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„Rationality and Legality of Non-market Economy Treatment in Antidumping Law - Novel perspectives on the changed legal environment“

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List of Abbreviations

AB	Appellate Body
AD	Anti-dumping
ADA	WTO Agreement on Implementation of Article VI of the GATT 1994 (WTO Anti-dumping Agreement)
ASEAN	Association of Southeast Asian Nations
CMEA	Council for Mutual Economic Assistance
COCOM	Coordinating Committee for Mutual Export Controls
COMECON	Council for Mutual Economic Assistance
CPTPP	Comprehensive and Progressive Agreement of Trans-Pacific Partnership
CVD	Countervailing Duty
DC	Developing Country
DOC	Department of Commerce
DSB	Dispute Settlement Body
DSM	Dispute Settlement Mechanism
DSU	WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding)
EC	European Community
ECOSOC	United Nations Economic and Social Council
ECSC	European Coal and Steel Community
EEC	European Economic Community
EU	European Union
FTA	Free Trade Agreement
GAAP	General Accepted Accounting Principles
GATT	General Agreement on Tariffs and Trade
GNI	Gross National Income
ILO	International Labor Organization
IMF	International Monetary Fund
ITO	International Trade Organization
ME	Market Economy
MES	Market Economy Status
MET	Market Economy Treatment
MFN	Most Favored Nation
NME	Non-market Economy
OCTG	Oil country tubular goods
OECD	Organization for Economic Cooperation and Development
OEEC	Organization for European Economic Cooperation
PRC	People’s Republic of China
SCM	Subsidies and Countervailing Measures
SG&A	Selling General and Administrative
SIMA	Special Import Measures Act

SIMR	Special Import Measures Regulations
SME	Small and Medium-sized Enterprise
SOE	State-Owned Enterprise
TPP	Trans-Pacific Partnership
UK	United Kingdom
UN	United Nations
US	United States
USMCA	United States-Mexico-Canada Agreement
USSR	Union of Soviet Socialist Republics
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

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Introduction

1. Background of the research

Recent years have witnessed constant controversy concerning China's status as a market or non-market economy in the WTO legal regime. This controversy was principally triggered by the expiry of Section 15(a)(ii) of China's accession protocol, provisions specifying China's special NME treatment commitments, on 11 December 2016. The market and non-market economy dichotomy gives people an intuitive impression that different market conditions in these two groups of economies have entailed considerably divergent international trade rules disciplining their respective trade practices and behaviors so as to level the global playing field. As an economic superpower, China's particular transitional economic regime is criticized to have unfairly inflicted great economic pressure and loss on other WTO Members. The change of its legal status from NME to ME is consequently deemed unwarranted.

International trade law experts, however, are clearly aware that distinguishing countries between market and non-market economies bears legal significance only in the realm of AD law, referring to the different methodologies applied for establishing normal value in AD investigations. ME status points to an exporting country's eligibility of having its own prices or costs being generally relied upon for determining normal value of its exports. NME status indicates an economy's general subjection to surrogate country methodologies, the use of external market economy values rather than its own, in establishing normal value of its exports. NMEs' own prices and costs are considered unreliable for establishing normal value because they are not freely determined by market forces but heavily distorted by considerable government intervention, not reflecting the genuine interaction between supply and demand. The use of surrogate country methodologies commonly leads to higher normal value, price comparison with which accordingly easily results in affirmative dumping determination and higher dumping margin. Only AD measures determined and imposed through this investigation approach are considered capable of providing sufficient defence against NME dumping.

A country's legal status as a market or non-market economy does not strictly correspond to the specific price comparison methodologies its producers or exporters actually receive in individual cases. NME exports can be applied with standard methodologies and ME exports can be subject to surrogate country methodologies as well on a case-specific basis as long as relevant terms and conditions, which are specified in individual countries' AD laws, are satisfied. The terminologies of ME treatment and NME treatment refer to the actual practices of basing normal value solely on an exporting country's own prices or costs or on some surrogate country values. NME treatment denotes the use of surrogate country benchmarks for establishing normal value on the account that significant government intervention in the exporting country's market has rendered its own benchmarks unreliable for price comparison regardless of whether the

exporting country *per se* has an NME status or not.

Countries have established their own multifarious legal rules and practices on NME treatment. Yet, for WTO Members, international AD law regulates how they should establish normal value of imports from other Members. International AD law comprises both general and special rules on normal value determination, the latter of which include special commitments provided by WTO Members, namely China, Vietnam and Tajikistan, concerning the establishment of normal value of their exports. In Section 15 of its accession protocol China committed itself to being directly treated as an NME in AD proceedings by other WTO Members. Thus, It can be subjected generally to surrogate country methodologies conditioned on agreed and specified terms and limits. Its commitments moreover embody an expiry clause, which sets the definitive and unconditional expiry of Section 15(a)(ii) of its accession protocol after 15 years from the date of its accession to the WTO. This expiry however aroused considerable controversy concerning China's graduation into market economy status, the termination of automatically applicable surrogate country methodologies regarding China, as the specified deadline approached. Different readings of both the expiry and the expired clauses are proposed. As the specified deadline already passed in 2016, WTO Members have reacted differently in response to the expiry based on their respective deliberation of the comprehensive interests involved against the changed political economic context. No unity is formed on this matter. The controversy moreover came to a real legal fight as China initiated two cases in the WTO, *DS515 US - measures related to price comparison methodologies* and *DS516 EU - measures related to price comparison methodologies*, immediately after the 2016 deadline challenging the US' and the EU's continuation of surrogate country methodologies regarding China respectively.

NME treatment has already been established and practiced for several decades. It is not, however, until recent years that it has been challenged on the international dispute settlement level, for instance in such cases as *DS473 EU - biodiesel (Argentina)* and *DS480 EU - biodiesel (Indonesia)*, both concerning the application of NME treatment to market economy imports. It was only with respect to China that a WTO Member's general legal status as an NME has been challenged for the first time in the WTO legal regime only. The controversy on terminating China's NME status actually further aroused widespread discussion and investigation of how to regulate trade distortive practices of Members transitioning to market economies in the multilateral trade legal regime. The overall sustainability of the current WTO rules system is called into question while proposals are being put forward on how to achieve its modernization.

2. Specific research questions

Confronting the background elaborated above, this thesis aims at investigating the rationality and legality of the practice of NME treatment so as to clarify its viability. Analysis of that practice will permit conclusions to be drawn and recommendations to be made possibly including proposals to consider abandoning this treatment in its entirety.

Being a normal value determination mechanism in AD, NME treatment is considered justifiable so as to prevent unfair trade from countries where governments intervene significantly

in market operations. Yet, the AD legal regime itself is barely justifiable if based on the "fairness" argument. Rather than levelling the global playing field, AD is operated more as a protectionist instrument. The justifiability of NME treatment, which is applied in a greatly discretionary and arbitrary manner, is questionable on any plausible rational ground.

In addition, currently great change has occurred in the international regime of AD rules substantiating NME treatment. A sound legal basis for NME treatment, Section 15(a)(ii) of China's accession protocol expired on 11 December 2016. Similar special NME treatment rules in Vietnam's and Tajikistan's accession legal documents, which are modelled on Chinese counterparts, will also expire in the new future. The continuation of NME treatment based on these Members' committed NME status would become even more controversial. Whiling Members have reacted differently to the expiry of special NME treatment rules in China's case, the EU in particular introduced a new approach, the "significant distortions" approach, for using surrogate country benchmarks, without labeling a specific country as an NME, to maintain the robustness of its AD regime against principally Chinese exports. WTO Members also maintain cost adjustment methodology to apply NME treatment to recognized market economies through reestablishing or adjusting unreasonable costs using surrogate country benchmarks. This remodelled NME treatment is being developed and increasingly used. Apart from investigating the rationality of NME treatment, the legality of NME treatment, including all its established and newly developed practices, against the changed legal background will also be analyzed.

3. Structure and content of the research

In order to clarify the rationality and legality of NME treatment, analysis is conducted in this research as follows:

Chapter 1 expounds economic justifications, both traditional and remodelled, for AD and presents arguments refuting these justifications so as to shed some light on the genuine relevance of AD for fairness in international trade.

Chapter 2 introduces the emergence of AD law and the historical development of international AD rules under the protectionist motive so as to reveal that international AD law is just a compromise reached among negotiators to trade protectionism and national AD mechanism, which is authorized and regulated by international AD law, accordingly plays principally a protectionist role.

Chapter 3 investigates the genesis and evolution of NME treatment in international and national AD law till the establishment of the WTO. It seeks to reveal the historical origins of and reasons for which this treatment was introduced into AD law and how it gradually evolved into an established mechanism of GATT contracting parties and how over time their increasing practical use of it in a way deviated from the original justification and legal authorization of it.

Chapter 4 analyzes WTO era NME treatment rules and practices, in particular China's, Vietnam's and Tajikistan's special NME treatment commitments and the US' and the EU's

considerably broadened NME treatment practices including their cost adjustment methodology, to demonstrate how this treatment has developed in practice to cater for importing countries' protectionist needs in the WTO era as well as to show the present day disarray in the application of NME treatment regarding predominantly but not exclusively transitional economies.

Chapter 5 investigates the effect of the expiry of Section 15(a)(ii) of China's accession protocol, which is a significant change of the international legal basis for NME treatment. It also explores the reaction to this expiry by main WTO Members, including in particular that of the EU through its introduction of a new "significant distortions" approach to the application of NME treatment. It aims to illustrate WTO Members' maintenance of NME treatment, though through different approaches, confronting the changed international legal basis of it and WTO Members' application of this treatment at their will to serve protectionist needs while scarcely taking into account the changed international legal authorization.

Chapter 6 examines whether NME treatment can be justified by general international AD rules apart from special NME treatment commitments so as to draw a conclusion on the legality of NME treatment in international AD law. It then proposes recommendations for the revision of the AD legal regime based on the conclusion regarding the rationality and legality of NME treatment. It also articulates some recommendations on how to improve the WTO legal regime as a whole to deal with government interventionism in the economy given the inappropriateness of AD in dealing with this matter.

4. Methodology

Concerning economic arguments for and against AD, research will be made by investigating prevailing contentions embodied in existing literature. A historical research methodology will then be employed to clarify the emergence and development of AD law under the protectionist motive as well as the genesis and evolvement of NME treatment. While conducting historical analysis, existing pertinent literature, comprising both books and journal articles, as well as relevant documents, including *inter alia* archives of relevant legislative proposals, legal texts and case materials, will be principally explored and studied. The WTO era NME treatment rules and practices can be adequately analyzed by investigating readily available international and national AD rules on NME treatment and pertinent case materials. The effect of the expiry of Section 15(a)(ii) of China's accession protocol will be clarified by comparing and contrasting divergent opinions and their respective supporting arguments expressed in articles and position papers in light of reading disputed provisions according to customary interpretation rules and based on pertinent DSB rulings. Major trading Members' reaction to the expiry will be investigated through the empirical methodology by exploring their domestic AD legislation on NME treatment, in particular pertinent variation, if any, in conjunction with other legal documents, such as legislative proposals, memoranda of understanding, administrative reports, and substantiating materials. Finally, the conformity of NME treatment with general international AD rules will be clarified by figuring out the correct interpretation of relevant general international AD rules on normal value determination in particular in light of past DSB adjudication.

5. Significance of the research

This research firstly seeks to reasonably and comprehensively examine the long argued and strongly claimed fairness justification for NME treatment and reveal the nefarious role this treatment plays in the real contemporary global trading environment. Through investigating various existing forms of NME treatment practices and their conformity with international AD rules, this research can also clearly and thoroughly clarify the legality of NME treatment in international trade law. It will not only answer the question regarding China's acquisition of market economy status, but also resolve the problem of the overall possibility of continuing NME treatment to WTO Members. Research in this regard benefits not only China, but also other transitional economies as well as market economies which are also targeted by NME treatment. The current research will clear up the equivocality of pertinent international AD rules, which gives considerable latitude for protectionist arguments, so as to make some contribution to rule of law in international economic governance. By figuring out the real implication and legality of NME treatment, it also helps people to find out the right direction and acting points of reforming the multilateral trade rules system confronting prevailing calls for modernizing the WTO legal regime to regulate trade distortive behaviors of governments.

Chapter 1: Economic Justifications for Antidumping

Jacob Viner, the first scholar to present a comprehensive and systematic theoretical treatise on dumping, has defined dumping as "price discrimination between national markets" in his monograph "Dumping - A problem in international trade".[1] The WTO AD Agreement defines dumping as the introduction of a product into the commerce of another country at less than its normal value.[2] Concerning the determination of dumping, it stipulates that a product is to be considered as being dumped 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".[3] In addition, Article 2.2 of the WTO AD agreement further provides that 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.[4] WTO rules therefore provide three means for the identification of dumping: price comparison with (1) domestic price, (2) export price to a third country, and (3) constructed value. These three approaches are not at the same footing with the latter two being alternatively applicable insofar as the first approach is not suitable. International trade law condemns dumping if it causes or threatens material injury to an established domestic industry or materially retards the establishment of a domestic industry.[5] Yet, international trade rules, *per se*, do not directly restrict the behavior of dumping, an act of private enterprises, but authorize and discipline the importing countries' application of AD measures. In economic terms, an importing country's adoption of AD measures is alleged to be justifiable on two counts: preventing international predatory pricing, and levelling the global playing field. But neither of them is capable of justifying AD in any plausible sense. AD measures based on the current international AD rules act principally as protectionist devices.

[1] Jacob Viner, *Dumping: A Problem in International Trade*, Sentry Press, New York, reprinted in 1966, p.3.
[2] Article 2.1, The 1994 WTO Anti-dumping Agreement.
[3] Ibid.
[4] Article 2.2, The 1994 WTO Anti-dumping Agreement.
[5] Article VI:1, GATT 1994.

1. Traditional economic justification - preventing international predatory pricing

AD initially was defended by the argument of preventing international predatory pricing, which is an anti-competitive behavior detrimental to competition and social welfare of the importing country.[6] Dumping can be exercises in the form of international predatory pricing, i.e. predatory dumping. While conducting predatory dumping, an enterprise undersells its products, setting prices at non-remunerative levels, long enough to drive existing rivals out of the market and deter new entrants from entering to acquire monopolistic status, and then charges supra competitive prices to recoup its short-term loss and to gain monopolistic profits. Predatory dumping is motivated by monopolistic profits in the long run. It excludes all sources of competition with the intention of eliminating more efficient competitors in a foreign market. Its later charge of inflated monopolistic prices prevents the increase of production efficiency and impairs consumer interests. Therefore, in economic terms, predatory dumping based on international predatory pricing is harmful and actionable. Non-predatory dumping conversely is normally considered as harmless in terms of competition policy since it benefits the importing country's economy by making consumption cheaper, though it may also adversely affect the competitive structure of the importing country.[7]

In reality, however, international predatory pricing is seldom, if ever, successful, and is quite irrational. International predatory pricing firstly is very costly since an enterprise needs to sell its products at non-remunerative levels for an uncertainly long period of time to acquire monopolistic status. It can be even more so since the predator normally has a higher and increasing market share.[8] Secondly, the acquisition of monopolistic position by predatory pricing is uncertain since the victims may well defend themselves and the probability of acquiring a monopolistic status may be determined by a number of factors.[9] Thirdly, a predator cannot recoup its loss in the predatory period and realize monopolistic profits by charging inflated prices for sure even if all existing rivals are eliminated since there is always threat of new entry or reentry of competitors once it raises its prices to normal or supra-competitive levels. The possibility of successful predatory pricing is even weaker when openness of the importing country allows for sufficient import competition, which is also a factor facilitating dumping, since inflated prices in the importing market would rapidly attract competition from exporters other than those who are dumping as long as the entry costs are not deterringly high. The logic of impossibility of recoupment actually is not a new one. As early as 1906, A.C. Pigou had pointed out that dumping would not be worth its while unless the dumper had got "a world-embracing monopoly", since otherwise the dumper would easily be prevented from reaping its reward by

[6] Jean Marc Leclerc, "Reforming Anti-dumping Law: Balancing the Interests of Consumers and Domestic Industries", *McGill Law Journal*, Vol.44, 1999, p.111.
[7] Yan Luo, *Anti-dumping in the WTO, the EU and China - The Rise of Legalization in the Trade Regime and its Consequences*, GB, Kluwer Law International, 2011, p.55.
[8] Gunnar Niels, "What is Antidumping Policy Really about?", *Journal of Economic Surveys*, Vol.14, No.4, 2000, p.476.
[9] Gabrielle Marceau, *Anti-dumping and Anti-trust Issues in Free-trade Areas*, Oxford University Press, 1994, p.13.

the presence of other foreign sellers.[10] True international predatory pricing is rarely attempted and even more rarely succeeds even without the imposition of any AD measures. The risk of supra-competitive pricing by the dumper is remote and it is simply an assumption that dumping would reduce competition on the importing market. Since predatory dumping rarely happens in practice, the argument of preventing international predatory pricing for justifying AD measures is implausible.

2. Rectification of traditional economic justification - levelling the global playing field

As the argument of preventing international predatory pricing quickly lost its credibility, AD was then justified principally by the fairness argument - preserving a level global playing field for the product concerned. Concerning non-predatory dumping, AD measures against them are highly questionable in economic terms since they increase prices of the imported goods and possibly also the goods produced domestically to the detriment of buyers' interests, either industrial users or final consumers. The cost of AD measures is normally considered as outweighing the benefit derived from them for the economy as a whole.[11] However, AD measures against this dumping are alleged to be justifiable on account of levelling the global playing field.

The conduct of dumping is pointed to presuppose the existence of two conditions: 1) market segregation, and 2) different elastic demands in separate markets.[12] Market segregation indicates the existence of separate markets. An exporter can charge different prices between domestic and export sales only when the two markets concerned are separated. Moreover, the separated home market normally has to be less accessible than the export market regarding the importation of the product concerned, thus the dumped exports will not be re-exported to the country of origin to level out the price difference and result in price arbitrage, which would negatively affect the dumper's domestic business. A freely accessible home market also allows for foreign competition which may depress prices in the market and thus frustrate the dumper's practice of maintaining higher prices in home market. The different elastic demands in separate markets likewise indicate lower elasticity in the home market and higher elasticity in the export market, i.e. the domestic market is less competitive compared with the export market. Therefore, an exporter tends to charge lower prices in export sales so as to increase sales volume while maintaining higher prices in domestic sales, since such a practice in international trade is more profitable. Overall, dumping presupposes the existence of a segregated less-competitive home market for the dumper. Its higher-priced domestic sales generate profits which cross-subsidize its dumped exports. The home market consequently forms a sanctuary market providing artificial advantage for the dumper. Owing to this artificial advantage, a dumper is able to compete with more efficient rivals in the export market to gain market share, increase economies of scale, and

[10] Jacob Viner, *Dumping: A Problem in International Trade*, supra note 1, p.120.
[11] Wolfgang Müller, Nicholas Khan, Tibor Scharf, *EC and WTO Anti-dumping Law - A Handbook,* 2nd edition, New York, Oxford University Press, 2009, p.6.
[12] Gabrielle Marceau, *Anti-dumping and Anti-trust Issues in Free-trade Areas*, supra note 9, p.12.

get higher chance of survival in economic recession. This is unfair to producers of the export country since they have no equal access to this sanctuary market. Though low-priced imports without predatory intent are not harmful to the importing country's general economy, they are detrimental to its specific domestic industry adversely affected by dumping. AD measures therefore are alleged to be justifiable for levelling the global playing field for the affected industry. The imposition of AD measures is also premised on material injury, or treat of material injury to a domestic industry, or material retardation of the establishment of a domestic industry caused by dumping.

In addition, a segregated sanctuary home market can form based on a series of factors, including both natural and unnatural ones.[13] But frequently, the main cause is some sort of government intervention or acquiescence which creates obstacles to trade or reduces competitiveness in the home market of the dumper. Moreover, countries like Japan, Korea, India and China are even pointed to once or still implement mercantilist policy, which tries to improve competitiveness of its domestic operators often with a global strategy by *inter alia* providing financial support or restricting import competition.[14] Dumping conducted under and/or as an integral part of the mercantilist strategy manifests vicious intent and the embodied unfairness calls for AD measure. Yet, it is worth mentioning that it is highly questionable if countries do have any incentive to apply such a dumping encouraging policy. This is because such a policy for one thing would reduce welfare of their own nationals for they are paying higher prices, for another place their domestic producers using higher-priced inputs at a cost disadvantage compared with foreign producers using dumped inputs when the dumped good is an intermediate product.[15]

Furthermore, some closely related legitimate concerns of the importing country are at risk if AD measures are not permitted under the fairness justification. Firstly, the adversely affected domestic industry of the importing country can be one of special significance which should not be substituted by importation. The iron and steel industry, for example, is considered to be a pillar industry for many industrial countries since it forms the basis of many industrial value chains and a robust industrial base is essential to economic growth, preservation of sustainable jobs and maintenance of international competitiveness.[16] The protection of this industry is therefore of considerable long-term interest to the importing country that substantiates the use of, *inter alia,* AD measures. Secondly, the injury caused by dumping to a domestic industry will lead to unemployment. Under today's economic conditions, it is unrealistic for the redundant workers to soon find equivalent jobs and job displacement may be particularly traumatic to the individuals and communities concerned in a rapidly-changed society.[17] Thirdly, AD measures act as an interface for countries with different economic or legal policies to conduct trade with each

[13] Wolfgang Müller, Nicholas Khan, Tibor Scharf, *EC and WTO Anti-dumping Law - A Handbook*, supra note 11, p.5.
[14] Ibid, p.7.
[15] Gunnar Niels, "What is Antidumping Policy Really about?", supra note 8, p.475.
[16] European Commission, *Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank - Steel: Preserving sustainable jobs and growth in Europe*, COM (2016) 155 final, Brussels, 16.3.2016, p.1.
[17] Susan Hutton, Michael Trebilcock, "An Empirical Study of the Application of Canadian Anti-dumping Laws: A Search for Normative Rationales", *Journal of World Trade*, Vol.24, No.3, 1990, p.123.

other.[18] There is a political need for these measures since hardly can a country gain public support for continuing trade liberalization without these measures while some other countries are maintaining higher tariff or non-tariff barriers and preserving a segregated sanctuary home market.[19] In particular, such a one-sided trade liberalization is at the expense of its own growth and employment. The best solution actually should be removing obstacles and market distortions operated or condoned by the dumper's home market to facilitate fair trade. But differences in national economic and legal policies are normal and to certain extent reasonable, and they can hardly be eliminated unless relevant international standards are enacted.[20] AD measures erecting or re-establishing trade barriers in the importing country therefore are considered to be a second-best choice.[21] They deprive a dumper's artificial trade advantage gained from sales in a closed sanctuary home market and offer a safety valve that facilitates international trade liberalization.

