetting

dumping or subsidization which causes or threatens material injury to an industry in the territory of another contracting party exporting the product concerned to the territory of the importing contracting party. The CONTRACTING PARTIES shall waive the requirements of sub-paragraph (a) of this paragraph, so as to permit the levying of a countervailing duty, in cases in which they find that a subsidy is causing or threatening material injury to an industry in the territory of another contracting party exporting the product concerned to the territory of the importing contracting party.*

(c) In exceptional circumstances, however, where delay might cause damage which would be difficult to repair, a contracting party may levy a countervailing duty for the purpose referred to in sub-paragraph (b) of this paragraph without the prior approval of the CONTRACTING PARTIES; Provided that such action shall be reported immediately to the CONTRACTING PARTIES and that the countervailing duty shall be withdrawn promptly if the CONTRACTING PARTIES disapprove.

7. A system for the stabilization of the domestic price or of the return to domestic producers of a primary commodity, independently of the movements of export prices, which results at times in the sale of the commodity for export at a price lower than the comparable price charged for the like commodity to buyers in the domestic market, shall be presumed not to result in material injury within the meaning of paragraph 6 if it is determined by consultation among the contracting parties substantially interested in the commodity concerned that:

(a) the system has also resulted in the sale of the commodity for export at a price higher than the comparable price charged for the like commodity to buyers in the domestic market, and

(b) the system is so operated, either because of the effective regulation of production, or otherwise, as not to stimulate exports unduly or otherwise seriously prejudice the interests of other contracting parties.

Interpretative Note Ad Article VI from Annex I

Paragraph 1

1. Hidden dumping by associated houses (that is, the sale by an importer at a price below that corresponding to the price invoiced by an exporter with whom the importer is associated, and also below the price in the exporting country) constitutes a form of price dumping with respect to which the margin of dumping may be calculated on the basis of the price at which the goods are resold by the importer.

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.

Paragraphs 2 and 3

1. As in many other cases in customs administration, a contracting party may require reasonable security (bond or cash deposit) for the payment of anti-dumping or countervailing duty pending final determination of the facts in any case of suspected dumping or subsidization.

2. Multiple currency practices can in certain circumstances constitute a subsidy to exports which may be met by countervailing duties under paragraph 3 or can constitute a form of dumping by means of a partial depreciation of a country's currency which may be met by action under paragraph 2. By “multiple currency practices” is meant practices by governments or sanctioned by governments.

Paragraph 6 (b)

Waivers under the provisions of this sub-paragraph shall be granted only on application by the contracting party proposing to levy an anti-dumping or countervailing duty, as the case may be.

1.16 The Agreement on Implementation of Article VI of the GATT 1994 (Anti-Dumping Agreement, ADA), Article 2

Article 2

Determination of Dumping

2.1 For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

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

2.2.1 Sales of the like product in the domestic market of the exporting country or sales to a third country at prices below per unit (fixed and variable) costs of production plus administrative, selling and general costs may be treated as not being in the ordinary course of trade by reason of price and may be disregarded in determining normal value only if the authorities determine that such sales are made within an extended period of time in substantial quantities and are at prices which do not provide for the recovery of all costs within a reasonable period of time. If prices which are below per unit costs at the time of sale are above weighted average per unit costs for the period of investigation, such prices shall be considered to provide for recovery of costs within a reasonable period of time.

2.2.1.1 For the purpose of paragraph 2, 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 exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration. Authorities shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer in the course of the investigation provided that such allocations have been historically utilized by the exporter or producer, in particular in relation to establishing appropriate amortization and depreciation periods and allowances for capital expenditures and other development costs. Unless already reflected in the cost allocations under this sub paragraph, costs shall be adjusted appropriately for those nonrecurring items of cost which benefit future and/or current production, or for circumstances in which costs during the period of investigation are affected by startup operations.

2.2.2 For the purpose of paragraph 2, the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under

investigation. When such amounts cannot be determined on this basis, the amounts may be determined on the basis of:

(i) the actual amounts incurred and realized by the exporter or producer in question in respect of production and sales in the domestic market of the country of origin of the same general category of products;

(ii) the weighted average of the actual amounts incurred and realized by other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin;

(iii) any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin.

2.3 In cases where there is no export price or where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine.

2.4 A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability. In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.