The fairness justification together with its economic, social and political dimension significance appears to be plausible. Refection of AD measures based on the current international AD norms, however, will reveal that this justification is only of face value. Permitted AD measures barely play the role of levelling the global playing field. First and foremost, in accordance with the current international AD law, AD measures can be imposed as long as the three prerequisites are satisfied, i.e. the existence of dumping, injury, and causal link between them. Dumping is to be determined by comparing export price with either domestic price, or export price to a third country, or constructed value.[22] Apart from price comparison, however, no further requirement is proposed concerning the determination of dumping. In particular, the root cause of dumping and the actual existence of a segregated sanctuary home market are not required to be investigated. That is to say, the alleged unfairness of dumping is not within an investigating authority's consideration. In reality, international price discrimination may be due to a series of factors, many of which are based on normal commercial considerations and on cost-efficiency free from artificial competitive advantage. For example, a producer may price its exports at prices lower than domestic prices when its goods are not well-known to foreign customers, its distribution channels are restricted only to some powerful international buyers in a foreign market, its transitional transportation cost is high enough to materially reduce its export sales, etc.[23] Confronting a different foreign market, in which "established incumbents" normally enjoy a built-in competitive advantage, it is reasonable for a producer to adjust prices of its products and to lower its profits to increase competitiveness. The critical point is that its lower priced exports do not necessarily have to be cross-subsidized by higher profits gained from sales in a segregated sanctuary home market. The producer's home market can be equally open to foreign competitors, allowing domestic and foreign producers to compete on a basically fair basis. It is

[18] Wolfgang Müller, Nicholas Khan, Tibor Scharf, *EC and WTO Anti-dumping Law - A Handbook,* supra note 11, p.9; WTO, Communication from the United States to the WTO Working Group on the Interaction between Trade and Competition Policy, WT/WGTC/W/88, 27.7.1988, p.2.

[19] Ibid; Gunnar Niels, "What is Antidumping Policy Really about?", supra note 8, p.469.

[20] Gabrielle Marceau, *Anti-dumping and Anti-trust Issues in Free-trade Areas*, supra note 9, p.16.

[21] Wolfgang Müller, Nicholas Khan, Tibor Scharf, *EC and WTO Anti-dumping Law - A Handbook,* supra note 11, p.7.

[22] Articles 2.1, 2.2, The 1994 WTO AD Agreement.

[23] Brink Lindsey, "The US Antidumping Law: Rhetoric versus Reality", *Trade policy Analysis*, No.7, 1999, p.13.

even pointed out that sometimes it is the importing country whose market is more closed.[24] A "dumper" can undercut its export sales prices simply due to its higher cost-efficiency, rather than its government's adoption of any distortive and protectionist policy. Furthermore, price comparison with export price to a third country market is even less able to reliably reveal the existence of unfairness. A third country market normally is not less accessible to producers allegedly being injured by dumped imports based on the MFN treatment imposed by WTO rules. If the country importing dumped products has concluded any freer regional trade agreement with a third country, market of this third country can even be more freely accessible to its producers than the dumpers, for example Canada and US when export price to either country is used as the benchmark to compare with export price to the other.[25] In other words, barely can a third country market be a segregated sanctuary market cross-subsidizing certain foreign dumpers. With respect to the constructed value approach, it could be seen that what it really measures is if export sales are being made below some baseline level of profitability, rather than if home market sales are made above any similar baseline and home market is protected from import competition to from a sanctuary market.[26] It is even pointed out that the constructed value methodology cannot show international price discrimination since price data are not used for one side of the comparison.[27] Consequently, none of the three methodologies provided in the current international AD law reliably reveal the existence of a sanctuary market unfairly cross-subsidizing dumping. Some rules concerning the determination of dumping conversely even directly conflict with the presumption of the existence of a segregated sanctuary market. For example, WTO rules set sales below costs within an extended period of time in substantial quantities and to significant extent as not in the ordinary course of trade which can be disregarded for price comparison.[28] But such sales condition exactly demonstrates the unlikely existence of any sales capable of cross-subsidizing dumping. Moreover, according to international AD law, low volume of domestic sales also results in the disregard of domestic price for establishing normal value. This situation actually also reveals that there is no viable sanctuary home market to provide war chest for undercutting sales abroad.

Secondly, apart from the absence of any mechanism genuinely investigating unfairness, international AD law as currently formulated fails to specify precise rules accurately measuring dumping. Conversely, it provides considerable discretionary margin allowing for national AD authorities' making of biased decision tilting to affirmative dumping determination and inflated dumping margin. Regarding the calculation of dumping, international AD law employs many ambiguous and subjective words and phrases, such as "comparable price", "in the ordinary course of trade", "a proper comparison", "an appropriate third country", "representative", "a reasonable amount", "due allowance", "fair comparison", and etc. Such wording enables WTO Members' enactment of vague discretionary national AD legal rules as well as complex and seemingly technical ones which support their national AD authorities' making of biased determination. Methodological quirks and biases can be used in many steps of an investigation. First, a national AD authority may manipulate for example the selection of a like product, an

[24] Ibid, p.12.
[25] Ibid, p.6.
[26] Ibid.
[27] Ibid.
[28] Article 2.2.1, The 1994 WTO Anti-dumping Agreement.

appropriate third country market, comparable price, and the determination of sales outside the ordinary course of trade to distort the calculation of dumping. Second, an investigating authority usually has to make adjustment before price comparison, including for price-related product differences and for sales conditions differences. This is because frequently the like product selected as the final match in an AD investigation is not identical to the exported one and conditions of sales in different markets are normally not the same. In the adjustment process, the investigating authority may also skew the calculation of dumping by asymmetrically adjusting the export and the comparison market sales. Third, an enterprise may make a great number of sales, prices of which fluctuate, during the period covered by the investigation. An investigating authority thus has to adopt an averaging method for price comparison. An overt distortive averaging approach is the notorious practice of "zeroing", which sets the export price exceeding normal value at zero but counts only the export price below normal value. The final aggregation based on zeroing is undeniably tilted toward affirmative dumping determination and inflated dumping margin. Moreover, it is also pointed out that if a weighted average-to-weighted average method is adopted for comparison, whenever relatively larger volume is purchased in the export market at the lower prices, the average export price will be lower than the average domestic price and dumping can be easily found even if identical prices are charged to all customers at all time.[29] In this case, affirmative dumping determinations are simply artifacts of an imperfect methodology. Fourth, an investigating authority's construction of normal value based on costs and profits embodies greater arbitrariness allowing for discriminatory determinations. And lastly, an investigating authority can actively skew the adoption of reliable information to distort the investigation result. Overall, AD investigation can be easily manipulated. An investigating authority can even conjure dumping out of thin air to punish a "dumper" that is actually not engaged in dumping behavior at all.

In conclusion, dumping as currently defined and evaluated is far away from the fairness justification. It covers each and every case of price differentiation, including normal competitive behavior and allows for methodological quirks and biases through which an investigating authority can fabricate the existence and the extent of price differentiation. Were AD measures counteract unfair practices, dumping *per se* would be actionable without requiring for the establishment of injury. There is sharp divergence between "AD rules' inner workings and AD measures' wholesome public imagine".[30] AD rules' convoluted technical complexities prevent people, except a few insiders and specialists, from understanding the reality underlying the fairness rhetoric.[31] The technical complexity can actually be effortlessly utilized by AD authorities to realize their trade protectionist aim. AD measures nowadays have become an easily-accessible non-tariff barrier. The cure, implementation of AD laws as an intermediate to promote trade liberalization, has turned out to be worse than the disease as AD measures are increasingly and frequently relied upon to restrict more efficient import competition. AD laws are commented as "incapable of distinguishing between unfair trade and normal healthy competition" and AD measures are "too often stifled in the name of fighting dumping, but in fact indulge in

[29] Brink Lindsey, Dan Ikenson, "Anti-dumping 101 - The Devilish Detail of 'Unfair Trade' Law", *Trade Policy Analysis*, No.20, 2002, p.10.
[30] Ibid, p.28.
[31] Ibid, p.1.

old-fashioned protectionism".[32] With AD's nature of a more effective trade protectionist vehicle being increasingly revealed, it is AD, rather than dumping, that has become one of the major concerns in international trade.[33] In fact, WTO rules never define dumping as unfair.[34] The historical development of AD rules can also reveal that the AD regime is hardly based on any reasonable economic justification, but established, maintained and spread simply for protectionist aims. Rather than bad draftsmanship resulting in methodological shortcomings, international AD rules as they currently stand have been formulated intentionally to serve protectionist aims.

[32] Ibid, p.29.

[33] Bernard Hoekman from the World Bank said if he's asked what's the rationale behind antidumping policy, the answer would be "it's all about protection". WTO Public Forum 15-17 September 2010, Session 36: Panel looks at the double-edge sword of anti-dumping actions, available at: https://www.wto.org/english/news_e/news10_e/pfor_pm_17sept10_e.htm#session36.

[34] WTO, Understanding the WTO: the agreements - Anti-dumping, subsidies, safeguards: contingencies, etc., available at: https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm.

Chapter 2: Historical Development of AD Law based on Protectionist Intent

Irrespective of the controversial economic rationales underlying AD, AD rules have developed from a unilateral trade policy to an international trade legal regime. They now have acquired a worldwide status "with incredible complex international rules and jurisprudence and a growing number of national laws".[35] Yet, examination of the history of AD law will reveal that AD rules are more a well-established "political construct" than a reasonably justified trade defence instrument against unfair trade.

1. The emergence of AD law as a unilateral trade policy

Compared with some newly developed international trade rules, AD rules have a much longer history reflecting pre-Word War II policies at national level. The first modern AD law was enacted in Canada in 1904 as part of the amendments to its Customs Tariff Act of 1897, though similar practices had already been used in the absence of relevant legislation in the late 19th century.[36] This law was enacted at the turning point of the century, which is featured of more international trade owing to industrial expansion and improved transportation, and the shifting balance of power amongst states.[37] Canada introduced AD law against this backdrop largely aiming to act against cheap US steel exports.[38] It purported to satisfy domestic manufacturers' demand for protection without increasing tariffs, which might have antagonized farmers.[39] According to the newly introduced AD law, an automatic AD duty could be imposed on the importation of a dumped product which equaled to the difference between the product's Canadian price and the price of similar goods in the exporting country.[40] There was no requirement for investigation into the exporter's intent as well as the injury caused to the importing country, and until 1969 Canadian AD provisions contained no injury test.[41]

Following Canada, a series of other countries enacted successively their own AD laws, New Zealand in 1905, Australia in 1906, south Africa in 1914, the US in 1916, and Japan in 1920.[42] These countries constitute the first batch of countries adopting AD law, and most of them had

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[35] Maurizio Zanardi, "Anti-dumping: what are the numbers to discuss at Doha?", *The World Economy*, Vol.27, 2004, p.403.

[36] Francis Snyder, *The EU, the WTO and China - Legal Pluralism and International Trade Regulation*, Hart Publishing, 2010, p.215; Dan Ciuriak "Anti-dumping at 100 years and Counting: A Canadian Perspective", Symposium: *A Centennial of Anti-Dumping Legislation and Implementation*, University of Michigan, Ann Arbor, March 12, 2004, p.1.

[37] John J. Brceló III, "A History of GATT Unfair Trade Remedy Law - Confusion of Purposes", *The World Economy*, Vol.14, 1991, p.311.

[38] Jacob Viner, *Dumping: A Problem in International Trade*, supra note 1, p.86.

[39] Ibid, p.193.

[40] Dan Ciuriak "Anti-dumping at 100 years and Counting: A Canadian Perspective", supra note 36, pp.1-2.

[41] Gabrielle Marceau, *Anti-dumping and Anti-trust Issues in Free-trade Areas*, supra note 9, p.8.

[42] Jacob Viner, *Dumping: A Problem in International Trade*, supra note 1, p.204-236.

enacted this kind of law to fight against low-priced imports from Germany.[43] Different from Canada's legislation, remarkably, the majority of these early AD laws followed the spirit of competition law of that time and addressed mainly concerns of monopolization. For example, the first US AD law enacted in 1916 was known officially as "Section 801 of the Revenue Act of 1916".[44] It was basically an antitrust statute which extended the 1914 Clayton Act's provisions on price discrimination to foreign trade.[45] It targeted international predatory dumping which priced products exporting to the US below their "actual market value".[46] The "actual market value" indicated prices in the principal markets of the country of production or of other foreign countries to which the products concerned were commonly exported.[47] The law required the proof of the exporter-importer's predatory intent and provided for treble damages.[48] The first US AD law has a strong feature of competition law. It is based on the concern that competing foreign producers might drive out domestic rivals by setting prices at unreasonably low level. This concern corresponded with the then economic situation that international trade of manufactured goods was concentrated among several large industrialized countries and tariff rates were still relatively high. There was insufficient import competition and international predatory pricing could be reasonably predicted.

Soon after the enactment of their first AD laws, Australia, New Zealand and the US promulgated new AD statutes in 1921, and the UK and Newfoundland also enacted their AD laws in the same year.[49] These AD laws provided for the levy of a special duty on imported goods which were sold below their normal value provided that a domestic industry was injured by such imports.[50] The three basic requirements for taking AD measures were generally formed, which later constituted the basis of Article VI GATT 1947. Among these countries, the US's 1921 AD legislation is particularly noteworthy since it influenced directly the formation of international AD rules due to the US's influential political power at that time. The US adopted in 1921 its first specialized AD law, Title II of the Emergency Tariff Act 1921.[51] This law was enacted to wipe out the requirement for establishing predatory intent in the 1916 Act so as to facilitate considerably AD complaints.[52] It incorporated an injury test which required that dumped imports should be shown to actually or potentially injure the domestic industry, and provided for the imposition of AD duties equal to the margin of dumping.[53]

It can be seen from the pre-GATT development of national AD law that early AD laws, with

[43] Ibid, p.51.
[44] Ibid, p.242.
[45] John J. Brceló III, "A History of GATT Unfair Trade Remedy Law - Confusion of Purposes", supra note 37, p.314.
[46] Jacob Viner, *Dumping: A Problem in International Trade*, supra note 1, p.243.
[47] Francis Snyder, *The EU, the WTO and China - Legal Pluralism and International Trade Regulation*, supra note 36, p.216.
[48] Jeffrey L. Kessler, "The Anti-dumping Act of 1916: Antitrust Analogy or Anathema?", *Antitrust Law Journal*, Vol.56, No.2, 1987, p.485.
[49] Jacob Viner, *Dumping: A Problem in International Trade*, supra note 1, pp.216-227, 258.
[50] Wolfgang Müller, Nicholas Khan, Tibor Scharf, *EC and WTO Anti-dumping Law - A Handbook,* supra note 11, p.3.
[51] Francis Snyder, *The EU, the WTO and China - Legal Pluralism and International Trade Regulation*, supra note 36, p.217.
[52] Phillip Evans, James Walsh, *The EIU guide to the new GATT*, The Economist Intelligence Unit Limited, 1994, p.49.
[53] Gabrielle Marceau, *Anti-dumping and Anti-trust Issues in Free-trade Areas*, supra note 9, p.9.

the exception of the earliest Canadian one, were closely related to competition law. They were introduced to counteract principally predatory international price discrimination, which was relatively more likely at that time due to limited international competition and high trade barriers maintained by countries. National AD laws, however, soon abandoned the requirement for predatory intent since even at that time international predatory pricing rarely took place. At that time, a global playing field featured with free trade among countries was not even formed, then let alone AD's role of leveling the global playing field. The AD mechanism was established and maintained simply to protect domestic manufacturers against more competitive foreign ones, mostly from Germany and in Canada's case also from the US, in addition to tariffs. Compared with tariff, AD measures are less like to antagonize consumers due to its technical complexity. From the right beginning, AD is just a tool of protectionism.

2. The development of international AD rules

2.1 Article VI of the GATT 1947

After AD rules were established in national law, they found their way into the international arena in the ITO-GATT negotiations. In the negotiations, the US insisted in addressing unfair trade in the form of dumping and subsidization.[54] It in particular proposed that AD rules be incorporated into the GATT 1947 as a counterbalance of the high tariffs on imports in several exporting countries.[55] This proposal was accepted by the Contracting Parties and the then GATT AD rules largely reflected the US 1921 AD law.[56]

Specifically, AD rules were stipulated in Article VI of the GATT 1947. It consists of 7 paragraphs covering less than 3 pages. Paragraph 1 firstly defines dumping as the introduction of products into the commerce of another country at less than their normal value. It then declares that such practice is to be condemned if it causes or threatens material injury to an established domestic industry or materially retards the establishment of a domestic industry. Regarding normal value, which is to be compared with the product's export price for the determination of dumping, paragraph 1 provides for three benchmarks: 1) the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country; in the absence of a domestic price, 2) highest comparable price for the like product for export to any third country in the ordinary course of trade, or 3) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit. Paragraph 2 of Article VI sets AD duty as the remedy against dumping, which should not exceed the dumping margin. Paragraphs 3-7 further stipulate some principles concerning the levy of AD duties as well as countervailing duties. In general, Article VI of the GATT 1947 though is rather brief, arguably contains all the "bare bones" of AD law and establishes a rough framework of international AD

[54] Terence P. Stewart ed., *The GATT Uruguay Round: a negotiating history (1986-1992)*, Vol.2, Kluwer Law and Taxation Publisher, 1993, p.1405.
[55] Aubrey Silberston, "Anti-dumping Rules - Time for Change", *Journal of World Trade*, Vol.37, Issue 6, 2003, p.1078.
[56] Gunnar Niels, "What is Antidumping Policy Really about?", supra note 8, p.469.

rules for further development.[57] The key substantive aspects of AD established by this article have remained unchanged until nowadays. Though AD rules were introduced into the international trade law on the US's insistence to defend unfair trade, these rules had not been formulated to require for the investigation of the real existence of any unfairness. Rather, they were introduced simply to preserve AD measures as an effective mechanism in Contracting Parties' protectionist toolbox while tariff barriers were significantly dismantled.

2.2 The Kennedy round AD Code

The first AD Code was concluded during the Kennedy round of multilateral trade negotiations. Its conclusion was based on a several reasons. First and foremost, provisions of Article VI GATT 1947 were deemed too simple and ambiguous. A series of key substantive issues are not clarified, including in particular the lack of a well-defined "injury" caused by dumping, a working definition of "domestic industry", and a functional framework to assess the causal link. The lack of precision and specificity posed "a big concern" in practice and the Contracting Parties always implemented the rules according to their own understanding.[58] Article VI, moreover, provides no procedural rules for AD investigations. In the 1960s, as AD actions increased greatly, Contracting Parties called for negotiation of an AD Code embodying more precise rules to reduce discrepancies in national practices.[59] Second, Article VI GATT 1947 had only limited binding legal force in constraining Contracting Parties' national AD practices. The "grandfathering clause" in the Protocol of Provisional Application of the GATT specified that signatories were only obliged to comply with Article III to XXII to the fullest extent not inconsistent with existing legislation.[60] Article VI GATT 1947, though rather simple and ambiguous, is not fully legally binding to all GATT Contracting Parties. Third, with the decrease of tariff rates achieved through the first four rounds of trade negotiations, in the Kennedy round, reducing non-tariff barriers, including confining AD measures, gradually became the focus of further efforts for trade liberalization.[61] It is for all these reasons that AD was placed on the agenda of the Kennedy round trade negotiations with the aim of establishing a comprehensive set of biding AD rules which would increase predictability and reduce protectionist application. The result of these negotiations was the first AD Code under the auspices of the GATT – the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade.

The Kennedy round AD Code established a basic structure of an international AD agreement, which was then largely followed by its successors in 1979 and 1994. Its part 1 contains 12 articles covering subjects including: determination of dumping, determination of injury, definition of industry, initiation and subsequent investigation, evidence, price undertakings, imposition and collection of AD duties, duration of AD duties, provisional measures, retroactivity, and AD action

[57] John H. Jackson, William J. Davey, and Alan O. Sykes, *Legal Problems of International Economic Relations: Cases, Materials and Texts on the National and International Regulation of Transnational Economic Relations,* 4th edition, St. Paul: West Group, 2002, p.694.
[58] Terence P. Stewart ed., *The GATT Uruguay Round: a negotiating history (1986-1992)*, Vol.2, supra note 54, p.1409.
[59] Gabrielle Marceau, *Anti-dumping and Anti-trust Issues in Free-trade Areas*, supra note 9, p.9.
[60] Article 1(b), Protocol of Provisional Application of the General Agreement on Tariffs and Trade.
[61] Phillip Evans, James Walsh, *The EIU guide to the new GATT*, supra note 52, p.10; Terence P. Stewart ed, *The GATT Uruguay Round: a negotiating history* (1986-1992), Vol.2, supra note 54, p.1417.

on behalf of a third country. It contained a comprehensive set of AD rules, which clarified many substantive aspects of AD and set detailed procedural AD requirements. Substantive matters such as the determination of normal value, like product, export price, price comparison, material injury, and domestic industry were specified in greater details. The Kennedy round AD Code in particular required that the dumped imports should be demonstrably the principal cause of material injury, threat of material injury or material retardation.[62] Concerning procedural matters, the Code required especially that dumping and injury investigations be conducted simultaneously, provisional AD measures be taken only after affirmative findings of both dumping and injury were made.[63] Furthermore, the Kennedy round AD Code also established a permanent Committee on AD Practices, which became instrumental for the preparation of later AD negotiations of the Tokyo and Uruguay rounds.[64] According to Article 14 of the Code, every party of the Code were obligatory to take all necessary steps to ensure the full conformity of its laws, regulations and administrative procedures with the provisions of the AD Code.[65]

The majority of the improvements made, especially the substantive ones, are said to take account of concerns voiced principally by the EC.[66] The US, conversely, insisted mainly on things concerning greater transparency in AD proceedings, the effort of which led to the adoption of rules on, *inter alia*, hearings, disclosure of the results of investigation, and monitoring of signatories' AD legislation and practices.[67] The Kennedy round AD Code was accepted by 19 GATT Contracting Parties, with the EC counted separately from its Member States.[68] The US, however, did not formally adopt the Code since its congress in effect overruled the Code by enacting Title II of the Renegotiating Amendments Act of 1968, which placed US domestic AD law above the renegotiated international AD articles.[69] The US overshadowed the implementation of the Kennedy round AD Code largely due to its Tariff Commission's difficulties in the application of the Code's injury and causation standards, which were significantly higher than under the US law.[70] Nonetheless, the then AD laws of, inter alia, the EC, Canada and Australia, were enacted or modified to reflect the Kennedy round AD Code.[71] For the first time, major trading partners' demonstratively different AD legislation converged as the result of the development of international AD rules.

It is clear from the background of the negotiation of the Kennedy round AD Code and its

[62] Article 3(a), Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (1968).
[63] Articles 5(b), 10(a), ibid.
[64] Article 17, ibid.
[65] Article 14, ibid.
[66] Wolfgang Müller, Nicholas Khan, Tibor Scharf, *EC and WTO Anti-dumping Law - A Handbook,* supra note 11, p.14.
[67] Ibid.
[68] Phillip Evans, James Walsh, *The EIU guide to the new GATT*, supra note 52, p.51.
[69] The US Renegotiation Amendments Act of 1968 required the United States authorities to apply the Code only in so far as it was consistent with its 1921 AD Act, as amended. It also provided that nothing in the Code shall be construed to restrict the discretion of the United States Tariff Commission in performing its duties and functions under the 1921 AD Act. Johannes Friedrich Beseler, A.N. William, *Anti-dumping and Anti-subsidy Law: The European Communities*, Sweet & Maxwell, London, 1990, pp.11-12; Phillip Evans, James Walsh, *The EIU guide to the new GATT*, supra note 52, p.51.
[70] Johannes Friedrich Beseler, A.N. William, *Anti-dumping and Anti-subsidy Law: The European Communities*, ibid, pp.11-13.
[71] Terence P. Stewart ed, *The GATT Uruguay Round: a negotiating history (1986-1992)*, Vol.2, supra note 54, p.1431.

greatly enriched content that this AD Code was concluded to set stricter discipline for AD measures. AD measures were viewed as a non-tariff barrier in practice, the use of which needed to be constrained and the divergent national practices of which had to be unified. While formulating more precise international AD rules, both substantive and procedural rules were improved. However, the negotiation still failed to base international AD rules on any sound economic justification. Though the AD discipline was strengthened, AD measures it authorized were still just protectionist tools.

2.3 The Tokyo round AD Code

The Tokyo round trade negotiations had an ambitious agenda. Besides significant tariff reduction, this round had a major focus on regulating non-tariff measures, the work of which though started in the Kennedy round, became the main topic in the Tokyo round. Initially, AD was not considered a priority of the negotiation due to the resistance of some main trading parties based on their respective concerns. The US negotiators hesitated in undertaking further AD negotiations in view of the history of its congress's opposition to the Kennedy round AD Code.[72] Canada and Japan also failed to support AD negotiation since while Canada had managed to administer its AD law in a domestically acceptable manner without openly infringing the Kennedy round AD Code, Japan had traditionally managed to defend unfair imports by ways other than AD.[73] The EC, however, had a passion in negotiating AD rules, since rules of the Kennedy round AD Code, especially those relating to causality, circumscribed significantly its freedom to take AD measures against the backdrop of recession triggered by the oil crisis.[74] The injury and causation standards actually were hotly disputed, and given the political sensitivity of this issue, negotiating parties even worried that "a breakdown of negotiation in the AD regime could endanger the success of the entire round".[75] It was later under the auspices of the AD Committee, that the disputes finally led to the inclusion of AD into the negotiating agenda of the Tokyo round and the negotiating parties started to grapple with difficult AD issues which needed further clarification.[76] In addition, as a trade negotiation round focusing on non-tariff issues, the Tokyo round established a separate code on subsidies and countervailing measures. After the completion of this code, it was also agreed that the Kennedy round AD Code should be revised to make it parallel to the Subsidy Code.[77]

Based on this background, the Tokyo round AD Code firstly established new standards for the determination of injury and the proof of the causal link. According to this new code, dumped imports were no longer required to be the principal cause of injury. They just had to be

[72] Ibid, p.1435.
[73] Johannes Friedrich Beseler, A.N. William, *Anti-dumping and Anti-subsidy Law: The European Communities*, supra note 69, pp.13-14.
[74] Ibid.
[75] Wolfgang Müller, Nicholas Khan, Tibor Scharf, *EC and WTO Anti-dumping Law - A Handbook,* supra note 11, p.15; Terence P. Stewart ed, *The GATT Uruguay Round: a negotiating history (1986-1992)*, Vol.2, supra note 54, p.1435.
[76] Wolfgang Müller, Nicholas Khan, Tibor Scharf, *EC and WTO Anti-dumping Law - A Handbook,* ibid.
[77] John H. Jackson, William J. Davey, and Alan O. Sykes, *Legal Problems of International Economic Relations: Cases, Materials and Texts on the National and International Regulation of Transnational Economic Relations,* supra note 57, p.695.

objectively evaluated in isolation from other factors to be a cause of the injury, and injuries caused by other contributing factors must not be attributed to dumping.[78] Concerning the determination of injury, the Tokyo round AD Code specified three pertinent factors: (1) the volume of the dumped imports, (2) the effect of the dumped imports on prices in the domestic market for like products, and (3) the consequent impact of the dumped imports on domestic producers.[79] The Tokyo round AD Code, moreover, further improved procedural AD rules. It in particular introduced a time-limit for the completion of AD investigations,[80] elaborated evidence rules on confidential information,[81] and refined provisions on price undertaking.[82] In addition, the Tokyo round AD Code introduced the first dispute settlement provision into an AD code, i.e. article 15 of this code, which demonstrated the Contracting Parties' desire to strengthen the delegation of AD matters to a third-party adjudicator and make dispute settlement in this regime more "rule-oriented".[83]

The Tokyo round AD Code entered into force on 1 January 1980 and replaced the Kennedy round AD Code with respect to those who accepted it.[84] All signatories were under the obligation to bring their national laws, regulations and administrative procedures in line with the rules therein.[85] It can be seen from the development of international AD rules during this period that exploring the genuine effect of AD measure in defending against unfair trade is by no means at the core of improving international AD rules. Conversely, it is the effectiveness of these measures in protecting domestic industry that determines the modification of international AD rules. In a period of economic recession, countries tend to relax the substantive requirements for the application of AD measures. Nonetheless, in view of the protectionist usage of AD measures, procedural rules had been continuously tightened to limit their use and ensure procedural certainty. After the Tokyo round, AD rules became one of the most sophisticated international trade rules, which resulted in the distrust and hesitation of some countries, especially the US, to further strengthen the international AD discipline.[86] The issue of AD is pointed to have particular significance for the US and in the negotiation protection of its domestic AD law had been a central tenet of the US position.[87]

2.4 The WTO AD Agreement

As the Uruguay round trade negotiations first launched in 1986, AD was not expected to be a major subject since the comprehensive Tokyo round AD Code was considered to be a sound basis for international AD law by the majority of the signatories.[88] In the discussion within the

[78] Article 3.4, Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (1980).
[79] Article 3.1, ibid.
[80] Article 5.5, ibid.
[81] Article 6.3, ibid.
[82] Article 7, ibid.
[83] Yan Luo, *Anti-dumping in the WTO, the EU and China - The Rise of Legalization in the Trade Regime and its Consequences*, supra note 7, p.68.
[84] Article 16.5, The Tokyo round AD Code.
[85] Article 16.6, ibid.
[86] Yan Luo, *Anti-dumping in the WTO, the EU and China - The Rise of Legalization in the Trade Regime and its Consequences*, supra note 7, p.68.
[87] Ibid.
[88] Wolfgang Müller, Nicholas Khan, Tibor Scharf, *EC and WTO Anti-dumping Law - A Handbook,* supra note 11,

AD Committee, a number of questions nonetheless were found to be controversial.[89] Therefore, the Punta del Este Declaration (1986) launching the Uruguay round then added the Tokyo round agreements, which included the AD Code, to the negotiating agenda with the aim of achieving improvements, clarifications and, where appropriate, expansions.[90] AD however was still not explicitly listed as a separate subject for negotiation. The improvement of it was viewed to be only of a technical nature at that time.[91]

As the negotiation unfolded, AD surprisingly became a hotly contested subject and serious and divergent contentions emerged in this area. A number of countries conveyed their skeptical attitudes towards AD, which included Japan, Korea, India, Brazil, Mexico, Switzerland, the Nordic countries, as well as some EC Member Countries, in particular, the UK, Germany, and the Netherlands.[92] Some of these countries, though themselves were important AD users, began to voice their political concerns of AD measures as an excessively used protectionist instrument. They sought to strengthen the AD discipline and called for greater procedural uniformity and consistency in the application of AD measures.[93] Many of the countries commonly targeted by AD actions moreover pressed for changes in both the basic concepts in the Tokyo round AD Code and the practices that seemed to tilt the required price comparison so as to make the AD rules less susceptible of using for protectionist purpose.[94] The US, Australia, New Zealand, and other EC Member States however took an opposite position.[95] The US and the EC aimed at advancing the international AD legal regime by plugging the "loopholes" of the Tokyo round AD Code, in particular advocating the introduction of certain devices to prevent the circumvention of AD duties.[96] The divergence of the negotiating parties' positions was so huge that it led to such polarization where even the definition of some basic terms could not be agreed on and the mere existence of the entire international AD legal regime was called into question.[97] During the negotiation virtually none of the substantive questions could be resolved.[98] It was again mainly some procedural issues that enjoyed a fairly broad consensus, such as inserting a sunset review clause, strengthening transparency, and improving procedural justice.[99]

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p.16.

[89] Ibid.

[90] Part one, C "Subjects for Negotiation", subsection "MTN Agreements and Arrangements" of the Ministerial Declaration on the Uruguay Round (the Punta del Este Declaration) stipulates: "[n]egotiations shall aim to improve, clarify, or expand, as appropriate, Agreements and Arrangements negotiated in the Tokyo Round of Multilateral Negotiations".

[91] Wolfgang Müller, Nicholas Khan, Tibor Scharf, *EC and WTO Anti-dumping Law - A Handbook,* supra note 11, p.16.

[92] Ibid.

[93] Jeffrey S. Thomas, Michael A. Meyer, *The New Rules of Global Trade: A Guide to the World Trade Organization*, Carswell Thomson Professional Publishing, 1997, p.134.

[94] John H. Jackson, William J. Davey, and Alan O. Sykes, *Legal Problems of International Economic Relations: Cases, Materials and Texts on the National and International Regulation of Transnational Economic Relations,* supra note 57, p.695.

[95] Wolfgang Müller, Nicholas Khan, Tibor Scharf, *EC and WTO Anti-dumping Law - A Handbook,* supra note 11, p.16.

[96] John H. Jackson, William J. Davey, and Alan O. Sykes, *Legal Problems of International Economic Relations: Cases, Materials and Texts on the National and International Regulation of Transnational Economic Relations,* supra note 57, p.695.

[97] Wolfgang Müller, Nicholas Khan, Tibor Scharf, *EC and WTO Anti-dumping Law - A Handbook,* supra note 11, p.15; Jeffrey S. Thomas, Michael A. Meyer, *The New Rules of Global Trade: A Guide to the World Trade Organization*, supra note 93, p.134.

[98] Wolfgang Müller, Nicholas Khan, Tibor Scharf, *EC and WTO Anti-dumping Law - A Handbook,*ibid, p.16.

[99] Yan Luo, *Anti-dumping in the WTO, the EU and China - The Rise of Legalization in the Trade Regime and its*

Due to the lack of consensus on many of the major AD issues, the drafting of a text satisfactory to all appeared to be impossible during the early stages of the negotiations. AD, along with agriculture and services, became the most contentious major issues of the negotiation at that time.[100] Between 1991 and 1992, five drafts of a new AD code were issued with one of them drafted by the former GATT Director General Arthur Dunkel.[101] These drafts, however, were just "arbitrated" draft texts and none of them were made on the basis of negotiation and consensus.[102] The Dunkel Draft text was included in a Draft Final Act, which was distributed to all participants in late December 1991, hoping that it would be accepted by them in light of achievement in other areas.[103] However, some participants immediately found this draft text to be unacceptable, especially the US since it considered that two important issues were not sufficiently addressed by the draft: anti-circumvention and the so called "standard of review" applicable in AD disputes.[104] It is due to the later achievement in other negotiating areas and in order to exchange for concessions in other fields that the US accepted the final draft, which deleted the provisions on anti-circumvention but included provisions dealing with the standard of review.[105] Moreover, in December 1993, the breakthrough of the Uruguay round came in as a global compromise was finally reached regarding the major subjects, including agriculture, textile, service, intellectual property, and audio-visual products.[106] It is based on this background, the AD agreement was accepted at the last minute of the negotiation as an integral part of the single undertaking of the Uruguay round.[107]

The conclusion of the WTO AD Agreement clearly demonstrates that international AD rules are established based principally on political compromise rather than economic rationales. Compromise regarding AD rules in the Uruguay round in particular takes the overall WTO negotiations into account. The WTO AD Agreement, along with other covered agreements, is an integral part of the political balancing of countries. The WTO, as pointed out, is an institution of barter analogous to a private market where states "trade" their regulatory power towards international trade.[108] The text of the WTO AD Agreement is also a trade-off put together by negotiating parties with different agendas and therefore lacks consistency. In the Agreement, while procedural rules were further tightened, the substantive ones have remained largely unchanged. Therefore, some of the exporting countries' concerns were addressed while the importing countries' requirement for protecting domestic producers' interests was also satisfied. The Uruguay round though is a great success in achieving comprehensive agreements covering a

Consequences, supra note 7, p.70.

[100] Jeffrey S. Thomas, Michael A. Meyer, *The New Rules of Global Trade: A Guide to the World Trade Organization*, supra note 93, p.134.

[101] Wolfgang Müller, Nicholas Khan, Tibor Scharf, *EC and WTO Anti-dumping Law - A Handbook,* supra note 11, p.17.

[102] Jeffrey S. Thomas, Michael A. Meyer, *The New Rules of Global Trade: A Guide to the World Trade Organization*, supra note 93, p.135.

[103] Ibid.

[104] Ibid.

[105] Ibid.

[106] Wolfgang Müller, Nicholas Khan, Tibor Scharf, *EC and WTO Anti-dumping Law — A Handbook,* supra note 11, p.17.

[107] Ibid.

[108] Keith Steele, ed., *Anti-dumping under the WTO: A Comparative Review*, Kluwer Law International and International Bar Association, 1996, p.3.

wide variety of subjects, it failed to resolve the issue of increasing use of AD measures to harass legitimate trade.

3. Concluding remarks

It can be seen from the historical development retraced above that AD measures based on the current international AD legal regime can hardly be justified on economic grounds. Conclusion of international AD rules during different historical periods all failed to be based on deliberation of AD measures' genuine effect in defending against unfair international price discrimination. From the very beginning of Article VI GATT 1947 in the establishment of the multilateral trade rules system, international AD rules have been assigned the role of providing contracting parties with an international seal of approval for their use of AD measures in the general context of global trade liberalization to protect their domestic industries. The US insisted on the incorporation of AD rules authorizing the use of AD measures as a precondition for its negotiation of other open-market trade rules. This proposal was accepted by other negotiating parties. While improving international AD rules, though the nature of AD measures was frequently questioned, substantive AD rules did not significantly change and have always remained ambiguous and imprecise. Considerable discretionary margin is carved out so as to legalize diversified national practices. In some occasions, such as the change of the causal link from requiring dumping to be the principal cause of injury to a separate cause, substantive international AD rules were even relaxed to facilitate the use of AD measures. Furthermore, the WTO AD Agreement even established a special interpretation rule for AD matters, which requires that "where a panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations".[109] That is to say, international AD rules condone more divergent national AD practices. International AD rules embodying all these features are pointed to result in a series of biased consequences, including: (1) inflated dumping margin or even fabricated existence of dumping, (2) quasi presumption of injury, (3) remote or weak causal link.[110] In general, AD measures can easily be strategically utilized as restriction on import competition and protection of domestic production.[111] The conclusion of awfully technical international AD rules gives a licence to protectionist use of AD measures irrelevant of ensuring fairness.

International AD discipline has also been continuously reinforced to restrict contracting parties' use of AD measures. Dumping as a behavior of private enterprises, *per se*, is not regulated by international trade rules, which address only the actions of states. International AD rules only condemn injurious dumping but authorize, rather than oblige, importing countries' recourse to AD measures. Apart from authorization, international AD rules also discipline countries' use of AD measures. However, it is procedural AD rules that have been precisely formulated and continuously improved to confine national AD practices based on the easily

[109] Article 17.6(ii), The WTO AD Agreement.
[110] Yan Luo, *Anti-dumping in the WTO, the EU and China - The Rise of Legalization in the Trade Regime and its Consequences*, supra note 7, p.53.
[111] Ibid.

achieved agreement for due process. Substantive rules have remained imprecise to embrace divergent national practices. Compared with the simplicity of Article VI GATT 1947, succeeding specialized international AD agreements have progressively elaborated international AD rules. Yet without the refinement of substantive AD rules according to the genuine fairness rationale, the improvement of procedural ones cannot substantially prevent the abusive use of AD measures for protectionist aims. The evolution of international AD rules fails to strike a balance between providing contracting parties with an international seal of approval for their use of AD and regulating national AD practices to avoid its trade distortive effects.

Though international AD rules lack a coherent underlying philosophy towards AD and have feeble relevance to fairness, the conclusion of international AD rules in practice results in the proliferation of national AD laws and the increasing use of AD measures. In the pre-GATT era, only few countries equipped themselves with AD laws. As revealed, it is in parallel with the establishment and improvement of international AD rules that significant progress was made at national level to introduce national AD laws.[112] Moreover, AD measures initially were only occasionally taken by the first countries equipped with AD laws largely against each other. Until recently the most active AD users were still the US, Canada, Australia, and the EC.[113] Yet, in the wake of the improvement of international AD rules and the proliferation of national AD laws, AD measures increase significantly with in particular a number of newly industrialized and developing countries progressively adopting AD measures after the establishment of the WTO.[114] These phenomena can be partially explained by the following two points. Firstly, as the multilateral rounds trade negotiations, especially the Uruguay round, significantly dismantled other trade barriers, countries turned to and depended more and more on AD measures for trade protection. Under the regulation of international trade rules, acceding countries try to enact as many as possible the GATT/WTO authorized trade defence mechanisms to protect their domestic market. Secondly, since some countries already equipped themselves with AD laws and used AD measures to restrict imports, influenced exporting countries tend to also introduce the AD mechanism for retaliatory use against these countries. Consequently, given the unbalanced development of international AD rules, these rules in practice have activated countries' implementation of AD legislation and adoption of AD measures. Under the current AD legal regime, even normal commercial practice can potentially be "defended" against as being unfair under the title of "dumping". AD takes place of general import restriction as a more selective approach of trade protection. It moreover can be used not only as a shield to defend but also a sword to fight. As pointed out, AD has moved from "being a little used unilateral trade policy to a major WTO-approved weapon in the protectionist arsenal".[115] The strategic use of AD has rendered it currently the most litigious area of the WTO system, not only in terms of quantity but also quality.

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[112] Maurizio Zanardi, "Antidumping: A Problem in International Trade", Tilburg University, CentER Discussion Paper Series, No.2005-85, June 2005, pp.4-6.

[113] Ibid, p.9.

[114] Based on accumulative data, the top 10 frequent users of AD measures since the establishment of the WTO are India(656), United States(427), European Union(325), Brazil(251), Argentina(241), China(197), Turkey(189), Australia(151), Canada(145), and South Africa(137). Anti-dumping Measures: By Reporting Member 01/01/1995 - 31/12/2017, available at: https://www.wto.org/english/tratop_e/adp_e/AD_MeasuresByRepMem.pdf.

[115] William A. Kerr, Laura J. Loppacher, "Anti-dumping in the Doha Negotiations: Fairy Tales at the World Trade Organization", *Journal of World Trade*, Vol.38, Issue 2, 2004, p.211.

In conclusion, the development of international AD rules is a process mixed with a series of identifiable elements, such as multilateralism, trade liberalization, protectionism, interests trade-off, political compromise, and retaliatory motives, rather than based on the alleged single economic justification of fairness. Defending against unfair international price discrimination is even of the most trivial importance in this process. As was correctly observed, "the concept of AD on paper might be disarmingly simple, whereas it is anything but that".[116] AD measures are confirmed in international trade law most principally for protectionist aim. With AD measures being increasingly utilized, the AD legal regime has gradually evolved into "a popular legal game within which no one can fortunately have a way out" and "players are facing no-win situations in most occasions".[117]

The NME treatment in the AD legal regime yet is a mechanism targeting principally a specific group of countries featured with signification government intervention into the market. The application of this treatment has been continuously broadened ever since its emergence. As a part of the AD legal regime, this treatment is also hardly justifiable on the ground of fairness. Moreover, in contrast with its growing popularity, the NME treatment is loosing its legality in international trade law.

[116] Keith Steele, ed., *Anti-dumping under the WTO: A Comparative Review*, supra note 108, p.3.
[117] Raj Bhala, "New WTO Antidumping Precedents (Part One: The Dumping Margin Determination)", *Singapore Journal of International & Comparative Law*, Vol.6, 2002, pp.335-336.

Chapter 3: Pre-WTO Era Evolution of Non-market Economy Treatment Rules and Practices

Within the current AD legal regime, a most notable protectionist mechanism is the NME treatment, which is also considered to be one of the most egregious forms of AD abuse.[118] According to the NME treatment, trading countries can be artificially divided into two categories, "market economies" and "non-market economies", regarding which different methodologies are to be used for the determination of dumping and the calculation of dumping margin of their exports. For market economies, dumping calculation should be based on price comparison with its own prices or costs. However, for NMEs, dumping should be calculated by price comparison with some surrogate country benchmarks since their own prices and costs are viewed to be unreliable, not reflecting the genuine relation between supply and demand, due to prevailing government intervention in their overall economies. As the NME treatment develops, currently dumping of exports from countries not explicitly designated as NMEs are also sometimes calculated by using surrogate country values insofar as government intervention is present in the market of the exporting country that influences credibility of its own data for price comparison. For NMEs, exceptions have also been carved out which allow for AD authorities' use of standard methodologies, i.e. using their own data, for dumping calculation when market economy conditions are established to prevail with respect to relevant industries or specific producers. The term NME treatment is employed in this thesis in a broad sense to denote all cases of using surrogate country benchmarks for dumping calculation on account of the existence of government intervention in the market, regardless of whether a specific country is explicitly labeled an NME or not. The NME treatment in general has been continuously developed with its applicable scope being increasingly broadened as well, which evokes considerable criticism.

It needs to be pointed out that although the market and non-market economy dichotomy is repeatedly used in different contexts, it is of legal significance only in the field of AD and indicates merely the use of surrogate country benchmarks for dumping calculation. Concerning the NME treatment, international AD law however has provided only rather limited rules. It in particular gives no definition of NME even though this treatment is now frequently utilized in practice. Countries have developed their own national definition and criteria for their evaluation of NMEs, their own standards for the identification of the existence of market economy conditions in NMEs and the presence of government intervention influencing price comparability in market-oriented economies. Different countries moreover have adopted different approaches of using surrogate country values for price comparison in NME cases.

[118] K. William Watson, "It's Time to Dump Nonmarket Economy Treatment", *Free Trade Bulletin*, Herbert A. Stiefel Center for Trade Policy Studies, Cato Institute, No.65, March 9, 2016, p.3.

The application of the NME treatment is based on the argumentation that significant government intervention in NME cases have rendered prices and costs of the exporting country unreliable for establishing normal value of its exports, most frequently artificially low, and thus the dumping determined and dumping margin calculated based on these data will be insufficient for defending against unfair trade.[119] As analyzed before in the previous two chapters, the overall AD legal regime is hardly justifiable on the fairness account, but functions simply as a protectionist tool. As a part of the AD legal regime, the NME treatment also embodies a strong protectionist nature and incorporates great arbitrariness. Moreover, the divergent national practices of NME treatment have actually already gone beyond the boundary of international AD law, i.e. being applied inconsistently with international AD norms. In order to reveal specifically the irrationality and illegality of the NME treatment, this research firstly traces the genesis of this treatment as well as its evolvement before the establishment of the WTO. During this period, two threads run through the development of the NME treatment: the increasing legalization of international AD rules in general and the successive accession of socialist countries to the multilateral free trade legal regime. Political and economic concerns also intertwined in carrying forward the development of this treatment, underpinning its evolvement into an arbitrary protectionist tool against a certain group of countries which lacks sound international legal basis.

1. From the ill-fated ITO to the 1955 GATT Interpretative Note - rules and practices

The international society first formally negotiated the establishment of an international trade organization after World War II in 1946, at the first session of the preparatory committee to the UN conference on trade and employment. The germination of deliberation in this regard, however, dates back to the middle of the nineteenth century and extensive efforts actually had already been made during the war period.[120] Yet, however desirable the argumentation in favor of this initiative was, the establishment of an international trade organization did not go hand in hand with the expectation for international trade expansion. The ITO ultimately failed to be founded due to weakly balanced interests among countries.[121] The direct mark of this failure is acknowledged to be the fact that the US Truman administration announced in December 1950 that it would drop its effort to win ratification of the Havana Charter by the US Congress, who had rejected and derailed the approval of the Charter due to the claimed unholy alliance between supporters of protectionism and those of free trade.[122] Although the ITO was not established at that time, the effort regarding its establishment resulted in the creation of the first multilateral trade legal regime - the conclusion of the GATT 1947. This agreement initially just aimed to put the agreed tariff concessions, *inter alia*, achieved in the negotiation of the Havana

[119] David Kleimann, "The Vulnerability of EU Anti-Dumping Measures against China after December 11, 2016", European University Institute, Robert Schuman Centre for Advanced Studies, Global Governance Programme, EUI Working Paper RSCAS 2016/37, July 2016, p.3.
[120] Richard Toye, "The International Trade Organization" in Amrita Narlikar, Martin Daunton and Robert M. Stern eds., *The Oxford Handbook on the World Trade Organization*, Oxford University Press, 2012, pp.86-90.
[121] Ibid, pp.91-95.
[122] Ibid, pp.95-98.