2.4.1 When the comparison under paragraph 4 requires a conversion of currencies, such conversion should be made using the rate of exchange on the date of sale, provided that when a sale of foreign currency on forward markets is directly linked to the export sale involved, the rate of exchange in the forward sale shall be used. Fluctuations in exchange rates shall be ignored and in an investigation the authorities shall allow exporters at least 60 days to have adjusted their export prices to reflect sustained movements in exchange rates during the period of investigation.

2.4.2 Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction to transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average to weighted average or transaction to transaction comparison.

2.5 In the case where products are not imported directly from the country of origin but are exported to the importing Member from an intermediate country, the price at which the products are sold from the country of export to the importing Member shall normally be compared with the comparable price in the country of export. However, comparison may be made with the price in the country of origin, if, for example, the products are merely transshipped through the country of export, or such products are not produced in the country of export, or there is no comparable price for them in the country of export.

2.6 Throughout this Agreement the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

2.7 This Article is without prejudice to the second Supplementary Provision to paragraph 1 of Article VI in Annex I to GATT 1994.

1.17 Vienna Convention on the Law of Treaties, 1969, Articles 31 and 32

Article 31, GENERAL RULE OF INTERPRETATION

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32. SUPPLEMENTARY MEANS OF INTERPRETATION

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) Leaves the meaning ambiguous or obscure; or

(b) Leads to a result which is manifestly absurd or unreasonable.

Sources

Abbott, F. M. 1998. Reflection Paper on China in the World Trading System: Defining the Principles of Engagement, in Abbott, F. M. (ed.) *China in the World Trading System: Defining the Principles of Engagement*, Cambridge: Kluwer Law International, pp. 1–43.

Ahn, D. – Lee, J. 2016. Countervailing duty against China: Opening a Pandora's box in the wto system?, *Journal of International Economic Law* 14(2), pp. 329–68.

Baldwin, R. E. 2012. The Case for a Multilateral Trade Organization, in Narlikar, A. – Daunton, M. – Stern, R. M. (eds.) *The Oxford Handbook on the World Trade Organization*, New York: Oxford University Press, pp. 29–39.

Barshefsky, C. 2000. Hearing Before the Committee on Ways and Means, House of Representatives, available from: https://www.govinfo.gov/content/pkg/CHRG-106hhrg67129/html/CHRG-106hhrg67129.htm.

Barša, P. (ed.) 2009. *Dialog teorií: Filozofická dilemata výzkumu mezinárodních vztahů*, Praha: Slon.

BEA. 2020. *International Trade in Goods and Services* [online], available from: https://www.bea.gov/data/intl-trade-investment/international-trade-goods-and-services.

Beattie, A. 2020. The Perceived Dark Side of the WTO, *Investopedia* [online], available from: https://www.investopedia.com/articles/economics/dark-side-of-the-wto.asp.

Bellora, C. – Jean, S. 2016. Granting Market Economy Status to China in the EU: An Economic Impact Assessment, *CEPII Policy Brief* 11, pp. 1–16.

Benedetto, J. 2019. EU–China and U.S.–China Trade in Goods and Services, *U.S. International Trade Commission*.

Beshkar, M. – Chilton, A. S. 2016. Revisiting Procedure and Precedent in the WTO: An Analysis of US – Countervailing and Anti-Dumping Measures (China), *World Trade Review* 15(2), pp. 375–95.

Bhattasali, D. – Li, S. – Martin, W. (eds.) 2004. *China and the WTO: Accession, Policy Reform, and Poverty Reduction Strategies*, Washington: The International Bank for Reconstruction and Development/The World Bank.

Black, H. C. 2010. *Handbook on the Law of Judicial Precedents, Or, the Science of Case Law*, Michigan: Gale, Making of Modern Law.

Bown, C. P. 2016a. China's Market Economy Status and Antidumping: A $100 Billion, $10 Billion, or $1 Billion Dispute? Part 1, *Peterson Institute for International Economics* [online], available from: https://www.piie.com/blogs/trade-investment-policy-watch/chinas-market-economy-status-and-antidumping-100-billion-10.

Bown, C. P. 2016b. China's Market Economy Status and Antidumping: A $100 Billion, $10 Billion, or $1 Billion Dispute? Part 2, *Peterson Institute for International Economics*

[online], available from: https://www.piie.com/blogs/trade-investment-policy-watch/chinas-market-economy-status-and-antidumping-100-billion-10-0.