Charter into effect and provisionally apply them until the set-up of the then promising ITO.[123] It was effectuated by a protocol on the provisional application of the GATT and came into force in 1948.[124] But as the international society later lost sight of the establishment of the ITO, the GATT 1947 was actually provisionally applied for nearly half a century until the establishment of the WTO in 1995. And it had played a significant role in promoting freer international trade in spite of its previously intended transitional nature. Besides, its great achievement in economic regard, the GATT, which was also a loose, informal diplomatic organization at that time, functioned pretty well and significantly contributed to the institutional development of the multilateral trade legal regime. It had provided an effective platform for subsequent multilateral trade negotiations and had paved the way for the eventual establishment of the WTO.

Specific to the NME treatment in AD law, however, the first international effort to establish multilateral trade rules did not pay any attention to this issue. As the two major legal documents created in this period, neither the Havana Charter nor the original text of the GATT 1947 provided any provisions concerning the application of different methodologies for dumping calculation according to differences in exporting countries' economic regimes. It was not until the 1955 Interpretative Note entered into force that the GATT 1947 first introduced relevant NME treatment rules into international trade law. These first binding rules were introduced primarily in response to Czechoslovakia's proposal to amend the rules on the determination of dumping, which was posited against the background that it had entered into the Soviet block and reformed accordingly its economic system. In a nutshell, the period from the negotiation of the Havana Charter to the draft of the 1955 Interpretative Note is an era when NME treatment rules grew from non-existence, though the specific term "non-market economy" was still not employed to indicate this treatment. The emergence of the NME treatment rules was deeply rooted in the then historical background with political and economic factors combined stimulating the creation of these rules.

1.1 The ITO and the GATT

1.1.1 International trade rules negotiated against the backdrop of the advent of the cold war

The negotiation of the ITO and incidentally the GATT was conducted and developed in a relatively complex international background. Apart from the severe economic plight of European countries, the growing political power of underdeveloped states, the historical background that most closely related to the genesis of the NME treatment rules was the ensuing advent of the Cold War after World War II.[125] The end of World War II though terminated the hot war between the Axis and the Allies, it soon started the period of the Cold War between the United States and

[123] Article 29: The relation of this Agreement to the Havana Charter, the General Agreement on Tariffs and Trade.
[124] Article 2, Protocol of Provisional Application of the General Agreement on Tariffs and Trade.
[125] Richard Toye, "The International Trade Organization", supra note 120, pp.91-95.

the Soviet Union.[126] The Cold War following World War II roughly divided the world between the two super powers. In this bipolar world, the Soviet bloc included socialist countries mainly in central and eastern Europe and, as the post-war decolonization proceeded, some others in Asia, Africa and Latin America, in alliance with the USSR.[127] The majority of these countries, however, were not socialist countries at the end of World War II, but joined the Soviet bloc subsequently. In economic terms, socialist countries in the Cold War, especially in the early period, commonly adopted a highly centralized planned economic policy, which included, but was not limited to, the following main characteristics: allocation of resources and production of goods was determined by government decision rather than market signals; prices were not decided by the interaction of supply and demand as the price mechanism did not operate as it was assumed to do in a free, competitive market economy; foreign trade was largely determined by state plans; and currencies were usually not convertible.[128] Moreover, international economic organizations, *inter alia*, established during that period also had relatively strong political overtones, with some of them incorporating solely capitalist countries, such as the Coordinating Committee for Multilateral Export Controls (COCOM), and the Organization for European Economic Cooperation (OEEC), while others welcoming only socialist ones, for instance the Council for Mutual Economic Assistance (COMECON, also CMEA). However, there were also some international economic organizations which aimed to include both socialist and capitalist countries, like the IMF and the World Bank Groups. The proposed ITO was also initially predicted to be an international economic organization incorporating both kinds of country, which aimed to promote overall international trade so as to contribute to a balanced and expanding world economy.[129] And accordingly a broad range of trade-related issues were incorporated into its negotiation agenda, which included those in the field of employment, economic reconstruction, commercial policy, business practices, commodity policy, and so on.[130]

The US and the Soviet Union, however, held divergent opinions regarding the establishment of the ITO. The US was a principal advocate of the ITO. In the Atlantic Charter issued in August 1941, the American government clearly and publicly stated its desire, together with the British government, "to bring about the fullest collaboration between all nations in the economic field, with the object of securing for all improved labour standards, economic advancement and social security".[131] In collaboration with the British government and following the work of the US interdepartmental committee between 1943 and 1945, the US made the initial proposal for the creation of the ITO in 1946.[132] It put forward a "suggested Charter for an International Trade Organization" at the first session of the United Nations Economic and Social Council (ECOSOC) in

[126] Carole K. Fink, *Cold War: An International History*, West View Press, 2014, p.54.
[127] Richard H. Immerman, Petra Goedde eds., *The Oxford Handbook of the Cold War*, Oxford University Press, 2016, pp.107-286.
[128] Kenneth W. Dam, *The GATT: Law and International Economic Organization*, University of Chicago Press, 1970, p.318; Edmond M. Ianni, "The International Treatment of State Trading", *Journal of World Trade Law*, Vol.16, Issue 6, 1982, p.482.
[129] Article 1, Havana Charter for an International Trade Organization.
[130] Ibid.
[131] "Joint declaration by the President of the United States of America and Mr. Winston Churchill, representing His Majesty's government in the United Kingdom known as the Atlantic Charter", Cmd.6321, 1941.
[132] William Diebold, "The end of the ITO", *Essays in International Finance*, No.16, International Finance Section of the Department of Economics and Social Institutions in Princeton University, October 1952, p.4.

1946, which served as the basis for later negotiations.[133] In the negotiation of the Charter, the US was also doubtlessly the leading power given its influential economic and political strength after Word War II. However, some other states' appeals did compel the US delegation to make certain concessions in the negotiations, which ultimately rendered the Charter unacceptable to American domestic opinion.[134] But the US's leading role in the whole negotiation process was indisputable and it was right the US's refusal to ratify the Charter that led to the ITO's ill fate. Due to the failure to establish the ITO, the US's post-war economic strategy in international trade was then realized mainly through the GATT, the negotiation of which was also under its influence and auspices. Substituting the ITO, the GATT became one of the three pillars of the post-war multilateral economic regime, which was often portrayed as a product of American hegemonic imposition, along with the IMF and the World Bank Groups.[135]

The Soviet Union, the only socialist country existing in the negotiation period, however, had very different geopolitical interests from those of the US and held divergent attitude towards the establishment of the ITO. Although it voted for the establishment of the ITO at the ECOSOC session, it actually was disinterested in liberalizing international trade.[136] Negotiation of the Charter of the ITO had undergone three main sessions, the London conference in 1946 (the first session of the preparatory committee to the UN conference on trade and employment), the Geneva conference in 1947 (the second session of the preparatory committee), and the Havana conference from November 1947 to March 1948 (the UN conference on trade and employment).[137] In the Geneva conference, the GATT was also negotiated with the aim of putting the achieved tariff concessions, *inter alia*, into effect. The Soviet Union declined to take part in all these charter talks that led to the ill-fated ITO and the parallel negotiation which resulted in the effective GATT, despite that it had left open the chance that it would do so until just a few weeks before the Havana conference.[138] Nonetheless, the Soviet Union's negative attitude and inactive behavior still influenced the deliberation of the Havana Charter as well as the negotiation of the GATT 1947.

1.1.2 The deliberation of rules on state trading economies

In the negotiation of international trade rules, special provisions associating with a country's particular economic regime did use to be incorporated into the draft charter of the ITO. These provisions, however, were not concerned with AD issues, but rather related to the obligation of importation, and were later deleted due to the Soviet Union's non-participation in the negotiation. To be specific, the suggested charter for the ITO which was proposed by the US

[133] Alexander Polouektov, "'The Non-market Economy' Issue in International Trade in the Context of WTO Accession", United Nations Conference on Trade and Development, UNTAD/DITC/TNCD/MISC.20, 9 October 2002, p.7.
[134] Richard Toye, "The International Trade Organization", supra note 120, pp.91-95.
[135] Mark Beeson, "The Rise of the 'Neocons' and the evolution of American Foreign Policy", Asian Research Center, Working Paper No.107, August 2004, p.5.
[136] Longyue Zhao, Yan Wang, "Trade Remedies and Non-market Economies: Economic Implications of the First US Countervailing Duty Case on China", Policy Research Working Paper, 4560, The World Bank, World Bank Institute Poverty Reduction & Economic Management Division, March 2008, p.13.
[137] Richard Toye, "The International Trade Organization", supra note 120, pp.91-95.
[138] Ibid, p.98.

contained a section on state trading, which had three articles including one entitled "Expansion of Trade by Complete State Monopolies of Import Trade".[139] This article proposed that countries with a state monopoly of foreign trade should negotiate with other member countries on "an arrangement under which, in conjunction with the granting of tariff concessions by such other Members, and in consideration of the other benefits of this Chapter, it shall undertake to import in the aggregate over a period products of other Members valued at not less than any amount to be agreed upon."[140] That is to say, a negotiable quantitative import obligation was proposed by the suggested charter to be imposed on state trading country members while without any reciprocal undertaking on the part of non-state trading country members except for tariff concessions. This methodology was pointed to originate from the 1935 US bilateral trade agreement with the Soviet Union, which provided that in exchange for most-favored-nation treatment the Soviet Union would accept an obligation to import products from the United States worth at least $30 million a year.[141] This stipulation is a genesis of NME issues in international trade law.

In the negotiation of the ITO charter, however, the article on state trading country members' import obligation was viewed as impractical.[142] And especially due to the Soviet Union's little interest in participating the negotiation, this article was subsequently deleted from the draft.[143] When the Final Act of the United Nations Conference on Trade and Employment was signed by the then 54 out of 56 attending countries (including the UN), the Havana Charter, which was included in the Final Act, did still contain a section on state trading issues, namely, Section D of Chapter IV "state trading and related matters". Articles regarding import obligation on state trading countries did not exist anymore. What was preserved was an article on "expansion of trade", which required a member that established, maintained or authorized, formally or in effect, a monopoly of the importation or exportation of any product to negotiate with other members having a substantial interest to reduce trade obstacles so as to expand international trade.[144] The revised text was considered as flexible to allow negotiation with state trading economies.[145] In the deliberation of GATT rules, it was also considered appropriate to reduce state trading provisions since the GATT was presumed only to be a transitional legal regime and it assumed "essentially private-enterprise economies".[146] Its negotiating parties considered state trading to be an aberration, and they presumed that GATT parties would not practice state trading on any significant scale.[147] GATT rules on state trading matters were drafted essentially with state

[139] "Report of the First Session of the Preparatory Committee of the United Nations Conference on Trade and Employment", London, 1946, p.59.
[140] Ibid.
[141] "The Prospect of Soviet-American Trade Relations", Bulletin No. 39 of the Institute of International Finance of New York University, August 27, 1945. A similar provision was contained in a trade agreement of 1927 between Latvia and the Soviet Union. See Alexander Polouektov, "'The Non-market Economy' Issue in International Trade in the Context of WTO Accession", supra note 133, p.8.
[142] J.E.S. Fawcett, "State Trading and International Organization", *Law and Contemporary Problems*, Vol.24, No.2, 1959, p.343.
[143] Kenneth W. Dam, *The GATT: Law and International Economic Organization*, supra note 128, p.316.
[144] Article 31: Expansion of Trade, Havana Charter for an International Trade Organization.
[145] GATT, *GATT Analytical Index: Guide to GATT law and practice*, updated 6th edition, Vol.1, Bernan Press, Geneva, WTO Lanham, Md, 1995, p.478.
[146] MM Kostecki, *East-West Trade and the GATT System*, the MacMillan Press, London, 1979, p.35.
[147] V.A. Seyid Muhammd, *The Legal Framework of World Trade*, Praeger, New York, 1958, p.227.

trading by market economies in mind.[148] And ultimately provision concerning import obligation on state trading economies was dropped from the final text of the GATT.

Specific to state trading, it refers to governmental conduct and control of foreign trade, however, a precise definition cannot be made since it is hard to determine how much governmental participation is required to qualify the trading activity as state, rather than private, trade.[149] State trading can be conducted through state-owned enterprises, private enterprises directly controlled by state, and private enterprises granted exclusive or special privileges by the state (enterprises indirectly controlled by state), though the third category is considered to be overinclusive.[150] State trading may concern only import or export, or cover both; it can be conducted narrowly, i.e. in a particular product-line or economic sector, or extensively involving the entire economy; it moreover can be operated exclusively in the form of a state trading monopoly, or concurrently with domestic private traders.[151] Regarding the widely applied appellation "state trading country" or "state trading economy", there is no specific meaning as well. However, it traditionally refers to countries or economies whose foreign trade is conducted exclusively or predominantly by governmentally owned or controlled enterprises.[152] State trading countries are often referred to as NME countries, though NME countries' trade is not necessarily conducted exclusively in the form of state trading, and traditionally the primary state trading countries are socialist countries such as the Soviet Union.[153] It is worth noting that in the post-war period both official documents and economic texts employed the term "state trade country" to address the non-market phenomenon due to the overwhelming role a group of socialist states played in their foreign trade.[154]

Nonetheless, the practices of state trading actually are adopted not only by countries flying the flag of communism but also by countries operating a capitalist system. In socialist countries, state trading may be linked with other elements of a strengthened state as a part of their plan for economic development under state auspices, especially accompanying state production for the achievement of a socialist and ultimately communist society.[155] For non-socialist countries, state trading practices are not thus totally refrained from being taken simply due to the clash of ideologies or the prevailing economic philosophy of "*laissez faire*" in their society. State trading is utilized by them during war period, in economic depression, and also under normal conditions for a series of reasons, such as increasing export/import competitiveness, seeking revenue, protecting public health and welfare, and safeguarding national security.[156] Non-socialist countries traditionally adopt state monopolies for trade in tobacco, liquor, salt, pharmaceuticals, and the matches; they also practice state trading especially in the trade of some agricultural and

[148] Roy Baban, "State trading and the GATT", *Journal of World Trade Law*, Vol.11, 1977, p.335.
[149] Edmond M. Ianni, "State Trading: Its Nature and International Treatment", *Northwestern Journal of International Law & Business*, Vol.5, Issue 1, 1983, p.48.
[150] Ibid.
[151] Ibid, p.49.
[152] Kenneth W. Dam, *The GATT: Law and International Economic Organization*, supra note 128, p.316.
[153] Edmond M. Ianni, "State Trading: Its Nature and International Treatment", supra note 149, p.49.
[154] Alexander Polouektov, "'The Non-market Economy' Issue in International Trade in the Context of WTO Accession", supra note 133, p.38.
[155] John N. Hazard, "State Trading in History and Theory", *Law and Contemporary Problems*, Vol.24, Spring 1959, p.245.
[156] Ibid, pp.243-255.

raw material commodities, though to a lesser extent.[157]

The proposed multilateral trade legal regime - ITO permitted state trading, but tried to regulate its practices in order to avoid the impairment and nullification of ITO members' trading rights by them, though the effect of this regulation is questionable. Apart from deficiencies in norms, the ITO is also pointed as inappropriate to address the issues of state trading due to conflict of ideas. The basic rationale underlying the ITO is depoliticizing international trade, removing political considerations significantly away from economics.[158] But the elements influencing state trading are unavoidably complex since when the state controls external economic relation, it must take the total interests of the state rather than just economic ones into account.[159] In overall, the negotiation of the ITO charter, as well as the GATT rules, was conducted under the circumstance that the Soviet Union, the then only sate trading country, attended neither of these negotiations. And these negotiations were conducted essentially with state trading market economies in mind, generally orienting towards free-enterprise market economies, which were considered to be the normal.

1.1.3 No special AD rules applied to NMEs

With respect to AD rules, they were incorporated into the proposed multilateral trade legal regime right from the beginning. However neither the draft charter of the ITO nor the original text of the GATT 1947 included any provisions concerning special dumping calculation methodologies to be applied to NMEs. The suggested charter for an ITO proposed by the US included a draft article on AD. This article was based on its 1921 AD Act, which also drew on previous and concurrent elements of the international AD repertoire. Following revision, this provision eventually became Article VI of the GATT 1947.[160] No national AD legislation at that time provided any special rules on dumping calculation for NMEs though confronting the Soviet Union's exports, which might not be considered as creating any significant economic threat to importing countries' domestic industries. Neither did the then proposed international AD rules, since they were drafted largely based on national AD norms. What's more, due to the market-based nature of the GATT negotiation stemming from the non-participation of NMEs, deliberation in this regard was further ignored. Specifically, Article VI provided for the imposition of AD and countervailing duties. It defined dumping as the introduction of products of one country into the commerce of another country at less than the normal value of the products.[161] And a product is 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 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

[157] Ibid.
[158] Roy Baban, "State trading and the GATT", supra note 148, p.335.
[159] Robert Loring Allen, "State Trading and Economic Warfare", *Law and Contemporary Problems*, Vol.24, 1959, p.265.
[160] John H. Jackson, *World Trade and the Law of GATT*, Bobbs-Merrill, New York, 1969, pp.403-406.
[161] Paragraph 1, Article VI: Anti-dumping and Countervailing Duties, General Agreement on Tariffs and Trade.

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.[162] No consideration was given to special treatment to NME exports. Nowadays, one may argue that the wording "comparable price", "in ordinary course of trade" may indicate the requirement for transactions in market economies. However, this is not the case if we trace back to the genesis of these languages since they were introduced not to exclude NME transactions. A more reasonable explanation would be that the negotiating parties just completely ignored NME treatment issues due to the insignificant economic threat from NME exports and the non-participation of NMEs in the negotiation. A *lacuna* thus was created in the rules system.

1.1.4 Section summary

In conclusion, the proposed ITO initially was intended to incorporate all kinds of states so as to promote as much international trade as possible and no requirement regarding a country's specific economic regime was put forward for its acquisition of the ITO membership. The ITO aimed to depoliticize international trade by requiring non-discrimination and facilitate international trade through gradual reduction of both tariff and non-tariff barriers. It promoted freer international trade. But this did not mean completely free trade. The GATT 1947, which was drafted initially only as a transitional substitute for the ITO, possessed the same objectives regarding international trade promotion and did not propose any requirement for a contracting party's domestic economic regime either. However, it cannot be overlooked that in practice only market economies attended the negotiation of both the ITO and the GATT. Their attention and negotiation effort unavoidably focused only on trade issues in market economies based on their understanding of market economy. The already existed NME phenomenon was underestimated or even totally ignored. Especially in the negotiation of the GATT, hardly had the negotiating parties given any consideration to NME issues due to its then supposed transitional nature. It might be inaccurate to define the GATT as concluded based on principles of free trade in free markets, as some works in the late 20th century always do.[163] This is because the GATT neither required all contracting parties' economies to be market-oriented nor proposed completely free international trade. But one should not be surprised to find that the GATT is portrayed as "designed by market economies for market economies".[164] The GATT's market-based nature stemmed from its drafting history rather than being clearly specified in legal norms, and this nature is also evident from the GATT's operation in early years. Some of the GATT rules were difficult to apply to countries that did not fit into the economic patterns previously conceived by GATT contracting parties due to the lack of any constructive discussion of the place of NMEs in the multilateral trade system. And it is very difficult to use the GATT as a framework for the economic integration of the state trading communist bloc into the world economy.[165] The GATT AD rules are right a representative example in this regard, the negotiation of which did not take NME exports into sufficient account. Problems arose when they were applied to NMEs and the

[162] Ibid.
[163] John H. Jackson, "State trading and Nonmarket Economies", *The International Lawyer*, Vol.23, 1989, p.891.
[164] Alexander Polouektov, "'The Non-market Economy' Issue in International Trade in the Context of WTO Accession", supra note 133, p.7.
[165] Edmond M. Ianni, "State Trading: Its Nature and International Treatment", supra note 149, p.60.

first case concerned with their application to Czechoslovakia.

1.2 Proposal from Czechoslovakia

The real first deliberation of introducing NME treatment rules into international trade law was brought about by Czechoslovakia's proposal in this regard, which was put forward based on the then particular historical context. In general economic regards, the most pertinent circumstance of that time was the increasing trade between Eastern European countries, on the one hand, and Western European countries and the United States, on the other, in the 1950s.[166] More specific political and economic circumstances regarding Czechoslovakia, which directly led to its proposal, however, were the fact that when the GATT was drafted, Czechoslovakia was a market economy country, but it later joined in the Soviet bloc and accordingly reformed its economic regime.[167] This situation did not affect its status as a GATT contracting party. All these cases made the determination of dumping regarding Czechoslovakia rather tricky and troublesome based on existing international AD rules. And ultimately the question of how to ensure price comparability in Czechoslovakia's case came to the fore in the mid-1950s.

The GATT held a Review Session of contracting parties each year. In the 1954-55 Review Session, Czechoslovakia proposed to the Review Working Party[168] that paragraph 1(b) Article VI of the GATT be amended to deal with the special problem of applying paragraph 1 for the determination of normal value to the case of an exporting country whose domestic prices were fixed by the State.[169] It held that in this case there were special difficulties due to the fact that "no comparison of export prices with prices in the domestic market of the exporting country was possible when such domestic prices were not established as a result of fair competition in that market but were fixed by the State".[170] In order to remove these difficulties, it proposed that paragraph 1(b) be redrafted to read as follows:

> *(b) in the absence of such domestic price* ***or when the price in the domestic market is fixed by the State, is less than either:***
>
> *(i)* ***the average comparable price for the like product for export by third countries to the importing country in question in the ordinary course of trade****, or,*
>
> *(ii)* ***in the absence of such price, the average comparable price for the like product for export by the exporting country in question to third countries in the ordinary course of trade****, or*

[166] MM Kostecki, *East-West Trade and the GATT System*, supra note 146, pp.10-11.
[167] Carole K. Fink, *Cold War: An International History*, supra note 126, p.68.
[168] The Czechoslovak Delegation firstly put forward its proposal to the Review Working Party II on Tariffs, Schedules and Customs Administration. *Article VI Proposals by the Czechoslovak Delegation,* Document W.9/86, 9 December 1954, Document W.9/86/Rev.1, 21 December 1954. Its proposal was then considered by the Review Working Party III on Barriers to Trade other than Restrictions or Tariffs, whose terms of reference included the consideration of proposals submitted with respect to: (a) subsidies, and countervailing and anti-dumping measures, and (b) state trading, surplus disposal, disposal of non-commercial stocks and the general exceptions to the Agreement. GATT, *Report of Review Working Party III on Barriers to Trade other than Restrictions or Tariffs*, Document L/334, 1 March 1955.
[169] *Article VI Proposals by the Czechoslovak Delegation,* Document W.9/86/Rev.1, 21 December 1954*.*
[170] Ibid.

(iii) 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 ... (rest unchanged).[171]

The precondition set by Czechoslovakia's proposal for rejecting an exporting country's domestic prices was the fact that the price in the domestic market was fixed by the State. This precondition seemed to constitute a plausible basis justifying the rejection since for free-enterprise market economies, which the predominant GATT contracting parties were, normal value should be a value formed on the basis of the cost of production and fair market competition, at least not a value determined by the government. Concerning alternative benchmarks, the proposal kept the account of the constructed value approach unchanged, but proposed substantial amendment to the other one - the employment of "the highest comparable price for the like product for export to any third country in the ordinary course of trade" for price comparison.

What Czechoslovakia proposed first was the average comparable price for the like product for export from third countries to the importing country in question. In the absence of such price, the AD authorities could then use the average comparable price for the like product for export by the exporting country in question to third countries. What it advocated was no longer a highest comparable export price to any third country, but an average comparable price, the calculation of which undeniably would significantly increase AD authorities' investigating burden. This average comparable price firstly should be computed based on exports from third countries to the importing country in question. Obviously, this is an analogue country methodology since it uses economic value from countries other than the exporting country in question instead for the determination of the normal value of its export. The surrogate benchmark moreover was an average value. Its implication actually is that a country's export should not be determined as being dumped into another country as long as its export price to that country is not below the average of other countries' comparable export prices to that country. Czechoslovakia might have proposed this approach under the consideration that this approach at least was better than comparing export price with its domestic price since the latter was much higher. In addition, for importing countries, this approach was also desirable and adoptable since products imported at a price above the average purchase price of like products of other origins were less likely to harm its domestic industry. However, it is highly questionable if a country's export transaction can be deemed as fairly made only if its price is above the average price of other competing export transactions. What's more, relying completely on surrogate countries' information, this approach actually ignores completely the comparative advantages of the exporting country in question. For those exporting countries what have overwhelming comparative advantages in producing certain products on the international level, obviously, they would not be willing to accept this methodology to be applied to their exports.

In the absence of an average comparable price as described above, Czechoslovakia proposed the use of the average comparable price for the like product for export by the exporting country in question to third countries. This approach resembles the one set by GATT Article VI paragraph

[171] Ibid.

1(b), except that it still required for the use of an average price of all relevant adequate transactions. This approach at least relies still on the concerned exporting country's own economic value. And obviously it aimed to reduce the probability of an affirmative AD decision or the amount of calculated dumping margin, which would otherwise be determined based on the use of a highest comparable export price to a third country. What is worth mentioning is that this approach was proposed only as a substitutive option to be used in the absence of a comparable average price for the like product for export from third countries to the importing country in question. That is to say, Czechoslovakia preferred the use of other countries' export prices even to the use of its own. It not only tried to obtain other countries' rejection of its domestic prices for dumping calculation, but also persuaded other AD authorities to subordinate its export prices to other countries'. It is egregious that the priority was given to a kind of analogue country methodology, which totally does not reflect the exporting country's own economy. This preference actually reveals Czechoslovakia's clear awareness of the insufficient international competitiveness of its products. And as analyzed before, this hierarchy was unlikely to receive any support from countries whose manufacturing industries are internationally competitive.

The constructed value approach, i.e. calculating normal value based on cost of production plus a reasonable addition, however, was available at any time in the absence of comparable domestic prices. This approach seems to be relatively more reasonable under this circumstance for the determination of normal value. But the operation of this methodology in practice is rather complex. And it can be conducted extremely arbitrarily, especially when no clear international rules were given to regulate the exercise of this methodology.

By tracing the genesis of NME treatment rules, we can find in surprise that these rules actually were initially proposed by an NME itself and the notorious analogue country methodology was also firstly advocated by it. Underlying the argumentation that domestic prices fixed by the exporting country should not be used for price comparison, Czechoslovakia put forward the above amendment requirement actually under the concern that the use of its artificially high domestic prices would harm its export interests. It advocated the use of a kind of analogue country methodology as described in its proposal also on the account of its merchandises' inferior international competitiveness. Even at that time, the justification underlying Czechoslovakia's proposal was highly questionable, let alone the insistence of NME treatment under the current dramatically changed circumstance where hardly do any countries directly fix prices in their domestic markets. What's more, nowadays products from countries labeled as NMEs have strong competitive power on the international market, not weak as before. It is these countries that do not want to be applied with the analogue country methodology any more, which deprives their comparative advantages, but the other importing countries persist the continuation of NME treatment to mitigate the economic threat from their exports.

It can be seen that NME treatment rules were proposed initially to deal with the problem of incomparable fixed domestic prices in NMEs. These prices at that time might be claimed as artificially high due to insufficient competition in the domestic markets of NMEs and be argued as inappropriate for price comparison. This proposition directly opposes to the currently prevalent argumentation in support of NME treatment. The latter argues that artificially low domestic

prices are caused in NMEs due to excessive government intervention into their economies. And therefore these prices should be disqualified from being utilized as benchmarks for price comparison. What Czechoslovakia worried about at that time was the overestimated normal value of its exports. It tried to protect its export sales by proposing amendment to relevant AD rules. Yet what the staunch NME treatment supporters nowadays insist is the underestimated normal value of products from those countries labeled as NMEs. And they try to protect the interests of their domestic producers by propagating the legitimacy of utilizing some special methodologies regarding NME exports.

The contention in support of underestimation is primarily based on the concern that during the period of some NME countries' later privatization activities many previously state-owned assets, especially real estate such as lands and factory buildings, were transferred at a discount or even freely to the then newly established private enterprises and a significant amount of former state-owned enterprises' debts were directly wrote off by the government.[172] This state policy and relevant practices are deemed to have substantially cut down those manufactures' production costs and accordingly reduced prices of their manufactured goods. Moreover, some transitional economies' governments may be implementing a mercantilist policy, which encourages export production and promotes export sales through various policy tools, including providing subsidies and bounties, for their enterprises to seize global market share and earn hard currency. The aggressive economic policies adopted to support domestic producers may have not only promoted export sales but also benefited domestic sales, for example when general production subsidies are granted to increase domestic producers' competitiveness. In addition, transitional economies may also provide significant financial support to prop up development of their infant or strategic industries. Prices in these industries normally do not reliably reflect the interaction between supply and demand, being considerably lower than what would be in a perfect market.

Despite all the aforementioned potential cases of underestimation, it is undeniably the concern of the economic threat from certain transitional economies' large-scale of cheap exports, such as China's on current days, that leads to the insistence of NME treatment in AD proceedings. Government intervention and market distortion can actually cause prices in NMEs to fluctuate both upwards and downwards, not definitely leading to artificially low domestic prices. If low domestic prices are caused, the producers actually are less likely to dump since they may not be able to compensate their export sales by profits gained from domestic sales regardless of the reason for low domestic prices, whether due to government intervention or not. This circumstance directly goes against the presumption underlying the exercise of dumping justifying the use of AD measures - the existence of a sanctuary home market cross-subsidizing low-priced export sales, in the case of NME exports. If low-priced NME exports are suspected to be induced by government conferred financial benefits, either in the form of depreciated lands or factories

[172] This concern can be observed in the EC AD legislation. One of the criteria specified in the EC AD legislation for granting individual market economy treatment to enterprises from NMEs is just "the production costs and financial situation of firms are not subject to significant distortions carried over from the former non-market economy system, in particular in relation to depreciation of assets, other write-offs and payment via compensation of debts". Council Regulation (EC) No.905/98 of 27 April 1998 amending Regulation (EC) No.384/96 on protection against dumped imports from countries not members of the European Community, OJ L 128, 30.04.1998, p.18.

transfer, debt write-offs or any other, it is the anti-subsidy mechanism that should be used. Once affirmative finding is made, countervailing measures can be applied. Government subsidies are employed by both market and non-market economies. Market economy countries by no means never subsidize their domestic industries whatever situation they are confronting. And nowadays hardly can we find out any country whose market is completely insulated from government intervention.

1.3 The 1955 GATT Interpretative Note

Confronting the special problem concerning price comparability revealed by Czechoslovakia, the Working Party III on Barriers other than Restrictions or Tariffs, however, did not recommend amendment to Article VI as Czechoslovakia proposed, but agreed on an additional interpretative note in 1955 to meet the case.[173] This 1955 Interpretative Note stated that:

> *B. The interpretative notes to Article VI shall be amended by the addition of the following text:*
> *Paragraph 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 all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purpose 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.*[174]

This Interpretative Note is one of the two amendments affecting Article VI GATT 1947 that were recommended in the 1954-1955 Working Party's report.[175] While it concerned only the addition of a provision to the interpretative notes of Article VI paragraph 1, the other concerned an amendment to the text of paragraph 6 of the Article *per se*.[176] Both amendments, however, were brought into effect by means of a Protocol Amending the Preamble and Parts II and III of the GATT.[177] This protocol entered into force on 7th October 1957 and accordingly the 1955 Interpretative Note became binding on GATT contacting parties that had signed this protocol also from that time on.[178]

Specifically, the 1955 Interpretative Note contained two main parts: (1) defining the precondition for deviation from the regular approach for dumping calculation; (2) providing the permission of this deviation for GATT contracting parties. Regarding the precondition for deviation, it can be seen that the requirement was rather strict, which required the allegedly dumping country to have a ***complete*** or ***substantially complete*** monopoly of its trade and ***all***

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[173] GATT, *Report of Review Working Party III on Barriers to Trade other than Restrictions or Tariffs*, supra note 168.
[174] Ibid, Annex I, Part I, paragraph B.
[175] Ibid, paragraph 3.
[176] Ibid.
[177] GATT, *GATT Analytical Index: Guide to GATT Law and Practice*, updated 6th edition, supra note 145, p.255; GATT Legal and Drafting Committee, *Draft Protocol Amending Part II and Part III of the General Agreement on Tariffs and Trade*, Document W.9/246, 6 March, 1955.
[178] GATT, *Protocol Amending the Preamble and Parts II and III Entry into Force*, Document L/704, 17 October 1957.

domestic prices were fixed by the state. Words indicating extremely high threshold, like "complete", "substantially complete", and "all", were used. Prerequisites regarding the exporting country's domestic pricing mechanism as well as external trade system both were imposed. Failing to meet these prerequisites would disable a GATT contracting party from disobeying the regular approach for determining dumping. The precondition set by this Note apparently is stricter than that formulated in Czechoslovakia's proposal. It concerned not only the exporting country's domestic pricing mechanism, prescribing that all its domestic prices were set by the state, but also the country's external trade system, requiring the country to have a complete or substantially complete monopoly of its trade. However, it did not give a clear reason for why these two factors in conjunction influenced price comparability, but simply stated that special difficulty might exist in determining price comparability under the prescribed circumstance. The account of state trading in the Interpretative Note actually pointed to a state trading economy. At that time, these economies were just countries which directly determined all prices in their domestic markets. Therefore, the seemingly separate two prerequisites, one concerning the exporting country's external economic policy the other internal, were actually intimately related. According to GATT Secretariat's study of AD legislation in 1957, two types of economy existed at that time: one was the economy based on the cost of production and the other was the state-trading economy.[179] In the latter economy, prices within the national economy were determined on other bases than the cost of production and "this made the application of the GATT anti-dumping provisions, which were by definition based on the prices of the product, difficult in the case of state-trading countries".[180]

The legal consequence - the permission of deviation from the regular approach for dumping calculation, conversely, was vaguely formulated. Ambiguous words and phrases were employed, such as "special difficulties", "may", "the possibility", "may not always", and "appropriate". The importing contracting parties were allowed to evaluate the particularity of the economic situation and determine freely whether to employ the permitted deviation. More important, actually no explicit and precise prescription was provided concerning how GATT contracting parties could deviate from the standard approach and what specific methodologies they could or should alternatively apply to calculate dumping. It seems that the 1955 Interpretative Note simply admitted the existence of the problem concerning price comparability in cases of imports from sate-trading countries, and provided the possibility of deviation from the regular approach. But what is relatively clear is only a strict comparison with domestic prices cannot be used once the precondition is satisfied and the investigating authority finds necessary. No further information was given.

Norms providing the possibility of deviation though were vaguely formulated, they had been heavily relied upon to justify multifarious national practices concerning the calculation of dumping for NME exports, which were developed after the entry into force of the 1955 Interpretative Note. The United States' then changing practices in this regard clearly demonstrate the considerable arbitrariness introduced by the Interpretative Note. The 1921 US AD Act did not deal with the issue of providing special methodologies for dumping calculation regarding NMEs

[179] GATT, *Anti-dumping and Countervailing Duties: Secretariat Analysis*, Document L/712, 23 October 1957, p.10.
[180] Ibid.

given the context that the Soviet Union was then the only centrally planned economy country and economic threat from its exports was insignificant.[181] The US Treasury simply used home market prices in NMEs as benchmarks for price comparison in its earliest AD investigations concerning NME exports.[182] Nonetheless, in 1960 when the US Treasury conducted AD investigation regarding *bicycles from Czechoslovakia*, it firstly deviated from its normal trajectory.[183] It determined that "the proper fair value comparison was between purchase price and either home market price or constructed value" and found that in this case purchase price was lower than either of them.[184] The Treasury in fact used both benchmarks, though the published decision did not explain what measure was employed for constructing the value.[185] This case is considered to be the first NME treatment case in the US,[186] in spite of the fact that it had no legal basis in US AD law at that time.[187] Later in the case of *Fur Felt Hoods, Bodies and Caps from Czechoslovakia*, the US Treasury again rejected domestic prices in Czechoslovakia and used the prices at which similar products were sold to the US from competing third countries instead.[188] The same methodology was then followed in the ensuing case - *Jalousie-Louvre-sized Sheet Glass from Czechoslovakia*.[189] The facts of this case, however, were different since in this case there were no sales in Czechoslovakia, either for home consumption or for exportation to countries other than the US.[190] Moreover, no information concerning the actual costs, expenses and profit in Czechoslovakia was available.[191] In the investigation, third countries' export prices to the US were utilized to serve as the basis to calculate the constructed value of Czechoslovakia's product.[192] Furthermore, in the 1963 *Portland Cement from Poland* case, the US Treasury for the first time stated its reason for rejecting home market prices in NMEs and concluded that such sales were not considered as having been made in the ordinary course of trade.[193] This decision explicitly conveyed the US Treasury's authoritative proposition that prices in an NME country's domestic market of a product concerned should not be used as the normal value for the determination of dumping.[194] The argumentation of "not in ordinary course of trade" moreover seemed to have laid foundation for the US Treasury's rejection of not only domestic prices, but

[181] Robert H. Lantz, "The Search for Consistency: Treatment of Nonmarket Economies in Transition under United States Anti-dumping and Countervailing Duty Laws", *American University Journal of International Law and Policy*, Vol.10, Issue 3, 1995, p.1002.

[182] Donald L. Cuneo, Charles B. Mauel, Jr, "Roadblock to Trade: The State-controlled Economy Issue in Anti-dumping Law Administration", *Fordham International Law Journal*, Vol.5, Issue 2, 1981, p.284.

[183] Department of the Treasury, *Bicycles from Czechoslovakia*, Determination of Sales at Less Than Fair Value, Fed. Reg. Vol.25, 1960, p.6657.

[184] Ibid.

[185] Donald L. Cuneo, Charles B. Mauel, Jr, "Roadblock to Trade: The State-controlled Economy Issue in Anti-dumping Law Administration", supra note 182, p.284.

[186] Gary N. Horlick N., Shannon S. Shuman, "Nonmarket Economy Trade and US Antidumping/Countervailing Duty Laws", *The International Lawyer, V*ol.18, No.4, 1984, p.808.

[187] Jan M. Smith, "US Trade Remedy Laws and Nonmarket Economies: A Legal Overview", Congressional Research Service Report for Congress, January 31, 2013, p.2.

[188] Department of the Treasury, *Fur Felt Hoods, Bodies, and Caps from Czechoslovakia*, Fair Value Determination, Fed. Reg. Vol.27, 1962, p.6099.

[189] Department of the Treasury, *Jalousie-Louver-Sized Sheet Glass from Czechoslovakia*, Determination of Sales at Less than Fair Value, Fed. Reg. Vol.27, 1962, p.8457.

[190] Ibid.

[191] Ibid.

[192] Ibid.

[193] Department of the Treasury, *Portland Cement from Poland*, Fair Value Determination, Fed. Reg. Vol.28, 1963, p.6660.

[194] Gary N. Horlick, Shannon S. Shuman, "Nonmarket Economy Trade and US Antidumping/Countervailing Duty Laws", supra note 186, p.808.

also export prices to third countries and values of production factors in a state trading country.[195] In practice, the US Treasury consistently used a third country's prices, either its home market prices or export prices, primarily to the US, instead to determine normal value of state trading countries' exports with little or no explanation, and these third country prices were frequently termed as "constructed value" by it.[196] This is actually a confusing use of the term "constructed value" since according to Article VI GATT 1947 normal value should be constructed on the basis of costs of production in the country of origin plus a reasonable addition for other cost and for profit.[197] Both this use of the term as well as the various practices of using third country prices were reflected neither in US AD statutes nor GATT AD rules at that time, and the US Treasury did not state its reasons for selecting a specific means either.[198] The US approach of dealing with alleged NME dumping was based on administrative discretion, rather than mandated by congressional legislation.[199] Nevertheless, new practices were created which laid the basis for subsequent US AD legislation, which substantially influenced NME treatment rules' overall development.

Apart from the US, other countries' practices were also complex and volatile. As the GATT Secretariat's comparative study of national AD legislation found, importing countries often dealt with alleged NME dumping in different ways, including consulting with the exporting country, resorting to special bilateral agreements, and utilizing prices of comparable third countries instead.[200] Some of these strategies related to diplomatic approach, which tried to deal with issues of NME exports beyond the multilateral trade legal regime, while others still concerned with the finding of appropriate benchmarks for price comparison in AD proceedings. The analogue country methodology emerged, not yet in terms of legal rules but in administrative practices. Beyond the drafters' expectation, the 1955 Interpretative Note opened "a verifiable Pandora's box with regard to non-market economy dumping" and the NME treatment has remained a significant part of GATT law for the following years.[201]

Multifarious national practices resulted. This was largely due to the overly broadened understanding of the 1955 Interpretative Note. The statement in the Interpretative Note that "a strict comparison with domestic prices in such a country may not always be appropriate" was taken as permitting investigating authorities' deviation from the whole paragraph 1 of Article VI and allowing for their use of whatever alternative methodologies they deemed appropriate. It

[195] Robert A. Anthony, "American Response to Dumping from Capitalist and Socialist Economies - Substantive Premises and Restructured Procedures After the 1967 GATT Code", *Cornell Law Review*, Vol.54, No.2, 1969, pp.203-204.

[196] Exemplary cases include: *Window Glass from USSR*, 29 Fed. Reg. 8381 (1964), *Window Glass from Czechoslovakia*, 29 Fed. Reg. 13405 (1964), *Shoes from Czechoslovakia*, 31 Fed. Reg. 1207 (1966), *Fur Felt Hat Bodies from Czechoslovakia*, 31 Fed. Reg. 15024 (1966), *Fishery Products from USSR*, 32 Fed. Reg. 1101 (1967), *Pig Iron from Czechoslovakia*, 32 Fed. Reg. 2901 (1967), *Cast Iron Soil Pipe and Fittings from Poland*, 32 Fed. Reg. 2901 (1967), *Pig Iron from Czechoslovakia*, 33 Fed. Reg. 5105 (1968), *Pig Iron from East Germany*, 33 Fed. Reg. 5105 (1968), *Pig Iron from Romania*, 33 Fed. Reg. 5105 (1968), *Pig Iron from USSR*, 33 Fed. Reg. 5106 (1968), Titanium Sponge from the USSR, 33 Fed. Reg. 5467 (1968).

[197] Article VI.1(b)(ii), The General Agreement on Tariffs and Trade.

[198] Francis Snyder, *The EU, the WTO and China - Legal Pluralism and International Trade Regulation*, supra note 36, p.226.

[199] Ibid.

[200] GATT, *Anti-dumping and Countervailing Duties: Secretariat Analysis of legislation,* supra note 179.

[201] Francis Snyder, *The EU, the WTO and China - Legal Pluralism and International Trade Regulation*, supra note 36, p.223.

has been pointed out that the principal effect of the 1955 Interpretative Note had been "producing considerable normative ambiguity, or put positively, giving even greater scope for creative normative interpretation and administrative practice".[202] In the longer term, "it opened the door to alternatives other than the specific language of Article VI itself".[203] However, the Interpretative Note can also be interpreted as negating such unconstrained arbitrariness. The 1955 Interpretative Note did not formally amend Article VI, but was concerned only with how Article VI should be interpreted to meet the existing doubt about its application to cases of NME exports.[204] It admitted that strict comparison with domestic prices might not always be appropriate, which is the first-choice methodology for calculating dumping provided in Article VI. But it did not absolutely exclude the possibility of utilizing this methodology. The Interpretative Note *per se* did not propose any specific alternative methodologies once strict comparison with domestic prices was disregarded. But it must be read in conjunction with the Article it aimed to interpret, i.e. Article VI GATT 1947. Apart from comparison with domestic prices, Article VI GATT 1947 provided two other methodologies for calculating dumping, i.e. comparison with export prices to a third country and comparison with cost of production plus a reasonable addition. Investigating authorities were required to utilize selectively either of these two benchmarks in the absence of comparable domestic prices in the exporting country.[205] This line of reasoning should also be followed once domestic prices are disregarded based on the 1955 Interpretative Note. Nonetheless, in the GATT period, no authoritative interpretation was given regarding the reading of Article VI in light of the 1955 Interpretative Note to clearly clarify the applicable methodologies. The ambiguity of the 1955 Interpretative Note in practice had led to various arbitrary national practices concerning the determination of NME exports' normal value.

It is worth mentioning that these multifarious national practices arose against a changing international background. The real first break made by the US AD authorities in the 1960s was arguably based on the then political background - the aggravated tension in the Cold War and the deteriorated relation between the US and the USSR.[206] The intensified conflict was manifested in the Bay of Pigs invasion of Cuba, the erecting of the Berlin wall, the Cuban missile crisis, and so on.[207] The antagonism between the two political blocs resulted in hostility against socialist countries' economic regime in international trade, which affected GATT contracting parties' interpretation of the 1955 Interpretative Note as well as their adoption of NME treatment in AD proceedings. The economic theory against NME and the ideological opposition against communism converged in a trade policy which rejected NME exports. Politics, as well as economics, influenced the selection and deployment of elements in the then existing AD rules, the development of national practices, and the later formation of new rules and legal concepts.[208]

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[202] Ibid.
[203] Ibid.
[204] Ibid.
[205] GATT, *GATT Analytical Index: Guide to GATT law and practice*, updated 6th edition, supra note 145, p.4225; GATT, *Anti-dumping and countervailing duties: reports of group of experts*, Geneva, 1961, Sales No.GATT/1961-2, p.9.
[206] Francis Snyder, *The EU, the WTO and China - Legal Pluralism and International Trade Regulation*, supra note 36, pp.221-224.
[207] Carole K. Fink, *Cold War: An International History*, supra note 126, pp.111-116.
[208] Francis Snyder, *The EU, the WTO and China - Legal Pluralism and International Trade Regulation*, supra note 36, p.221.