Brown, S. 2016. Is China Becoming a Market Economy Under World Trade Organization Rules?, in *The Pros and Cons of Granting China Market Economy Status*, Congressional Digest, pp. 21, 23.

Cafruny, A. et al. 2016. Introduction, in Cafruny, A. – Talani, L. – Martin, G. (eds.) *The Palgrave Handbook of Critical International Political Economy*, London: Palgrave Macmillan, pp. 1–6.

Changsoo, K. 1996. Terms of Endearment: The United States' China Policy and China's Accession to the World Trade Organization, *The Journal of East Asian Affairs* 10, pp. 74–100.

Cattaneo, O. and Braga, C. A. P. 2009. Everything You Always Wanted to Know about WTO Accession, *World Bank Policy Research Paper 5116*.

Cheng, S. 2016. Is China Becoming a Market Economy Under World Trade Organization Rules?, in *The Pros and Cons of Granting China Market Economy Status*, Congressional Digest, pp. 28, 30.

Cheong, C. – Yee, C.H. 2003. *Handbook of China's Accession and its Impacts*, Singapore: World Scientific Publishing.

Choukroune, L. 2012. China and the WTO Dispute Settlement System, *China Perspectives* 1, pp. 49–58.

De Kok, J. 2016. The Future of EU Trade Defence Investigations against Imports from China, *Journal of International Economic Law* 19, pp. 515–47.

Detlof, H. – Fridh, H. 2006. *The EU Treatment of Non-Market Economy Countries in Antidumping Proceedings*, Swedish National Board of Trade.

Egger, P. and Nelson, D. 2011. How bad is antidumping? Evidence from panel data, *Review of Economics and Statistics* 93(4), pp. 1374-1390.

Eglin, M. 1997. China's entry into the WTO with a little help from the EU, *International Affairs* 73, pp. 489–508.

Espa, I. – Levy, P. 2018. The Analogue Method Comes Unfastened – The Awkward Space between Market and Non-Market Economies in EC–Fasteners (Article 21.5), *World Trade Review* 17(2), pp. 313–34.

EU "Basic Regulation", available from: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016R1036&from=EN.

EU Commission. 2016a. *Towards a robust trade policy for the EU in the interest of jobs and growth*, available from: https://trade.ec.europa.eu/doclib/docs/2016/october/tradoc_155024.pdf.

EU Commission. 2016b. *Commission Staff Working Document: Impact Assessment*, available from: https://ec.europa.eu/transparency/regdoc/rep/10102/2016/EN/SWD-2016-370-F1-EN-MAIN-PART-1.PDF.

EU Commission. 2017a. *Commission welcomes agreement on new anti-dumping methodology* [online], available from: http://trade.ec.europa.eu/doclib/press/index.cfm?id=1735.

EU Commission. 2017b. *Commission Staff Working Document on Significant Distortions in the Economy of the People's Republic of China for the Purposes of Trade Defense Investigations*, available from: https://trade.ec.europa.eu/doclib/docs/2017/december/tradoc_156474.pdf.

EU. 2017. *First Written Submission to EU–Measures Related to Price Comparison Methodologies (DS516)*, available from: https://trade.ec.europa.eu/doclib/docs/2017/november/tradoc_156401.pdf.

EUROSTAT. 2019. *A third of EU trade is with the United States and China* [online], available from: https://ec.europa.eu/eurostat/documents/2995521/9678910/6-20032019-AP-EN.pdf.

EUROSTAT. 2020. *China–EU – international trade in goods statistics* [online], available from: https://ec.europa.eu/eurostat/statistics-explained/index.php/China-EU_-_international_trade_in_goods_statistics#EU-China_trade_by_type_of_goods.

EUROSTAT. not-dated. *Top 5 Partners in International Trade in Goods* [online], available from: https://ec.europa.eu/eurostat/web/international-trade-in-goods/visualisations.

Fang, D. 2018. EU – Price Comparison Methodologies (DS516): Interpretation of Section 15 of China's WTO Accession Protocol, in Bungenberg, M. et al. (eds.) *The Future of Trade Defense Instruments*, Springer, pp. 107–24.

Federal Register 25/6657. 1960. Available from: https://cdn.loc.gov/service/ll/fedreg/fr025/fr025136/fr025136.pdf.

Federal Register 27. 1962/8457. Available from: https://cdn.loc.gov/service/ll/fedreg/fr027/fr027164/fr027164.pdf.

Federal Register 27/6099. 1962. Available from: https://cdn.loc.gov/service/ll/fedreg/fr027/fr027125/fr027125.pdf.

Felbermayr, G. – Kohler, W. 2006. Does WTO Membership Make a Difference at the Extensive Margin of World Trade?, *CESifo Working Paper 1898*, pp. 1–33.

Felbermayr, G. – Kohler, W. 2010. Modelling the Extensive Margin of World Trade: New Evidence on GATT and WTO Membership, *The World Economy* 33(11), pp. 1430–1469.

Fojtíková, L. 2019. *Compliance Číny s WTO*, Praha: Wolters Kluwer.

GAO. 2006. *U.S.–China Trade: Eliminating Nonmarket Economy Methodology Would Lower Antidumping Duties for Some Chinese Companies*, United States Government Accountability Office.

GATT. 1950. *Summary Record of the Sixth Meeting*. GATT/CP5/SR6, available from: https://docs.wto.org/gattdocs/q/GG/GATTCP5/SR6.PDF.

GATT. 1971. *Summary Record of the First Meeting*. SR/27.1, available from: https://docs.wto.org/gattdocs/q/GG/SR/27-1.PDF.

GATT. 1986. *Minutes of Meeting Held in the Centre William Rappard on 15 July 1986*. C/M/201, available from: https://docs.wto.org/gattdocs/q/GG/C/M201.PDF.

Gatta, B. 2014. Between 'Automatic Market Economy Status' and 'Status Quo': A Commentary on 'Interpreting Paragraph 15 of China's Protocol of Accession', *Global Trade and Customs Journal* 9(4), pp. 165–72.

Gertler, J. L. 1998. The Process of China's Accession to the World Trade Organization, in Abbott, F. M. (ed.) *China in the World Trading System: Defining the Principles of Engagement*, Cambridge: Kluwer Law International, pp. 65–74.

Gertler, J. L. 2004. What China's Accession Is All About, in Bhattasali, D. – Li, S. – Martin, W. (eds.) *China and the WTO: Accession, Policy Reform, and Poverty Reduction Strategies*, Washington: The International Bank for Reconstruction and Development/The World Bank, pp. 21–8.

Gil-Pareja, S. – Llorca-Vivero, R. – Martínez-Serrano, J.A. 2016. A Re-Examination of the Effect of GATT/WTO on Trade, *Open Economic Review* 27, pp. 561–584.

Graafsma, F. – Kumashova, E. 2014. In re China's Protocol of Accession and the Anti-Dumping Agreement: Temporary Derogation or Permanent Modification?, *Global Trade and Customs Journal* 9(4), pp. 154–9.

Hufbauer, G. C. – Cimino-Isaacs, C. 2015. Looming US-China Trade Battles?: Market Economy Status (Part II), *Peterson Institute for International Economics* [online], available from: https://www.piie.com/blogs/trade-investment-policy-watch/looming-us-china-trade-battles-market-economy-status-part-ii.

Hufbauer, G. C. 2016. Is China Becoming a Market Economy Under World Trade Organization Rules?, in *The Pros and Cons of Granting China Market Economy Status*, Congressional Digest, pp. 24, 26, 28.

Hur, N. 2018. Historical and Strategic Concern over the US-China Trade War: Will They Be within the WTO?, *Journal of East Asia and International Law* 11(2), pp. 393–411.

IBA. 2010. *Anti-Dumping Investigations Against China in Latin America*, IBA Divisions Project Team.

Import Administration Policy Bulletin, number 04.1, available from: https://enforcement.trade.gov/policy/bull04-1.html.

Jackson, J. 1998. The Institutional Ramifications of China's Accession to the WTO, in Abbott, F. M. (ed.) *China in the World Trading System: Defining the Principles of Engagement*, Cambridge: Kluwer Law International, pp. 75–80.

Jäger, J. et al. 2016. Critical International Political Economy and Method, in Cafruny, A. – Talani, L. – Martin, G. (eds.) *The Palgrave Handbook of Critical International Political Economy*, London: Palgrave Macmillan, pp. 101–18.

Jinshan, L. 2007. Market Economy Status, in Crossick, S. – Reuter, E. (eds.) *China–EU: A Common Future*, Singapore: World Scientific, pp. 171–7.