The 1955 Interpretative Note though was introduced to clarify the application of Article VI in the case of NME exports, it did not clearly and unambiguously resolve this issue. Conversely, additional problems were raised about the appropriate balance to be achieved between GATT rules, national law and national administrative discretion in finding comparable benchmarks for the determination of normal value of NME exports. Though this issue was firstly raised by Czechoslovakia, a state trading economy, to meet its own interests, the then adopted GATT rules did not follow the normative mode conceived by Czechoslovakia in dealing with this matter. They in particular did not follow Czechoslovakia's suggestion to specify clearly the applicable methodologies for determining normal value of NME exports. The 1955 Interpretative Note was formulated in a compromised manner probably since no consensus concerning the specific applicable methodologies could be reached. But as we can see, considerable arbitrariness resulted therefrom, which gradually led to the prevalence of the arbitrary use of surrogate country values for price comparison that went far beyond Czechoslovakia's initial proposal. The simple recognition of the "inappropriateness" of a strict comparison with domestic prices in state trading countries has later evolved over years into "a trade policy instrument that is not only absurd from the economic viewpoint, but also eminently unfair", concerning which "remote policy implications have long outlived their causes".[209]

2. From the 1955 GATT Interpretative Note to the negotiation of the WTO

The period from the 1955 GATT Interpretative Note to the establishment of the WTO is featured by two main characteristics that influenced the development of NME treatment rules. The first is the incorporation of NME treatment rules into specialized AD codes and subsidies code which were concluded during this period. The Kennedy and Tokyo rounds of multilateral trade negotiations conducted in this period each concluded a specialized AD code and the Tokyo round additionally led to a separate code on subsidies and countervailing measures. All these codes contained rules on NME treatment. The second characteristic is the introduction of NME treatment rules into several countries' accession legal documents to the GATT. Several socialist countries acceded to the GATT in this period, the economic regimes of which did not fit into the pattern originally conceived by the core signatories of the GATT. In the negotiation of these countries' accession, rules concerning NME treatment to be applied to each of them were introduced into the working party reports regarding their accession respectively.

What is noteworthy is that before the Kennedy and the Tokyo rounds several other rounds of multilateral trade negotiations had already been conducted. These former rounds focused primarily on tariff reduction on industrial goods, which did not interest most developing countries at that time since they yet had to industrialize.[210] The contacting parties did not touch

[209] Alexander Polouektov, "'The Non-market Economy' Issue in International Trade in the Context of WTO Accession", supra note 133, p.8.

[210] Thomas W. Zeiler, "The Expanding Mandate of the GATT: the First Seven Rounds" in Amrita Narlikar, Martin Daunton and Robert M. Stern eds., *The Oxford Handbook on the World Trade Organization*, supra note 120,

upon AD affairs for this issue then was of limited importance to them compared with tariff concession. These former rounds also witnessed great accomplishment in adding additional countries to the list of contracting parties. Eleven nations acceded to the GATT at Annecy in 1949, six more in the Torquay round.[211] The Federal Republic of Germany and Japan also acceded to the GATT before the Geneva II and Dillon rounds.[212] The accession of new parties added new problems to the GATT and brought about additional competition to international trade. The Europe and Japan gradually recovered from the war, the emerging Third World nations increasingly appealed their demands.[213] In general, the GATT regime progressively moved into a new era which required an overhaul of its existing rules and the expansion of its mandate to range into a host of global trade issues.[214] The Dillon round marked the end of the era of recovery and the beginning of the age of competition, when challenges from all quarters were faced by the GATT.[215]

Within the bipolar world, gaps in economic development began to appear in the 1960s. The capitalist economy gradually achieved unprecedented western prosperity to a large extent due to rapid increase in trade, foreign investment, personal contacts and technology transfers.[216] The socialist countries, to the contrary, confronted with chronic problems of low agricultural productivity and inability to produce advanced tools, machinery, and equipment needed for a genuine economic modernization due to self-contained soviet bloc trade and patterns in the planned economies.[217] As communist growth rates slowed, the idea of using western imports to reinvigorate economic growth at home grew in the course of the 1960s.[218] Soviet bloc countries, including the Soviet Union, were forced to expand trade with the non-communist world.[219] Some soviet bloc countries even tried to accede the multilateral trade regime to promote trade at the cost of providing a series of additional commitments. Some other socialist countries, such as China, however, were not yet interested in expanding trade with the external world in the 1960s and 1970s. It is not until the 1980s, after its implementation of the opening-up policy that trade between the PRC and the west was greatly increased.[220] Moreover, the expansion of trade between the east and the west was generally coupled with an emerging political détente - the relaxation of Cold War tensions between the US and the USSR.[221] The period of détente is featured by a series of events, including the signature of the nuclear non-proliferation treaty on July 1, 1968, and the normalization of trade relations between the US and the USSR on an MFN

p.109.

[211] Ibid, pp.107-108.

[212] Ibid.

[213] Ibid, p.108.

[214] Ibid.

[215] Ibid.

[216] Angus Maddision, *Contours of the World Economy, I-2030 AD: Essays in Macro-Economic History*, Oxford University Press, 2007, p.81.

[217] Robert Mark Spaulding, "Chapter 23: Trade, Aid, and Economic Warfare" in Richard H. Immerman, Petra Goedde eds., *The Oxford Handbook of the Cold War*, Oxford University Press, 2016, p.397.

[218] Ibid.

[219] Ibid.

[220] Ibid, pp.398-400.

[221] The political détente however collapsed during 1975-1980 and the second cold war continued from 1981 to 1985. Generally, during 1985-1991, the cold war gradually came to an end. In spite of the fluctuation of political relation, trade between different blocs was continued. Carole K. Fink, *Cold War - An International History*, supra note 126, pp.174-229.

basis in October 1972.[222] Both Superpowers realized their respective limits after the shocks of Tet and Prague and their confrontation of increasingly volatile conditions in the Third World.[223] Economic motives actually were a major impetus in Soviet policies which fostered the political context for détente.[224] Trading power of the two sides was not balanced since while the soviets valued trade with the west, the west were generally not dependent on trade with soviet bloc countries.[225] Moreover, the inconvertibility of socialist countries' currencies profoundly limited their ability to pay for western products. Their imports were largely financed by a combination of exports, especially those of natural resources, and western credits.[226] Overall, western governments had a superior status in trade relation and they were able to manipulate trade to achieve broader political aims. Compared with other tools of statecraft, trade manipulations were "more nimble and easily scalable", and because of their utility, trade manipulations, both large and small, were widely used by Western governments.[227] It is based on this background that NME treatment rules and practices were greatly developed in this period.

2.1 The Kennedy round AD Code

The Kennedy round trade negotiations led to the first AD code, the specific content of which, however, was based principally on a comprehensive expert report on AD law published in 1961. The 1961 expert report was therefore of great significance due to its genealogical link to the first GATT AD code. Yet, this report provided no account concerning the NME treatment. It simply reiterated Article VI GATT 1947 while dealing with the issue of determining normal value in the absence of comparable domestic prices.[228] It did not mention the 1955 Interpretative Note, nor the various national practices of NME treatment. This situation was strange since the 1955 Interpretative Note was already in force as an integral part of the GATT 1947 and the special difficulties in interpreting Article VI in NME cases as well as controversial national practices were already well known. A possible explanation given is that this non-involvement might have been intentionally made to reassert and reinforce the normative primacy of Article VI GATT 1947.[229] It indicated the requirement for national AD authorities to work with the other two ways of determining normal value, i.e. relying on export prices to a third country or constructed value, when no comparable domestic price is available, including in NME cases. The 1961 expert report is considered to be a way of trying to hold Article VI of the GATT fort confronting divergent national practices and therefore constituting a "cultural baggage" of national AD authorities.[230] In overall, by dealing with the NME treatment issue negatively, the expert report made no, or rather limited, significant contribution in clarifying the applicable methodologies for NMEs.

The Kennedy round AD Code, however, made considerable changes to rules concerning the

[222] Ibid, pp.150-151.
[223] Ibid, p.149.
[224] Robert Mark Spaulding, "Chapter 23: Trade, Aid, and Economic Warfare", supra note 217, p.397.
[225] Ibid, p.401.
[226] Ibid, p.399.
[227] Ibid, p.401.
[228] GATT, *Anti-dumping and countervailing duties: reports of group of experts*, supra note 205, p.9.
[229] Francis Snyder, *The EU, the WTO and China - Legal Pluralism and International Trade Regulation*, supra note 36, p.226.
[230] Ibid.

calculation of dumping. Specifically, Article 2(d) of the Code set that:

> *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, 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 any third country which may be the highest such export price but should be a representative price, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and any other costs and for profits. As a general rule, the addition for profit shall not exceed the profit normally realized on sales of products of the same general category in the domestic market of the country of origin.*

In addition, the Code stated explicitly that this provision is without prejudice to the 1955 Interpretative Note.[231]

The Kennedy round AD Code had innovated in three main points relating to the NME treatment. Firstly, Article 2(d) of the Code elaborated the circumstance "in the absence of such domestic price" specified in GATT Article VI into two different scenarios: no sales of the like product in the ordinary course of trade in the domestic market of the exporting country, and the existence of particular market situation that renders domestic sales incomparable. The separately specified scenario "particular market situation" is considered by some as indicating just the circumstance of state trading economies described in the 1955 Interpretative Note, since the term "particular market situation" clearly echoes the "special difficulties" referred to in the Note and "proper comparison" arguably derives from the expression "a strict comparison ... might not always be appropriate".[232] The Kennedy round AD Code is therefore claimed to have transposed the particular market situation from the Interpretative Note to the main treaty text, integrating it into the normative mainstream and making it a normal scenario under GATT AD rules.[233] The contention that the "particular market situation" indicates merely the special situation specified in the 1955 Interpretative Note is not entirely groundless given the fact that the then most particular market situation was state trading economies' trade monopolization and price fixing. Yet, the literal meaning of "particular market situation" is obviously much wider, which is able to incorporate various situations in a market. The terminology "particular market situation" *per se* is rather ambiguous, which allows for considerable administrative discretion. According to the treaty text, the only normative restrictive condition imposed is that domestic sales do not permit a proper comparison, which is again rather ambiguous and highly subjective. No further stipulation was given concerning the factors influencing price comparability of domestic sales. The meaning of this provision therefore needs to be clarified in judicial cases. If negotiators of the Code really intended to transpose simply the special situation specified in the Interpretative Note to the main text of the treaty, they should have had described this intention clearly rather than employing such an ambiguous term with rather broad meaning capable of causing huge controversy. It is also argued that the ambiguous language was adopted to avoid antagonism

[231] Article 2 (g), the Kennedy round AD Code.
[232] Francis Snyder, *The EU, the WTO and China - Legal Pluralism and International Trade Regulation*, supra note 36, p.228.
[233] Ibid.

between different economic, and accordingly political, regimes in a period of détente in the Cold War.[234] Against this backdrop, a pragmatic legislative approach was employed in the international AD legislation which tried to deal with the NME treatment issue merely as a technical issue rather than a differentiation between divergent regimes.[235] But such an approach manifests awful draftsmanship. The so-called non-antagonism and pragmatism was pursued at the expense of introducing great uncertainty. Moreover, the Code stated explicitly that Article 2 is without prejudice to the 1955 Interpretative Note. This provision makes the independent relation between Article 2 of the Code and the Interpretative Note clear. By providing such a stipulation, the AD Code actually refrained from making any contribution to clarify the 1955 Interpretative Note as well as the resulted chaotic national practices. To the contrary, it tacitly permits the existing practices of NME treatment rather than constraining them.

Secondly, Article 2(d) of the Code spelled out ways of determining dumping margin under exceptional circumstances without referring to the term "normal value" at all. By refraining from the utilization of this term, it shifted the frame of reference from the determination of normal value to the calculation of dumping margin, and thus transferred the focus of AD rules from a general legal concept presumed to be universal to a specific, localized administrative task.[236] This change also manifests the Code's pragmatic approach. Thirdly, the main clause of Article 2(d) provided two alternative methodologies for the determination of dumping margin, which are almost identical to those stipulated in GATT Article VI paragraphs 1(b)(i) and (ii). Moreover, by utilizing the word "shall', Article 2(d) excluded explicitly the searching for comparable prices in the exporting country's domestic market under particular market situation. Only the two specified alternative methodologies are available. However, since the existence of the precondition, particular market situation influencing price comparability is to be determined by national AD authorities with significant discretionary margin, domestic prices are actually still at national AD authorities' disposal.

To sum up, the Kennedy round AD Code did not contribute to clarifying the NME treatment issue, but made the already chaotic situation even worse by introducing vague provisions on particular market situation. Regardless of their vagueness, provisions on particular market situation have been preserved in succeeding Tokyo round AD Code as well as the WTO AD Agreement. Especially as the economic and political situation later changed dramatically with the line between market and non-market economies getting extremely vague, the particular market situation clause gradually play an important role due to its capability to allow for AD authorities' incorporate of all sorts of government intervention into the market, which also introduces abusive use of AD measures for protectionist aim. The pragmatic approach embodied in the particular market situation clause facilitates its use in later years when confrontations between different political and economic regimes no longer prevail. However, one thing worth mentioning is that though the Kennedy round AD Code tended to mask or weaken broader political elements, it by no means was entirely apolitical. Politics were just less visible since they were then embodied principally in specific countries' national practices.

[234] Ibid, p.229.
[235] Ibid.
[236] Ibid.

2.2 Influential domestic legislation - the US: clear specification of surrogate country methodologies

The Kennedy round AD Code is considered to be the first fully-fledged regime with respect to the NME treatment since it contained a set of implicit or explicit principles and norms regarding this issue, which were then largely followed by later international legislation.[237] During the negotiation of the Code, the US had the upper hand since it was the only superpower or hegemony involved in the negotiation. The basics rules of the Code therefore came principally from the US propositions. But as introduced before, the US actually did not formally adopt the Kennedy round AD Code largely due to concerns of the higher injury and causation standards in the Code.[238] Nevertheless, the US Treasury amended its AD regulations concerning requirements for the determination of dumping in 1968 so as to conform to the provisions of the Kennedy round AD Code.[239] The amended US AD regulatory rules to a large extent reflect the US executive's understanding of the Code. In the amendments, a new provision explicitly dealing with the NME treatment was promulgated, which reflects the US understanding of the Code concerning the NME treatment issue and which significantly influenced other countries' implementation of the Code. Specifically, this new provision set:

> ***Merchandise from controlled economy country.*** *Ordinarily, if the information available indicates that the economy of the country from which the merchandise is exported is controlled to an extent that sales or offers of sales of such or similar merchandise in that country or to countries other than the United States do not permit a determination of fair value under §53.3 or §53.4, the Secretary will determine fair value on the basis of the constructed value of the merchandise determined on the normal costs, expenses and profits as reflected by the prices at which such or similar merchandise is sold by a non-state-controlled economy country either (1) for consumption in its own market; or (2) to other countries, including the United States.*[240]

These provisions are simply regulatory rules which lack any statutory basis in US AD law. The content of them is based on previous practices of the US Treasury. Regarding these provisions, several points are noteworthy. Firstly, the regulation introduced a new label - "controlled-economy country" for NMEs, though the precise meaning of it was not clearly specified. The "controlled economy" language actually was firstly used by the US Treasury in the 1966 *Fur Felt Hat Bodies from Czechoslovakia* case.[241] It was then confirmed by the US Treasury regulation, but no definition was given. The criterion provided is the economy of the exporting country is controlled by the state to an extent that sales or offers of sales of like product in its domestic market or to third countries do not permit a determination of normal value. Compared

[237] Stephen D. Krasner, *International Regimes*, Cornell University Press, 1983, p.2.
[238] Johannes Friedrich Beseler, A.N. William, *Anti-dumping and Anti-subsidy Law: The European Communities*, supra note 69, pp.11-13.
[239] Donald L. Cuneo, Charles B. Mauel, Jr, "Roadblock to Trade: The State-controlled Economy Issue in Anti-dumping Law Administration", supra note 182, p.290.
[240] 19 C.F.R. §53.5(b), 1969.
[241] Department of the Treasury, *Fur Felt Hat Bodies form Czechoslovakia*, Notice of Intent to Discontinue Investigation and to Make Determination that No Sales Exists below Fair Value, Fed. Reg. Vol.31, 1966, p.15024.

with Article 2(d) of the Kennedy round AD Code, it added an additional circumstance where export sales to third countries are not appropriate for the determination of normal value. The US criterion though is obviously different from that specified in the 1955 Interpretative Note, it is considered to have reflected the two elements contained in the Note, i.e. fixing of domestic prices and monopoly of foreign trade, since the two scenarios described implicitly correspond to these two elements.[242] Secondly, the regulation clearly excluded both domestic prices in the exporting controlled-economy country and export prices from it to third countries. What it confirmed is the utilization of "constructed value" in AD proceedings. This is a confusing use of this term, which had already been adopted by the US AD authorities. The regulation explicitly authorized AD authorities to construct the value of the imported merchandise based on its normal costs, expenses and profits. These elements yet are to be determined by AD authorities in accordance with like products' prices from some other country, i.e. a surrogate non-state-controlled economy country's prices of the product concerned. Therefore, under the title of constructed value, what the Treasury regulation actually provided is the analogue country methodology. In this regulation, the US for the first time formally confirmed in legal rules the use of surrogate country values for determining normal value of NME exports. Thirdly, the applicable surrogate country values include prices of a non-state-controlled economy country on either its own market or on an export market, including the US itself. This regulation therefore not only expressly confirmed the analogue country methodology, but also specified the scope of applicable surrogate values. Before then, The US Treasury apparently was completely at ease regarding its making of fair-value determinations for NME exports.

In 1973, these regulatory rules were formally adopted again in the form of a Treasury Customs Regulation.[243] And in 1974, they were incorporated into the 1921 US AD Act by the Trade Act of 1974.[244] Finally the Treasury's AD practices which had developed during the previous fifteen years were ratified by the Congress and were confirmed by a statutory legislation. It is considered that the Congress had adopted this legislation to prevent the executive branch's possible abuse of its discretion to adopt some other methodologies in the then-current atmosphere of deténte.[245] Moreover, the statutory legislation gave the Treasury an additional option for the determination of normal value. To be specific, the first statutory rule on NME treatment in US AD law provided:

> *if available information indicates to the Secretary that the economy of the country from which the merchandise is exported is state-controlled to an extent that sales or offers of sales of such or similar merchandise in that country or to countries other than the United States do not permit a determination of foreign market value under subsection (a), the Secretary shall determine the foreign market value of the merchandise on the basis of the normal costs, expenses and profits as reflected by either (1) the prices, determined in accordance with subsection (a) and section 202, at which such or similar merchandise of a*

[242] Francis Snyder, *The EU, the WTO and China - Legal Pluralism and International Trade Regulation*, supra note 36, p.231.
[243] 19 C.F.R. §153.5(b), 1973.
[244] Trade Act of 1974, Pub. L. No. 93-618, title III, §321, 88 Stat. 2043-49, 1975.
[245] Gary N. Horlick, Shannon S. Shuman, "Nonmarket Economy Trade and US Antidumping/Countervailing Duty Laws", supra note 186, p.810.

non-state-controlled-economy country or countries is sold either (A) for consumption in the home market of that country or countries, or (B) to other countries, including the United States; or (2) the constructed value of such or similar merchandise in a non-state-controlled economy country or countries as determined under section 206.[246]

The term "state-controlled" is used for labeling an NME country' economy in this statutory provision, concerning which still no definition or clear criteria was provided. According to the new provision, all Treasury's options are based on surrogate countries' values, including their home market prices, export prices and constructed value. In order to bring the 1973 Customs Regulation into conformity with the statutory rules on AD introduced by the 1974 Trade Act, the US Treasury amended its regulations in 1976 again.[247] Concerning the NME treatment, it confirmed the use of constructed value in a non-state-controlled economy country.[248] Additionally, it explicitly provided for the use of US prices or constructed value "where sales or offers for sale of such or similar merchandise in any other non-state-controlled-economy country do not provide an adequate basis for comparison".[249]

Under the established regulatory and statutory provisions on NME treatment, difficulties still arose in US AD practices, which led to the Treasury's adoption of a new analogue country approach - "factors of production", and amendments to its regulations. To be specific, in the *Electric Golf Cars from Poland* case, the US Treasury conducted its investigation and made affirmative dumping determination initially by using the home consumption prices of Golf cars in Canada as the surrogate benchmark for price comparison.[250] However, problems arose in 1975 after the Canadian producer ceased to manufacture golf cars.[251] The US Treasury then faced a situation that only US prices or constructed value could be used for determining dumping because no country other than Poland and the US manufactured golf cars in sufficient commercial quantities.[252] But the Polish producer urged the Treasury not to use US values based

[246] Trade Act of 1974, Pub. L. No. 93-618, title III, §321, 88 Stat. 2047, 1975.
[247] Fed. Reg. Vol.41, 1976, p.26203.
[248] The revised regulatory provisions provided: "§ 153.7 **Merchandise from state-controlled-economy country** If the information available indicates to the Secretary that the economy of the country from which the merchandise is exported is state-controlled to an extent that sales or offers of sales of such or similar merchandise in that country or to countries other than the United States do not permit a determination of fair value under §§ 153.2, 153.3, or 153.4, the Secretary shall determine fair value on the basis of the normal costs, expenses, and profits as reflected by either: (a) The prices, determined in accordance with section 205(a) and section 202 of the Act (19 U.S.C. 164 (a), 161), at which such or similar merchandise of a non-state-controlled-economy country or countries including the United States, is sold either (1) for consumption in the home market of that country or countries, or (2) to other countries, including the United States; or (b) The constructed value of such or similar merchandise in a non-state-controlled-economy country or countries, including the United States, as determined under section 206 of the Act (19 U.S.C. 165). The prices or the constructed value of the United States produced merchandise generally will be utilized where sales or offers for sale of such or similar merchandise in any other non-state-controlled-economy country do not provide an adequate basis for comparison." Fed. Reg. vol.41, 1976, p.26205.
[249] Ibid.
[250] Department of Treasury, *Electric Golf Cars from Poland*, Determination of Sales at Less than Fair Value, Fed. Reg. vol.40, 1975, p.25497.
[251] Robert L. Meuser, "Note: Dumping from 'Controlled Economy' Countries: The Polish Golf Car Case", *Law and Policy in International Business*, Vol.11, 1979, p.784-787; United States International Trade Commission, *Electric Golf Cars from Poland*, USITC Publication 1069, June 1080, p.A-4, available at: https://www.usitc.gov/publications/other/pub1069.pdf.
[252] Robert L. Meuser, "Note: Dumping from 'Controlled Economy' Countries: The Polish Golf Car Case", ibid, p.788.

on the assertion that the use of these values would effectively preclude Polish exports from the US market since exports were possible only where the producing country achieved cost savings relative to the importing country.[253] In response to these concerns, the US Treasury then employed the "factors of production" approach, which constructed the product's normal value by calculating the exporting manufacture's costs of actual physical inputs according to these inputs' values in a non-state-controlled economy country.[254] The information concerning the specific amounts of different kinds of actual physical inputs must be obtained from the producer of the merchandise under investigation and be verified by the investigating authority.[255] But their values should be evaluated in a non-state-controlled-economy country determined to be reasonably comparable in terms of economic development to the exporting state-controlled-economy country.[256] This surrogate country did not need to be a producer of products similar to the one under investigation, and in this case the surrogate country chosen was Spain.[257] By applying this methodology, the Polish producer's claim was confirmed that its sales were not being made below fair value and the AD order was then revoked on the ground of "changed circumstances" in 1980.[258]

The factors of production methodology takes at least some of the state-controlled-economy country's comparative advantages into account and resembles what the constructed value approach really means. In 1978, the US Treasury amended its Customs Regulation to incorporate this methodology,[259] the validity of which under the statutory legislation, however, was still questionable at that time.[260] Moreover, the amended regulation also required the Treasury to give recognition to the level of economic development of the state-controlled-economy country and established a hierarchy for various different surrogate country methodologies.[261] Following an amendment in 1980,[262] the then formed order of preference taking account of the level of economic development is as set out below. The first choice should be using prices or constructed value (comparisons based on prices should be given preference) of the like product in a non-state-controlled-economy country which is at a stage of economic development comparable

[253] Ibid.