Joshi, M. 2018. Shifting Sands: The Evolution and Future Course of U.S. Anti-dumping Law and Practice Against China and Vietnam, in Nedumpara, J. – Zhou, W. (eds.) *Non-market Economies in the Global Trading System: The Special Case of China*, Singapore: Springer, pp. 201–36.

Kaszubska, K. 2017. Rethinking China's Non-Market Economy Status Beyond 2016, *Observer Research Foundation Occasional Paper* 107, pp. 1–22.

Kaszubska, K. 2018. Double Remedy: Beyond the Non-market Economy Status, in Nedumpara, J. – Zhou, W. (eds.) *Non-market Economies in the Global Trading System: The Special Case of China*, Singapore: Springer, pp. 131–54.

Kelly, B. 2014. Market Economies and Concurrent Antidumping and Countervailing Duty Remedies, *Journal of International Economic Law* 17, pp. 105–23.

Lam, E. 2009. *China and the WTO: A Long March towards the Rule of Law*, Alphen aan den Rijn: Kluwer Law International.

Lardy, N. 2014. *Markets Over Mao: The Rise of Private Business in China*. Washington, DC: Peterson Institute for International Economics.

Lardy, N. 2018. *States Strike Back*. Washington, DC: Peterson Institute for International Economics.

Lee, J. 2016. China's Nonmarket Economy Treatment and U.S. Trade Remedy Actions, *RSIE Discussion Paper* 657.

Lee, M. – Park, D. – Saravia, A. 2017. Trade Effects of US Antidumping Actions against China, *Asian Economic Journal* 31(1), pp. 3–16.

Lu, M. – Jiao, S. 2019. Comments on The Status of China's Market Economy and Structural Reforms: The Issues Behind the U.S.–China Trade War, *Asian Economic Papers* 18(3), pp. 52–4.

Messerlin, P. 2004. China in the World Trade Organization: Antidumping and Safeguards, *The World Bank Economic Review* 18(1), pp. 105–30.

Milanovic, B. 2019. *Capitalism, alone*, Cambridge: The Belknap Press of Harvard University Press.

Miranda, J. 2014. Interpreting Paragraph 15 of China's Accession Protocol, *Global Trade & Customs Journal* 9(3), pp. 94–103.

Miranda, J. 2016. More on Why Granting China Market Economy Status After December 2016 Is Contingent upon Whether China Has in Fact Transitioned into a Market Economy, *Global Trade & Customs Journal* 11(5), pp. 244–50.

Miranda, J. 2018. How China Did Not Transform into a Market Economy, in Nedumpara, J. – Zhou, W. (eds.) *Non-market Economies in the Global Trading System: The Special Case of China*, Singapore: Springer, pp. 65–98.

Mo, J. S. 1996. China, the World Trade Organization, and the Agreement on Trade-Related Investment Measures, *Journal of World Trade* 30, pp. 89–113.

Morrison, W. M. 2016. China–U.S. Trade Issues, in Simmons, P. (ed.) *Trade with China*, Nova Science Publishers, pp. 83–132.

Morrison, W. M. 2019. China's Status as a Nonmarket Economy (NME), *Congressional research center*.

Nedumpara, J. J. and Subramanian, A. 2018. China's Long March to Market Economy Status: An Analysis of China's WTO Protocol of Accession and Member Practices, in Nedumpara, J. – Zhou, W. (eds.) *Non-market Economies in the Global Trading System: The Special Case of China*, Singapore: Springer, pp. 13–64.

Nicely, M. R. 2014. Time to Eliminate Outdated Non-Market Economy Methodologies, *Global Trade & Customs Journal* 9(4), pp. 160–4.

Noel, S. 2016. Why the European Union Must Dump So-called "Non-market Economy" Methodologies and Adjustments in Its Anti-dumping Investigations, *Global Trade and Customs Journal* 11(7/8), pp. 296–305.

Overbeek, H. 2016. Globalizing China: A Critical Political Economy Perspective on China's Rise, in Cafruny, A. – Talani, L. – Martin, G. (eds.) *The Palgrave Handbook of Critical International Political Economy*, London: Palgrave Macmillan, pp. 309–30.

O'Connor, B. 2011. Market-economy status for China is not automatic, *VOX* [online], available from: https://voxeu.org/article/china-market-economy.

O'Connor, B. 2016a. The Myth of China and Market Economy Status in 2016, *World Trade Law* [online], available from: https://worldtradelaw.typepad.com/files/oconnorresponse.pdf.

O'Connor, B. 2016b. Is China Becoming a Market Economy Under World Trade Organization Rules?, in *The Pros and Cons of Granting China Market Economy Status*, Congressional Digest, pp. 25, 27, 29, 31.

Örgün, B. O. 2012. Strategic Trade Policy Versus Free Trade, *Procedia – Social and Behavioral Sciences* 58, pp. 1283–1292.

Pan, R. 2015. China's WTO Membership and the Non-Market Economy Status: discrimination and impediment to China's foreign trade, *Journal of Contemporary China* 24(94), pp. 742–57.

Piskorski, P. H. 2005. A Dangerous Discretionary "Duty": U.S. Antidumping Policy Toward China, *Hofstra Law Review* 34(2), pp. 595–633.

Price, A. H. et al. 2015. China Can Still Be Treated As a Nonmarket Economy after 2016, *Law360*, available from: https://perma.cc/4FDZ-YHE4.

Prusa, T. 2017. NMEs and the Double Remedy Problem, *World Trade Review* 16(4), pp. 619–34.

Prusa, T. and Skeath, S. 2001. The Economic and Strategic Motives for Antidumping Filings, *NBER Working Paper No. 8424*.

Puccio, L. 2015. *Granting Market Economy Status to China: An Analysis of WTO Law and of Selected WTO Members' Policy*, European Parliamentary Research Service.

Rao, W. 2013. China's Market Economy Status under WTO Antidumping Laws after 2016, *Tsinghua China Law Review* 5(151), pp. 151–68.

Rémond, M. 2007. The EU's refusal to grant China 'Market Economy Status' (MES), *Asia Europe Journal* 5, pp. 345–56.

Reed, I. A. 2011. *Interpretation and Social Knowledge: On the Use of Theory in the Human Sciences*, Chicago: The University of Chicago Press.

Rinaldi-Larribe, M.–J. et al. 2009. Dies China deserve the market economy status?, *Journal of Chinese Economic and Foreign Trade Studies* 2(2), pp. 110–20.

Rose, A. 2004. Do We Really Know that the WTO Increases Trade?, *The American Economic Review* 94(1), pp. 98–114.

Ruessmann, L. – Beck, J. 2014. 2016 and the Application of an NME Methodology to Chinese Producers in Anti-dumping Investigations, *Global Trade & Customs Journal* 9(10), pp. 457–63.

Rumbaugh, T. – Blancher, N. 2004. *China: International Trade and WTO Accession*, IMF Working Paper.

Sandkamp, A. – Yalcin, E. 2016. China's Market Economy Status and European Anti-Dumping Regulation, *Ifo Institute*, pp. 77–85.

Scott, R. E. – Jiang, X. 2015. Unilateral Grant of Market Economy Status to China Would Put Millions of EU Jobs at Risk, *Economic Policy Institute Briefing Paper* 407, pp. 1–23.

Sereghyová, J. 2003. *Vybrané institucionální a strukturální aspekty otevírání čínské ekonomiky*, Praha: Professional Publishing.

Shadikhodjaev, S. 2018. Non-Market Economies, Significant Market Distortions, and the 2017 EU Anti-Dumping Amendment, *Journal of International Economic Law* 21, pp. 885–905.

Shepardson, D. 2019. U.S. imposes new anti-dumping duties on Chinese mattresses, beer kegs, *Reuters* [online], available from: https://www.reuters.com/article/us-usa-trade-china-duties/u-s-imposes-new-anti-dumping-duties-on-chinese-mattresses-beer-kegs-idUSKCN1SZ2X1.

Snyder, F. 2001. The Origins of the "Nonmarket Economy": Ideas, Pluralism and Power in EC Antidumping Law about China, *European Law Journal* 7(4), pp. 369–434.

Stewart, T. P. et al. 2014. The Special Case of China: Why the Use of a Special Methodology Remains Applicable to China after 2016, *Global Trade and Customs Journal* 9(6), pp. 272–9.

Suse, A. 2017. Old Wine in a New Bottle: The EU's Response to the Expiry of Section 15(a)(ii) of China's WTO Protocol of Accession, *Journal of International Economic Law* 20, pp. 951–77.