[254] Peter D. Ehrenhaft, "US Policy on Imports from Economies in Transition" in Peter D. Ehrenhaft, Brian Vernon Hindley, Constantine Michalopoulos and L. Alan Winters, *Polices on Imports from Economies in Transition: Two Case Studies*, Washington D.C, the World Bank, 1997, p.23.

[255] Ibid.

[256] Ibid.

[257] Ibid, pp.23-24.

[258] United States International Trade Commission, *Electric Golf Cars from Poland*, supra note 251, p.A-51.

[259] Fed. Reg. vol.43, 1978, p.35263.

[260] This approach was not confirmed by US statutory rules until 1988, in Section 1318 of the Omnibus Trade and Competitiveness Act of 1988, which amended Section 773(b) of the Tariff Act of 1930. Section 1318 retained the basic idea of the Treasury's regulatory rules on this approach, but added a particularly difficult requirement - the surrogate country chosen for the valuation of the factors of production should also be a producer of the merchandise. This requirement limits the selection of surrogates and often skews the comparability of the selected economy. Section 1318, The Omnibus Trade and Competitiveness Act of 1988, Pub. L. No.100-418, 102 Stat. 1107, HR 4848, 100th Congress, 2nd session 1988.

[261] Fed. Reg. vol.43, 1978, p.35263.

[262] In 1980, AD regulations contained in 19 C.F.R. Part 153 were deleted, and these provisions were codified at 19 C.F.R Part 353. This change was made to conform to the transfer of responsibility for AD investigation from the Customs Service, the Department of Treasury to the International Trade Administration, the Department of Commerce. The newly codified regulations effected the changes made by the Trade Agreements Act of 1979 and the reorganization Plan No.3 and adopted in part regulations proposed by the Customs Service. Department of the Treasury, Proposed Revision of the Customs Regulations Relating to Antidumping Duties, Fed. Reg. vol.44, 1979. p.59742; see also Fed. Reg. vol.45, 1980, pp.8182-8184.

to that of the state-controlled-economy country.[263] Considered next should be using such values in a non-state-controlled-economy country that does not have a comparable economy, or as an alternative, the "factors of production" approach if no non-state-controlled-economy country of comparable economic development produces such or similar merchandise.[264] As a last resort, US prices or constructed value of the like product should be considered.[265]

In general, compared with the Kennedy round AD Code, the US Treasury regulations are much more precise with respect to the NME treatment, especially concerning the surrogate country benchmarks to be utilized. The US NME treatment rules and practices exerted significance influence on other countries, including contracting parties of the Kennedy round AD Code. They moreover further affected later development of international NME treatment rules, including in particular those in some countries' accession legal documents.

2.3 GATT working party reports regarding the accession of Poland, Romania and Hungary

In the 1960s, countries under particular market situation were principally socialist countries, the majority of which were not GATT contracting parties, except Czechoslovakia, Cuba, and Yugoslavia.[266] AD investigations regarding exports from socialist countries other than them were not subject to any international AD rules but based completely on national legislation. One thing worth mentioning is that the Socialist Federal Republic of Yugoslavia formally acceded to the GATT in 1966.[267] It, however, had implemented a relatively liberal economic policy which fundamentally differed from that of the then other socialist countries, and was therefore regarded by many as having a market-type economy.[268] Yugoslavia was not a member of the Council for Mutual Economic Aid (COMECON), an external GATT framework that regulated state trading among its members, either.[269] Moreover, political factors perhaps more decisively determined GATT contracting parties' treatment of Yugoslavia as a market economy since after Tito's break with Stalin the US had maintained friendly ties with Yugoslavia.[270] In practice, countries simply used home market prices in Yugoslavia for price comparison based on the

[263] 19 C.F.R. §§353.8(a)(1),(2), (b)(1), 1980.
[264] 19 C.F.R. §353.8(b)(2), (c), 1980.
[265] 19 C.F.R. §353.8(b)(3), 1980.
[266] Cuba was an original party to the GATT 1947. In January 1959 a revolution led by Fidel Castro broke out in Cuba, which toppled the previous government, and Cuba then turned to the USSR. Carole K. Fink, *Cold War - An International History*, supra note 126, p.112.
[267] The Protocol for the Accession of Yugoslavia to the General Agreement on Tariffs and Trade was done at Geneva on 20 July 1966 and entered into force on 25 August 1966. Nonetheless, the Declaration on the Provisional Accession of the Federal People's Republic of Yugoslavia to the General Agreement on Tariffs and Trade was done at Geneva on 13 November 1962 and entered into force on 27 April 1963. The Contracting Parties to the GATT, *GATT Status of Legal Instruments*, Geneva, GATT/LEG/1, Supplement No. 15, December 1993, p.3-10.1, p.4-6.1.1.
[268] Kazimierz Grzybowski, "The Foreign Trade Regime in the Comecon Countries Today", *New York University Journal of International Law and Politics*, Vol.4, 1971, pp.186-187. Concerning Yugoslavia's economic reforms, see also paragraphs 6, 7, 9, 10, 11, and 16 of the Report of the Working Party on the Accession of Yugoslavia.
[269] Kazimierz Grzybowski, "The Foreign Trade Regime in the Comecon Countries Today", ibid.
[270] Gary N. Horlick, Shannon S. Shuman, "Nonmarket Economy Trade and US Antidumping/Countervailing Duty Laws", supra note 186, p.809.

account that the economy of it was not state-controlled to an extent that precluded the comparability of these prices.[271] In its accession to the GATT, accordingly, no special attention was paid to the application of GATT Article VI regarding its exports.

Nonetheless, several countries of the Soviet bloc that implemented a centrally-controlled economic policy sought to accede to the GATT at the same time as the Kennedy round AD Code was being agreed. In their accession, the issue of applying GATT Article VI to their exports was put forward. To be specific, Poland, Romania, and Hungary applied successively for accession to the GATT in the 1950s and 1960s.[272] The working parties established to prepare their respective accession legal documents proposed rules concerning dumping calculation that were different from those specified in GATT Article VI, the 1955 Interpretative Note and the Kennedy round AD Code. With respect to Poland, the Working Party Report on the Accession of Poland was adopted on 26 June 1967, 4 days before the adoption of the Kennedy round AD Code.[273] Paragraph 13 of it stipulated that:

> *With regard to the implementation, where appropriate, of Article VI of the General Agreement with respect to imports from Poland, it was the understanding of the Working Party that the second Supplementary Provision in Annex I to paragraph 1 of Article VI of the General Agreement, relating to 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, would apply. In this connexion it was recognized that a contracting party may use as the normal value for a product imported from Poland the prices which prevail generally in its markets for the same or like products or a value for that product constructed on the basis of the price for a like product originating in another country, so long as the method used for determining normal value in any particular case is appropriate and not unreasonable.*[274]

Romania's working party report employed some different wording while describing the exceptional circumstance specified by the second Ad Note to Article VI:1. However, its account of the applicable surrogate country methodologies is identical to that of Poland's working party report. Specifically, paragraph 13 of Romania's working party report provided that:

> *With regard to the implementation, where appropriate, of Article VI of the General Agreement with respect to imports from Romania, it was the understanding of the Working*

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[271] Though few cases existed, the US Treasury normally used home prices in Yugoslavia since it determined that "the economy of Yugoslavia is not state-controlled to an extent that sales or offers of sales of such or similar merchandise in Yugoslavia do not permit a determination of foreign market value under section 205(a) of the Act 19 U.S.C. 164 (a)". Department of Treasury, *Animal glue and inedible gelatin from Yugoslavia*, Fed. Reg. vol.42, 1977, p.39288. Exceptional cases, however, also existed, such as the case *Copper Sheet from Yugoslavia*, which used home market value in Western European countries instead. Department of Treasury, *Copper Sheet from Yugoslavia*, Fed. Reg. vol.29, 1964, p.8149.

[272] Poland proposed its request for accession on 31 March 1959. Preamble, *Protocol for the Accession of Poland to the GATT*, GATT publication, 30 June 1967, BISD 15S/46. Romania proposed its request on 22 July 1968. Preamble, *Protocol for the Accession of Romania to the GATT*, GATT publication, 15 October 1971, BISD 18S/5. Hungary proposed its request on 9 July 1969, Preamble, *Protocol for the Accession of Hungary to the GATT*, GATT publication, 8 August 1973, BISD 20S/3.

[273] Francis Snyder, *The EU, the WTO and China - Legal Pluralism and International Trade Regulation*, supra note 36, pp.232-233.

[274] Paragraph 13, Report of the Working Party on the Accession of Poland.

Party that the second Supplementary Provision in Annex I to paragraph 1 of Article VI of the General Agreement, relating to imports from a country in which foreign trade operations were carried out by State and cooperative trading enterprises and where some domestic prices were fixed by the law, would apply. In this connexion it was recognized that a contracting party may use as the normal value for a product imported from Romania the prices which prevail generally in its markets for the same or like products or a value for that product constructed on the basis of the price for a like product originating in another country, so long as the method used for determining normal value in any particular case is appropriate and not unreasonable.[275]

While dealing with the issue of dumping calculation, the Working Party Report on Hungary's Accession left out the complicated description of the precondition, but stipulated straightforwardly the applicable surrogate country methodologies, which simply reproduced relevant wording in the two precedents. Specifically speaking, this issue is dealt with in Paragraph 18 of the working party report concerning Hungary's accession, which set:

For the purpose of implementing Article VI of the General Agreement, a contracting party may use as the normal value for a product imported from Hungary the prices which prevail generally in its market for the same or like product, or a value for that product constructed on the basis of the price for a like product originating in another country, so long as the method used for determining normal value in any particular case is appropriate and not unreasonable.[276]

Clear and explicit NME treatment rules were specified in these reports, which distinguish them from previous international legal instruments. These three reports firstly overtly admitted the particularity of the acceding NME countries' economic regimes and directly confirmed the applicability of the second Ad Note to Article VI:1 in AD investigations regarding their exports. But strictly speaking, these countries actually did not meet the stringent criterion specified in the supplementary note even in the 1960s and 1970s. Hardly could one say prices in these three countries were all set by the state and they were accordingly considered to be "liberalized" NMEs.[277] By Hungary's accession to the GATT, it had already taken the first steps toward relaxing of the sate grip on foreign trade relations.[278] The working party report concerning Romania's accession subtly changed the criterion in the Ad Note from "a complete or substantially complete monopoly of its trade and all domestic prices are fixed by the State" to "foreign trade operations were carried out by State and cooperative trading enterprises and some domestic prices were fixed by the law". Hungary's accession working party report moreover simply left out description of the particular economic regime to avoid the embarrassment of Hungary's actual disqualification of the strict criterion of the Ad Note, but confirmed directly the use of surrogate country values for establishing normal value of Hungarian exports. In overall, from the 1960s, the strict trade monopoly and price fixing standard was already not taken at face value by GATT

[275] Paragraph 13, Report of the Working Party on the Accession of Romania.
[276] Paragraph 18, Report of the Working Party on the Accession of Hungary.
[277] Richard O. Cunningham, *Trade Policy and Strategies*, Cameron May, August 15, 2005, p.162.
[278] Alexander Polouektov, "'The Non-market Economy' Issue in International Trade in the Context of WTO Accession", supra note 133, p.12.

contracting parties. They had adopted an *ad hoc* approach to deal with gradually liberalized NMEs' inconformity with this stringent standard, i.e. reaching a consensus in the accession legal documents about the particularity of the acceding NME countries' economic regime and the applicability of surrogate countries methodologies regarding them. This *ad hoc* approach later is followed in the WTO era. Confronting NME countries' increasing liberalization, GATT/WTO contracting parties' deviation from this strictly formulated NME criterion goes further and further.

Secondly, these accession working party reports set clearly the surrogate country methodologies to be applied in AD investigations, which differs entirely from the 1955 Interpretative Note's approach of refraining from clarifying the specific methodologies to be applied in NME cases. The surrogate country benchmarks permitted to be used include prevailing prices in the importing country itself and the price of a like product charged by manufactures in a third, presumably market economy, country. These specific methodologies reflect existing practices of the US Treasury as well as some other GATT contracting parties' AD authorities, either in their relation with Czechoslovakia or with other non-GATT contracting NME states. It is in these reports that the international society for the first time jointly agreed on the use of surrogate country benchmark in AD proceedings in some international legal documents. Certain discretionary margin yet was left in these reports for national AD authorities' selection of specific surrogate country values on a case-specific basis. These reports further introduced the classical legal language - appropriateness and reasonableness into NME treatment rules to circumscribe AD authorities' administrative discretion in selecting surrogate country values. This requirement was later learned by national AD legislation. By employing the word "may" rather than "shall" to specify the permission of utilizing surrogate country benchmarks, these reports also reserved AD authorities' right to use NMEs' own prices and costs for calculating dumping. In general, NME treatment rules in these accession working party reports consolidated the analogue country methodology and contributed to the legalization of this methodology on the international level. These reports employed directly the term normal value, instead of dumping margin, to indicate the element to be determined by AD authorities. This explicit reference is also considered to have further entrenched the analogue country methodology.[279]

It must be pointed out, however, that accession working party reports are not legally binding, which contain NME treatment rules in Poland's, Romania's, and Hungary's cases. The binding accession legal instrument containing acceding countries' special commitments is the accession protocol. Nonetheless, this situation did not influence the actual effect of the NME treatment rules embodied in these three countries' working party reports since they established a consensus among GATT contracting parties on the applicability of the specified surrogate country methodologies to these three countries' exports.

The accession of Poland, Romania, and Hungary to the GATT in the 1960s and the 1970s is actually the first interface of the two economic regimes, market and non-market, in a multilateral trade legal regime that had been designed by market economy countries. The GATT rules system

[279] Francis Snyder, *The EU, the WTO and China - Legal Pluralism and International Trade Regulation*, supra note 36, p.232.

at that time contained almost no legal provisions dealing with the peculiarities of centrally planned economies. Special rules in this regard were introduced in the negotiation of these economies' accession. Apart from rules on special treatment in AD proceedings, rules containing special commitments on a series of other subjects were also introduced to cater these economies' accession to the GATT. Such rules firstly include those concerning the imposition of specific quantitative import obligation on NMEs. While applying for accession, Hungary already introduced a customs tariff and therefore succeeded in acceding to the GATT based on tariff concessions.[280] For Poland and Romania, however, quantitative import obligation was imposed since both countries had no customs tariff while applying for accession.[281] Secondly, special rules were also introduced to permit GATT contracting parties' maintenance of existing prohibitions and quantitative import restrictions inconsistent with GATT Article XIII to be continuously applied to the acceding NMEs, which however should be progressively relaxed and finally eliminated.[282] Thirdly, special rules were also introduced concerning selective safeguard measures,[283] which are termed as "buffering mechanisms" together with the NME treatment in AD proceedings.[284] Moreover, different arrangements for NMEs were also made concerning exchange matters,[285] periodic reviews,[286] and so on. All these special commitments were obliged to be made in the accession to guarantee reciprocity and mutual advantage of these countries' accession.[287] Whiling integrating centrally planned economies into the GATT, a market-based structure, such special commitments on *ad hoc* basis became indispensable to guarantee their accession to be consistent with GATT fundamentals. Yet, only the application of surrogate country methodologies in AD proceedings is termed as NME treatment. This is because only this practice classifies countries into two categories based on their economic regimes and accordingly treats their exports in divergent and unequal ways. Government intervention in NMEs directly leads to the unreliability of their own price and cost values, which could be substituted by price and cost values from the other group of countries, i.e. market economies.

Poland became a full contracting party of the GATT in October 1967, Romania in November 1971 and Hungary in September 1973.[288] Consequently, six socialist countries were incorporated

[280] Paragraphs 4, 11, Working Party Report on the Accession of Hungary.

[281] Paragraph 7, Working Party Report on the Accession of Poland; Paragraph 1, Annex B, Protocol for the Accession of Poland to the GATT; Paragraph 4, Working Party Report on the Accession of Romania; Paragraph 1, Annex B, Protocol for the Accession of Romania to the GATT.

[282] Paragraph 3, Protocol for the Accession of Poland to the GATT; Paragraph 3, Protocol for the Accession of Romania to the GATT; Paragraph 4, Protocol for the Accession of Hungary to the GATT.

[283] Paragraph 4, Protocol for the Accession of Poland to the GATT; Paragraph 4, Protocol for the Accession of Romania to the GATT; Paragraph 5, Protocol for the Accession of Hungary to the GATT.

[284] John H. Jackson, *The World Trading System: Law and Policy of International Economic Relations*, 2nd edition, the MIT Press, 1997, p.331.

[285] Paragraph 8, Protocol for the Accession of Poland to the GATT; Paragraph 7, Protocol for the Accession of Romania to the GATT; Paragraph 8, Protocol for the Accession of Hungary to the GATT.

[286] Paragraphs 5, 6 and Annex A, Protocol for the Accession of Poland to the GATT; Paragraph 5 and Annex A, Protocol for the Accession of Romania to the GATT; Paragraph 6 and Annex B, Protocol for the Accession of Hungary to the GATT.

[287] This idea is explicitly expressed in Paragraph 18, Working Party Report on the Accession of Poland, Paragraph 17, Working Party Report on the Accession of Romania, and Paragraph 21, Working Party Report on the Accession of Hungary.

[288] The Protocol for the Accession of Poland to the GATT entered into force on 18 October 1967. The Protocol for the Accession of Romania entered into force on 14 November 1971. And the Protocol for the Accession of Hungary entered into force on 9 September 1973. The Contracting Parties to the GATT, *GATT Status of Legal Instruments*, supra note 267, p.3-15.1, p.3-18.1, p.3-20.1.

into the GATT: Cuba, Czechoslovakia, Yugoslavia, Poland, Romania and Hungary. All these countries, with the exception of Yugoslavia, were centrally planned economies and also members of the Council for Mutual Economic Aid.[289] Among these centrally planned GATT contracting parties, Czechoslovakia was an original party to the Kennedy round AD Code.[290] Hungary joined this Code in November 1974, Poland joined in May 1977, while Cuba and Romania did not join.[291] But all these countries with the exception of Cuba later accepted the Tokyo round AD Code, which reproduced literally the provisions of the Kennedy round AD Code on NME treatment, though all of them did not accept the Tokyo round Subsidies Code.[292] It is worth mentioning that these centrally planned economies' accession to the GATT did not naturally result in these countries' economic prosperity and trade surplus.[293] This situation diverges hugely from China's later accession to the WTO, which induces surges of Chinese exports exerting great threat to importing countries. AD measure based the NME treatment are later frequently utilized to protect an importing country's domestic market against Chinese exports, rendering China the principal target of AD measures worldwide, while in the GATT period the NME treatment was merely of trivial importance in the overall AD repertoire. Nonetheless, the NME treatment rules formulated in Poland's, Romania's and Hungary's working party reports had further entrenched the idea and practices that NME exports' normal value should ordinarily be determined by surrogate country values and the evaluation of NMEs needed not be made based strictly on the extremely high threshold in the 1955 Interpretative Note. These rules greatly influenced later development of NME treatment rules and practices.

2.4 The Tokyo round Codes

The Tokyo round multilateral trade negotiations began in 1973 and ended in 1979.[294] With respect to the implementation of GATT Article VI, this round culminated in adopting two related codes, i.e. the Tokyo round AD Code and the Code on subsidies and countervailing duties, or put it differently, the Subsidies Code.[295] Concerning the NME treatment, the Tokyo round AD Code did not make any changes compared with the Kennedy round AD Code but just reiterated its provisions. It is, however, in the Subsidies Code that new rules relating to the NME treatment were specified. To be specific, Article 15 "special situations" of the Subsidies Code provided:

> *1. In case of alleged injury caused by imports from a country described in NOTES AND SUPPLEMENTARY PROVISIONS to the General Agreement (Annex I, Article VI, paragraph 1 point 2) the importing signatory may base its procedures and measures either*
>
> *(a) on this Agreement, or, alternatively*
>
> *(b) on the Agreement on Implementation of Article VI of the General Agreement on Tariffs*

[289] Edmond M. Ianni, "State Trading: Its Nature and International Treatment", supra note 149, p.53.
[290] The Contracting Parties to the GATT, *GATT Status of Legal Instruments*, supra note 267, p.10-4.2.
[291] Ibid.
[292] Ibid, p.16-9.3, p.16-4.6.
[293] Alexander Polouektov, "'The Non-market Economy' Issue in International Trade in the Context of WTO Accession", supra note 133, p.11.
[294] Terence P. Stewart, *The GATT Uruguay Round: A Negotiating History (1986-1992)*, supra note 54, p.1435-1461.
[295] The full title of the 1979 AD Code is "Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade". The full title of the Subsidies Code is "Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade".

and Trade.

2. It is understood that in both cases (a) and (b) above the calculation of the margin of dumping or of the amount of the estimated subsidy can be made by comparison of the export price with

(a) the price at which a like product of a country other than the importing signatory or those mentioned above is sold, or

(b) the constructed value of a like product in a country other than the importing signatory or those mentioned above.[296]

3. If neither prices nor constructed value as established under (a) or (b) of paragraph 2 above provide an adequate basis for determination of dumping or subsidization then the price in the importing signatory, if necessary duly adjusted to reflect reasonable profits, may be used.

4. All calculation under the provisions of paragraphs 2 and 3 above shall be based on prices or costs ruling at the same level of trade, normally at the ex factory level, and in respect of operations made as nearly as possible at the same time. Due allowance shall be made in each case, on its merits, for the difference in conditions and terms of sale or in taxation and for the other differences affecting price comparability, so that the method of comparison applied is appropriate and not unreasonable.

Article 15 of the Subsidies Code provided a relatively clear set of NME treatment rules. The title of this article "special situations" echoed the term "particular market situation" referred to in the AD Code. In paragraph 1, it further elaborated the special situations as indicating merely the circumstance described in the 1955 Interpretative Note. Concerning imports from countries under this special situation, the Subsidies Code confirmed explicitly AD authorities' use of surrogate country values and set a relatively clear set of rules on the specific applicable surrogate country values and their hierarchy. AD authorities firstly can use a surrogate third market economy's real prices or constructed value of a like product for price comparison. The Code provided constructed value in addition to real prices in a surrogate third market economy as benchmarks for determining dumping. If neither of them provides an adequate basis, the Code further permitted AD authorities' use of prices in the importing country itself as alternatives. Considerable discretionary margin is still left in the Code, in particular including the non-specification of the criterion for selecting surrogate third countries. Nonetheless, NME treatment rules in this Code are much clearer. It is in the Subsidies Code that surrogate country methodologies are for the first time directly and explicitly specified in a binding international trade agreement with detailed rules concerning their application.

The Subsidies Code was agreed prior to the AD Code in the Tokyo round and the latter was revised to ensure compatibility of the two Codes.[297] Yet in the negotiation of the Subsidies Code, there was cross-fertilization between the two negotiating teams of the two Codes and the negotiating team of the Subsidies Code had drawn on experience of the Committee on AD Practices in its periodic reviews of the implementation of the first AD Code since 1968.[298] The

[296] It is noted in the footnote 33 of the Subsidies Code that "constructed value means cost of production plus a reasonable amount for administration, selling and any other costs and for profits".

[297] Johannes Friedrich Beseler, A.N. William, *Anti-dumping and Anti-subsidy Law: The European Communities*, supra note 69, p.18.

[298] Ibid, p.17-18.

Subsidies Code in effect codified some existing national practices in this regard, especially those of the US and the EC. However, the problem is that the Subsidies Code adopted an unusual approach of dealing with AD matters in a subsidies code. It confirmed the interpretation of the AD Code as allowing for AD authorities' use of surrogate country methodologies and set specific rules on the application of them. The Tokyo round AD Code, conversely, did not specify any new clear NME treatment rules, but simply reiterated pertinent provisions of the Kennedy round AD Code, including both its Article 2(d) and Article 2(g). Furthermore, one thing worth mentioning is that as a plurilateral agreement the Subsidies Code is legally binding only on countries that accepted it. And actually no centrally planned economy singed this Code. In a word, though this Code bears great significance in further entrenching the NME treatment in practice, its formal legal effect is rather limited.