Sutter, K. M. 2019. U.S.–China Trade and Economic Relations: Overview, *Congressional Research Service*, available from: https://fas.org/sgp/crs/row/IF11284.pdf.

Telep, J. – Lutz, R. 2018. China's Long Road to Market Economy Status, *Georgetown Journal of International Law* 49, pp. 693–708.

The Aluminum Association. 2016. Coalition Of U.S. Manufacturers Calls On Department Of Commerce To Fairly Assess China's Economic Status [online], available from: https://www.aluminum.org/news/coalition-us-manufacturers-calls-department-commerce-fairly-assess-china%e2%80%99s-economic-status.

Tietje, C. – Nowrot, K. 2011. Myth or Reality? China's Market Economy Status under WTO Anti-Dumping Law after 2016, *Transnational Economic Law Research Center*, Policy Paper 34.

Tietje, C. – Sacher, V. 2018. The New Anti-Dumping Methodology of the European Union: A Breach of WTO Law?, *Beiträge zum Transnationalen Wirtschaftsrecht*.

Tomz, M. – Goldstein, J. – Rivers, D. 2005. *Membership Has Its Privileges: The Impact of GATT on International Trade*, Stanford: Stanford University Center for International Development.

Tomz, M. – Goldstein, J. – Rivers, D. 2007. Do We Really Know that the WTO Increases Trade? Comment, *American Economic Review* 97(5), pp. 2005–2018.

UNTAD. 2006. *Training Module on the WTO Agreement on Anti-Dumping*, available from: https://unctad.org/en/Docs/ditctncd20046_en.pdf.

Urdinez, F. – Masiero, G. 2015. China and the WTO: Will the Market Economy Status Make Any Difference after 2016?, *The Chinese Economy* 48, pp. 155–72.

US Committee on Finance. 2017. *Hearing Before the Committee on Finance, First Session*, Washington: U.S. Government Publishing Office, available from: https://www.finance.senate.gov/imo/media/doc/30211.pdf.

US Tariff Act of 1930, available from: https://uscode.house.gov/view.xhtml?path=/prelim@title19/chapter4&edition=prelim.

US. 2017. *Third Party Submission to the EU–Measures Related to Price Comparison Methodologies (DS516)*, available from: https://ustr.gov/sites/default/files/enforcement/DS/US.3d.Pty.Su.pdf.

USCB. not-dated. *Trade in Goods with China Database* [online], available from: https://www.census.gov/foreign-trade/balance/c5700.html.

USCBC. 2019. *2019 State Export Report*, The US–China Business Council.

USDOC. 2017. China's Status as a Non-Market Economy, *United States Department of Commerce*, available from: https://enforcement.trade.gov/download/prc-nme-status/prc-nme-review-final-103017.pdf.

USTR. not-dated. *The People's Republic of China* [online], available from: https://ustr.gov/countries-regions/china-mongolia-taiwan/peoples-republic-china.

Vandenbussche, H. and Zanardi, M. 2010. The Chilling Trade Effects of Antidumping Proliferation, *European Economic Review* 54(6), pp. 760-777.

Vermulst, E. et al. 2016. Normal Value in Anti-Dumping Proceedings against China Post-2016: Are Some Animals Less Equal Than Others?, *Global Trade and Customs Journal* 11(5), pp. 212–28.

Washington, A. 2018. Not So Fast, China: Non-Market Economy Status is Not Necessary for the "Surrogate Country" Method, *Chicago Journal of International Law* 19(1), pp. 260–94.

Watson, K. W. 2014. Will Nonmarket Economy Methodology Go Quietly into the Night? U.S. Antidumping Policy toward China after 2016, *CATO Institute Policy Analysis* 763, pp. 1–17.

Watson, K. W. 2016. Is China Becoming a Market Economy Under World Trade Organization Rules?, in *The Pros and Cons of Granting China Market Economy Status*, Congressional Digest, pp. 16, 18, 20, 22, 24.

Weija, R. 2013. China's Market Economy Status under WTO Antidumping Law after 2016, *Tsinghua China Law Review* 5(2), pp. 151–68.

Wilson, C. 2016. Is China Becoming a Market Economy Under World Trade Organization Rules?, in *The Pros and Cons of Granting China Market Economy Status*, Congressional Digest, pp. 17, 19, 21.

Williams, A. 2018. What a Dump! The Current State of Antidumping Duty Calculations in Non-Market Economy Cases, *Emory International Law Review* 32, pp. 433–65.

Wong, J. 1996. China and the World Trade Organization, *Asian Economic Journal* 10, pp. 291–303.

World Bank. 2017. *Doing Business Report 2017*, World Bank Group.

World Bank. 2018. *Doing Business Report 2018*, World Bank Group.

World Bank. 2019. *Doing Business Report 2019*, World Bank Group.

World Bank. 2020. *Doing Business Report 2020*, World Bank Group.

WTO. 1996. *Working Party on the Accession of China*. WT/ACC/CHN2, available from: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=40242,40359,10426,29207,28804,13934,4128,27881,2239,26700&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True.

WTO. 2000. *Working Party on the Accession of China Communication* (WT/ACC/CHN2).

WTO. 2001. *Press release 243* [online], available from: https://www.wto.org/english/news_e/pres01_e/pr243_e.htm.

WTO. 2019. *China – Trade Profile* [online], available from: https://www.wto.org/english/res_e/statis_e/daily_update_e/trade_profiles/CN_e.pdf.

WTO. 2020a. *Dispute settlement* [online], available from: https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm.

WTO. 2020b. *Statistics on antidumping* [online], available from: https://www.wto.org/english/tratop_e/adp_e/adp_e.htm.

WTO. 2020c. *WTO Data Portal* [online), available from: https://timeseries.wto.org/.

Wu, C.-H. 2012. *WTO and the Greater China: Economic Integration and Dispute Resolution Account*, Leiden: Koninklijke Brill NV.

Wu, M. 2018. Foreword, in Nedumpara, J. – Zhou, W. (eds.) *Non-market Economies in the Global Trading System: The Special Case of China*, Singapore: Springer, pp. v–vii.

Xiangchen, Z. 2017. *Opening Statement by Ambassador Zhang Xiangchen as a part of the Oral Statement of China at the First Substantive Meeting of the Panel in the dispute: European Union – Measures Related to Price Comparison Methodologies (DS516)*.

Xu, S. – Tang, Y. 2009. European Union Antidumping Investigations Against China: Characteristics and Determinants, *The Chinese Economy* 42(6), pp. 66–80.

Yalcin, E. et al. 2016. *New Trade Rules for China? Opportunities and Threats for the EU*, Directorate-General for External Policies.

Yu, M. – Guan, J. 2017. The Non-Market Economy Methodology Shall Be Terminated After 2016, *Global Trade & Customs Journal* 12(1), pp. 16–24.

Yu, M. 2019. The Status of China's Market Economy and Structural Reforms: The Issues Behind the U.S.–China Trade War, *Asian Economic Papers* 18(3), pp. 34–51.

Zalan, E. 2016. Thousands protest Chinese steel dumping, urge EU to act, *EUobserver* [online], available from: https://euobserver.com/eu-china/132268.

Zhenghao, L. 2016. Interpreting Paragraph 15 of China's Accession Protocol in Light of the Working Party Report, *Global Trade and Customs Journal* 11(5), pp. 229–37.

Zhou, W. – Noël, S. 2019. EU's New Anti-Dumping Methodology and the End of the Non-Market Economy Dispute?, *Global Trade and Customs Journal* 14(9), pp. 417–24.

Zhou, W. – Peng, D. 2018. EU – Price Comparison Methodologies (DS516): Challenging the Non-Market Economy Methodology in Light of the Negotiating History of Article 15 of China's WTO Accession Protocol, *Journal of World Trade* 52(3), pp. 505–34.

Zhou, W. – Percival, A. 2016. Debunking the Myth of 'Particular Market Situation' In WTO Antidumping Law, *Journal of International Economic Law* 19, pp. 863–92.

Zhou, W. 2017. China's Litigation on Non-Market Economy Treatment at the WTO: A Preliminary Assessment, *Chinese Journal of Comparative Law* 5(2), pp. 345–64.

Zhou, W. 2018a. Appellate Body Report on *EU–Biodiesel*: The Future of China's State Capitalism under the WTO Anti-Dumping Agreement, *World Trade Review* 17(4), pp. 609–33.

Zhou, W. 2018b. The Issue of 'Particular Market Situation' under WTO Anti-dumping Law, in Nedumpara, J. – Zhou, W. (eds.) *Non-market Economies in the Global Trading System: The Special Case of China*, Singapore: Springer, pp. 185–200.