2.5 Influential domestic legislation - the EC: first direct use of the term "non-market economy"

Around the negotiation of the Tokyo round Codes, both the US and the EC enacted new AD legislation to reflect the development of international AD rules. At the close of the Tokyo round the US enacted the 1979 Trade Agreements Act, which repealed its 1921 AD Act and added a new Title VII "Countervailing and Antidumping Duties" to the 1930 Tariff Act, which superseded the 1921 AD Act and implemented the provisions of the Tokyo round Codes.[299] Concerning the NME treatment, the 1979 Trade Agreements Act used continuously the term "state-controlled-economy country" to indicate the particular situation and specified applicable surrogate country methodologies in consistent with Article 15 of the Tokyo round Subsidies Code.[300] The EC, conversely, had amended its AD rules on NME treatment in 1979 even before the conclusion of the Tokyo round, the action of which however was still conducted in the shadow of the negotiation of the Tokyo round Codes.

The first EC legislative reform concerning the NME treatment is made by the Commission Recommendation 158/79/ECSC, which entered into force on 30 January 1979 and concerned only coal and steel products.[301] It amended Recommendation 77/329/ECSC with respect to the determination of normal value for NME exports.[302] It stated that

In the case of imports from countries where trade is on a basis of near or total monopoly and

[299] Trade Agreements Act of 1979, Pub. L. No.96-39, 93 Stat.144, July 26, 1979.
[300] The Tariff Act of 1930, title VII, Subtitle D, Sec.773(c), codified at 19 U.S.C. §1677b, (Supp. III 1979).
[301] Article 2, Commission Recommendation 158/79/ECSC, OJ L 21, 30.1.1979, p.14.
[302] The Commission Recommendation 77/329/ECSC is the first ECSC AD legislation which provided for the analogue application to coal and steel products of the principles and definitions contained in Regulation (EEC) No 459/68. Concerning the NME treatment, Article 3(6) of the Commission Recommendation 77/329/ECSC, which was amended by the Commission Recommendation 158/79/ECSC, set:" [i]n the case of imports from countries where trade is on a basis of near or total monopoly and where domestic prices are fixed by the State, account may be taken of the fact that an exact comparison between the export price of a product to the Community and the domestic prices in that country may not always be appropriate, since in such cases special difficulties may arise in determining price comparability of prices." Article 3(6), Commission Recommendation 77/329/ECSC, OJ L 114, 5.5.1877, p.6.

where domestic prices are fixed by the State, account may be taken of the fact that an exact comparison between the export price of a product to the Community and the domestic price in that country is not normally appropriate. In such cases normal value shall be determined on the basis of either:

(a) the prices at which a like product of a market-economy country or countries is sold either

(i) for consumption in the domestic market of that country or countries or

(ii) to other countries, including the Community; or

(b) the constructed value of a like product in a market-economy country or countries.

If neither prices nor constructed value as established under (a) or (b) above provide an adequate basis for determination of normal value, then the prices or constructed value as determined from the sales or production in the Community shall be used.[303]

The first EC AD legislation was Council Regulation 459/68, which closely followed the Kennedy round AD Code and GATT Article VI, including the second Ad note to it, while dealing with the NME treatment issue and refrained from clarifying the specific surrogate country methodologies permitted to be used.[304] It is this Regulation that firstly explicitly and clearly confirmed EC AD authorities' use of surrogate country methodologies and further consolidated the applicable surrogate country values as well as set a hierarchy for their application. The consolidated surrogate country methodologies reflect established practices of the US as well as the EC itself. The formulation of the rules on surrogate country methodologies moreover is inconsistent with the Subsidies Code. The 1979 Recommendation set trade monopoly and price fixing as the precondition for the application of surrogate country methodologies, adopting the strict test in the 1955 Interpretative Note. However, while specifying applicable surrogate country values, the Recommendation required them to be of "a market-economy country or countries". No definition or further clarification was given regarding the implication of this term, which from the context might indicate simply the opposite situation of the specified precondition. Nonetheless, the term "market economy" was formally introduced into AD law to categorize countries. The market and non-market economy dichotomy later prevails in national AD laws, which facilitates countries' adoption of various arbitrarily determined assessment criteria going beyond trade monopoly and price fixing and lacking any sound economic basis to discriminate certain countries in AD proceedings for protectionist aims.

On 1 August, 1979, the EC adopted the Council Regulation 1681/79/EEC to extend the same NME treatment rules to other economic sectors since the Commission Recommendation 158/79/ECSC concerned only coal and steel products.[305] Specifically, Article 1 of this Regulation provided

In the case of imports from non-market economy countries and, in particular, those to which Regulations (EEC) No.2532/78 and (EEC) No.925/79 apply, normal value shall be determined in an appropriate and not unreasonable manner on the basis of one of the following criteria:

(aa) the price at which the like product of a market economy third country is actually sold;

[303] Article 1(2), Commission Recommendation 158/79/ECSC, OJ L 21, 30. 1. 1979, p.14.
[304] Council Regulation (EEC) No 459/68, OJ L 93, 17.4.1968, p.1.
[305] Council Regulation (EEC) No 1681/79, OJ L 196, 2.8.1979, p.1.

(i) for consumption on the domestic market of that country, or

(ii) to other countries, including the Community; or

(bb) the constructed value of the like product in a market economy third country; or

(cc) if neither price nor constructed value as established under (aa) or (bb) above provides an adequate basis, the price actually paid or payable in the Community for the like product, duly adjusted, if necessary, to include a reasonable profit margin...[306]

This Regulation closely followed the ECSC Recommendation in specifying the application of surrogate country methodologies for establishing normal value, including confirming the requirement of using surrogate country benchmarks for determining normal value of NME exports, listing specific applicable surrogate country values, and setting a hierarchy for them. The Regulation additionally required AD authorities to act in an appropriate and not unreasonable manner in this process to constrain their discretion. The significant reform made by this Regulation is its direct employment of the concept of "non-market economy countries" to indicate a particular group of countries regarding which surrogate country benchmarks shall be used for determining normal value of their exports. It abandoned the strict test of state trade monopoly and price fixing in the 1955 Interpretative Note, but used only the abstract term "non-market economy countries" to specify its precondition for using surrogate country methodologies. No definition and criteria was provided by the Regulation for identifying non-market economy countries. It however directly incorporated several countries into the category of non-market economy countries, i.e. countries regulated by Regulations (EEC) No.2532/78 and (EEC) No. 925/79. While Regulation (EEC) No.925/79 set common rules for imports from state-trading countries, Regulation (EEC) No.2535/78 laid down the first common rules for imports from China.[307] The EC as well as the EU AD legislation later continues this approach of cross-referring to some other regulations to circumscribe its scope of NME countries and designating some countries directly as NME countries in legislative form. The scope of NMEs delineated by this approach though is relatively clear, it is totally unknown based on what criteria the EC legislator has made its identification of NMEs, and it is able to make its decision in this regard driven by considerations of factors having nothing to do with government intervention influencing price comparability in AD proceedings.

The Council Regulation 1681/79/EEC is considered to symbolize the birth of the idea of NME in EC AD law and accordingly a legislative landmark.[308] The utilization of this terminology in AD legislation then spread to other jurisdictions. AD laws of other countries later also adopted the title of NME to name a distinct group of countries for their use of surrogate country methodologies to calculate dumping. For example, the US enacted the Omnibus Trade and Competitiveness Act in 1988, which amended the Tariff Act of 1930.[309] It replaced the traditional US term "state-controlled-economy country" with that of "non-market economy country", and moreover set a definition for this term as well as specified a series of economic indexes for the

[306] Ibid, p.2.

[307] Council Regulation (EEC) No 2532/78, OJ L 306, 31. 10. 1978, p.1; Council Regulation (EEC) No 925/79, OJ L 131, 29. 5. 1979, p.1.

[308] Francis Snyder, *The EU, the WTO and China - Legal Pluralism and International Trade Regulation*, supra note 36, p.252.

[309] The Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat.1107, HR 4848, 100th Congress, 2nd session, 1988.

authorities' evaluation of NMEs.[310] While circumscribing the scope of NMEs, either by setting a definition with assessment criteria for NME or specifying directly countries regarded as NMEs, GATT contracting parties significantly lowered their threshold for permitting the use of surrogate countries methodologies. The identification of NMEs is no longer based on the strict standard of state trade monopoly and price fixing in the 1955 Interpretative Note. Countries in practice are at ease to identify NMEs according to their own understanding based on some seemingly plausible economic factors. It is highly questionable how these arbitrarily introduced economic factors influence price comparability in AD proceedings, let alone the considerable subjectivity and discrimination embodied in the NME test.

The market and non-market economy dichotomy stems from the economic thought of the German Ordoliberal school, which is also known as the Freiburg school founded in the 1930s as an opponent of the Nazi regime.[311] According to its economic thought, there were two ideal types of economic system: exchange or transaction economy, and planning or centrally-administered economy.[312] These two economic regimes could be distinguished by two criteria: first, the dominance of state or private management of the economy (primary criterion), and second, the system of ownership (secondary criterion).[313] These two systems were considered to be incompatible since the importation of elements from one to the other was pointed to harm the operation of the system.[314] Contrary to classical liberals, the Ordoliberals did not wish to restore a *laissez-faire* economy since they thought *laissez faire* would induce a monopolistic economy that hampered competition.[315] As the history showed, during the *laissez-faire* era, monopolies and cartels started to dominate many sectors of the economy and the abundance of freedom turned into a threat to freedom itself because it allowed private powers build-ups.[316] The goal of the Ordoliberals was a competitive economy, a new kind of synthesis, within which competition was intended to be the principle of economic coordination and needed to be safeguarded by a clear structural framework.[317] Nevertheless, the Ordoliberals firmly objected to central planning and interventionism, opposing economic policy measures politicians used to intervene in actual economic process, affecting the way it ran either directly or indirectly.[318] What they advocated was a liberal economic regime, a free competitive market

[310] Ibid, Section 1316.

[311] Konrad Zweig, *The Origins of the German Social Market Economy - the Leading Ideas and the Intellectual Roots*, Adam Smith Institute, London and Virginia, 1980, p.15-19.

[312] Norbert Kloten, "Zur Typenlehre der Wirtschafts-und Gesellschaftsordnungen", in *Ordo,* Vol.7, 1955, p.123, cited in Kurt Schmidt, "The Public Sector in a Market Economy", in Alan T. Peacock, Hans Willgerodt eds., *German's Social Market Economy: Origins and Evolution*, Macmillan for the Trade Policy Research Center, London, 1898, p.195.

[313] Kurt Schmidt, "The Public Sector in a Market Economy", ibid.

[314] As Adam Smith indicated, that there must always be a certain mixture of principles, since no economic activities can be coordinated optimally by only one system of economic control. The Odoliberals also admitted that all real economic systems displayed a mixture of public as well as private economic leadership and public and private ownership. Egon Tuchtfeldt, "Will Communism and Capitalism Become Similar Economic Systems?", in Alan T. Peacock, Hans Willgerodt eds., *German's Social Market Economy: Origins and Evolution*, supra note 312, p.87.

[315] Rolf H. Hasse, Hermann Schneider, Klaus Weigelt eds., *Social Market Economy: History, Principles and Implementation - From A to Z*, Ferdinand Schöningh, Paderborn, Germany, 2008, p.36.

[316] Ibid.

[317] Ibid, p.38; Alfred Müller-Armack, "The Meaning of the Social Market Economy", in Alan T. Peacock, Hans Willgerodt eds., *German's Social Market Economy: Origins and Evolution*, supra note 312, p.82.

[318] Ibid, p.37.

economy, which fundamentally differed from a centrally-administered one that was implemented in Germany during the National Socialist dictatorship.[319] The Ordoliberals believed collectivism caused economic disturbances and crises, which hindered social progress, and the market was the only organization of economic life that created a just and optimal distribution and solved social problems that no collectivist authorities could replace.[320] A free and competitive organization was deemed to be "the best guarantee to meet the expectations of a life of personal freedom and dignity, which no collective or planning system could ever give".[321] The Ordoliberals placed great emphasis on "economic constitutionalism", i.e. legal constraints on government action, and they considered that decision-making should be subject to legal principles and clear legal rules.[322] The thoughts of German Ordoliberals played a central role in the development of the EC competition law, and to some extent the EC trade law and private law and they are supposed to have also played an important role in shaping the distinction between market and non-market economies in the EC AD law.[323]

Regardless of the economic rationales underlying the market and non-market economy dichotomy, its application in the field of AD is highly problematic. Without a precise definition and clear criteria for NMEs, it is totally unclear how domestic markets of countries arbitrarily labeled as NMEs have formed segregated sanctuary home markets for their producers to reap supra-competitive profits from domestic sales to cross-subsidize export sales, which is the justification for AD measures. Moreover, there is no legal basis in international AD law for this arbitrary division as well. The introduction of this dichotomy is more for protectionist aim based on the then political-economic context. The late 1970s is a period of recession which was triggered by the oil crisis and featured by the decline of US hegemony.[324] Protectionism was growing in the EC at that time.[325] The increased imports from central and eastern European countries also posed some new economic threat to the EC, which included an increasing number of AD petitions against them.[326] The perceived emergence of economic threat from these countries and the protectionist sentiment in the EC jointly led to its introduction of this dichotomy into AD law to facilitate its use of surrogate country methodologies regarding these countries to make affirmative dumping determination and to inflate dumping margin. What's worth mentioning is that this landmark reform in EC AD law coincides with China's embarking of market-oriented economic reform and its implementation of the opening-up policy, which began in December 1978. Later years witnessed dramatically increased Chinese exports to the EC and China gradually became the most principal target of the EC's application of the NME treatment.

In conclusion, the Council Regulation 1681/79/EEC manifests a definite break with the

[319] Konrad Zweig, *The Origins of the German Social Market Economy: The Leading Ideas and Their Intellectual Roots*, supra note 311, pp.15-18.
[320] Ibid, p.17.
[321] Ibid, p.8.
[322] Ibid, p.42.
[323] Francis Snyder, *The EU, the WTO and China - Legal Pluralism and International Trade Regulation*, supra note 36, p.254.
[324] Ibid, p.255; Johannes Friedrich Beseler, A.N. William, *Anti-dumping and Anti-subsidy Law: The European Communities*, supra note 69, p.13.
[325] Ibid.
[326] John Maslen, "The European Community's Relations with the State-trading Countries of Europe 1984-1986", *Yearbook of European Law*, Vol.6, Issue 1, 1986, pp.345-346.

language of GATT Article VI by formally and creatively introducing the market and non-market economy dichotomy into AD law. Early in the 1960s, the progressive liberalization of foreign trade in centrally planned economies already rendered the strict criterion concerning state trading countries in the 1955 Interpretative Note increasingly insignificant.[327] The US firstly adopted the term "controlled-economy country" in the 1960s in its Treasury regulations to denote countries subjected to surrogate country methodologies. As market-oriented economic reforms getting deeper and deeper in previous planned economy countries, the term NME introduced by the EC AD law in the late 1970s then prevails since it better caters importing countries' need to incorporate more liberalized countries into the applicable scope of surrogate country methodologies. The later prevalence of this term in AD law confronting the varying economic and political background significantly changed NME treatment's application in reality. In particular, this treatment is continued in the WTO era, in which there is actually rarely any country still running a highly centralized planned economic regime. While general international AD rules on NME treatment have remained substantially unchanged in the WTO era, WTO Members have conversely increasingly broadened the applicable scope of surrogate country methodologies. Thus, serious questions arise concerning the rationality and legality of this treatment.

[327] Longyue Zhao, Yan Wang, "Trade Remedies and Non-Market Economi*es: Economic Implications of the First US Countervailing Duty Case on China",* supra note 136, p.13.

Chapter 4 WTO Era Non-market Economy Treatment Rules and Practices

1. Historical background

The Uruguay round multilateral trade negotiations (1986-1994) dealt with a broad range of trade issues resulting in a series of multilateral and plurilateral trade agreements. Most importantly, these negotiations also ended up establishing an inter-governmental international trade organization - the WTO, a breakthrough of the multilateral trading system and an intellectual descendant of the aborted ITO. Different from negotiation of the ITO, regarding which a bunch of countries, especially socialist ones, expressed little interest, negotiation of WTO rules attracted unprecedented interest of a large number of different countries. This situation might have been caused due to national governments' awareness of the great achievements the multilateral free trading regime had already made. It was also promoted by the political and economic reforms undertaken in some former and present socialist countries.

As a Matter of fact, the developing countries (DCs) initially distrusted or even opposed the negotiation of broader WTO rules for fear that their relatively weak economies would be harmed by freer trade rules, especially those in new areas such as trade in services and intellectual property rights.[328] However, largely due to the energetic campaign of GATT Director-General Sutherland, GATT's top official since mid-1993, national governments were persuaded that further delay would erode the rule of law in international trade, aggravate protectionism and pressure for fortified trade blocs,[329] all unfavorable developments which could stifle the hard-won benefits of economic reforms in DCs and countries in transition, and thus even further undermine political support for their newly democratic governments.[330] Instead of resisting further trade liberalization, which would adversely affect their domestic economies and politics, they thought it preferable to unite, to strengthen their bargaining power and to actively take part in the negotiations to strive for more favorable legal rules. Finally, the situation reached such a stage that even notably poor net food importers had "seen their long-term interests as best protected by a rule-governed trading system which sheltered them from the arbitrary dictates of economic superpowers", even at the expense of "experiencing short-term loss as a result of the Uruguay round deal".[331] During the course of the round, 24 developing countries joined the GATT and their enthusiasm in embracing the negotiation became a striking feature of the Uruguay round.[332]

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328 Phillip Evans, James Walsh, *The EIU guide to the new GATT*, supra note 52, p.1.
329 Ibid.
330 Ibid.
331 Ibid, pp.1-2.
332 Ibid, p.1.

Moreover, the Uruguay round multilateral trade negotiations coincided with the dramatic change in the direction of world politics and economics, primarily due to the end of a bipolar world of countries following two antithetical ideologies, capitalism and socialism. Perhaps more significantly, fundamental political and economic reforms had already been initiated in a series of Soviet bloc countries, including Poland, Romania and Hungary, which then fundamentally changed their social system. These countries began to adopt the capitalist system instead, implementing democratic multipartism as well as practicing market economy. In fact, when the WTO was established, all former socialist contracting parties of the GATT, with the exception of Cuba, had already reformed their social system leaving China, Vietnam, Laos, Cuba and North-Korea as the only remaining socialist countries in the world.[333] Although some of them are still socialist, they had actually undertaken economic reform by exploring market economy practices. For example, China adopted a reform and opening-up policy early in 1978, according to which it started privatization and marketization of its economy, economic reforms which are on-going.[334]

Regarding socialist countries' attitude towards international trade, it may have changed even longer before their economic reform, which was manifested in some socialist countries' pursuit of accession to the GATT. After extensive economic reform, transitional countries' enthusiasm of getting involved in international trade ran much higher, with those countries who were still outside the multilateral trading system actively pursuing the accession to the GATT, or after 1994, the membership of the WTO. Both existing and former socialist countries in the process of transitioning toward market economies apparently accepted that prosperity was best based on strong international trade rules and their vigorous enforcement.[335] They also admitted that global economic security was critical to global political security in a world where the previous two superpowers no longer held the ring.[336] They further regarded the strengthening of and participating in the international free trade regime as essential to protecting achievements of their economic reform and enhancing political support to their governments.[337] As a result, in early 1994, China and Russia, together with another 20 countries, were hoping to become founding members of the new WTO.[338] Having failed to acquire the status of a founding member, both successfully acceded to membership in the WTO, China in 2001, Russia in 2012.[339] Currently,

[333] It should be noted here that the exact meaning of "socialist country" can be divergent. A clear identification in this regard is not easy to be made under every occasion. Though currently a dozen of countries have written in their constitutional laws that they are implementing a socialist system, only 4 legally set the communist party as their governing party and enshrine Marxism-Leninism, i.e. China, Laos, Vietnam and Cuba. Even North-Korea is considered by some as not being a socialist country since its official ideology is already changed from Marxism-Leninism to Kimilsungism-Kimjongilism. From Wikipedia

[334] Gregory C. Chow, "Economic Reform and Growth in China", *Annals of Economics and Finance*, Vol.5, Issue 1, 2004, pp.127-140.

[335] Phillip Evans, James Walsh, *The EIU guide to the new GATT*, supra note 52, p.1.

[336] Ibid.

[337] Ibid.

[338] Ibid.

[339] China formally acceded to the WTO on 11 December 2001 as its 143rd Member, and Russia on 22, August 2012 as its 157th Member. WTO, *Notification of Acceptance and Entry into Force of the Protocol on the Accession of the Peoples' Republic of China*, 20 November, 2001, WT/Let/408, 01-5902; WTO, *Notification of Acceptance and Entry into Force of the Protocol on the Accession of the Russian Federation*, 25 July 2012, WT/Let/860, 12-4076.

the majority of former and existing socialist countries are Members of the WTO.[340] Some former soviet bloc countries in central and eastern Europe, including previous GATT contracting parties - Czechoslovakia, Poland, Romania and Hungary, moreover have already become member states of the European Union, which in lieu of all its member states possesses independent legal status in the WTO.[341] The WTO itself has emerged as one of the most influential international organizations. Its rules currently bind 164 Members, cover approximately 98% of world trade and greatly contribute to economic globalization.[342]

Changing international situation, both political and economic, under which new international trade rules were negotiated, significantly influenced the development of NME treatment rules and the application of NME treatment in the WTO era. The end of the Cold War and the considerably decreased number of socialist countries significantly weakened ideological conflict and political antagonism among countries. The substantial reduction of centrally planned economies further rendered NME treatment economically less reasonable. However, the incomplete economic reform of some of these countries still obsessed some other countries. This situation was the reason NME treatment rules in the GATT 1994 and in the WTO AD Agreement were maintained without any significant change. Moreover, economic reform implemented in some transitional countries greatly emancipated their productive forces and significantly boosted their exports, which accordingly increased the economic competition confronted by other countries. This made the retention of NME treatment to be applied against their exports relatively important for countries hoping to protect their domestic industries. As a consequence, in the WTO era, general international AD rules on price comparison are still being broadly and arbitrarily interpreted for some Members' continuation of the analogue country methodology regarding transitional economies, even though they are now WTO Members and their economic regimes have fundamentally changed. This arbitrary, or abusive, use of NME treatment actually creates a *de facto* second-tier membership for transitional WTO Members. In the negotiation of some transitional economies' accession to the WTO, especially those with large export trade volumes, NME treatment also became a crucial issue, as special commitments in their accession protocols were extracted from them enabling them to gain WTO membership. Special NME treatment rules were written in their accession legal documents so as to provide a sounder international legal basis for the continuation of NME treatment to be applied to them. This

[340] Until 10 December 2018, 36 economies have joined the WTO pursuant to Article XII of the Marrakesh Agreement Establishing the WTO. They are normally termed as the Article XII Members. Among these Members, formal and existing socialist countries include Bulgaria, Mongolia, Kyrgyz Republic, Latvia, Estonia, Georgia, Albania, Croatia, Lithuania, Republic of Moldova, China, Armenia, The former Yugoslavia Republic of Macedonia, Vietnam, Ukraine, Montenegro, Russian Federation, Lao People's Democratic Republic, Tajikistan, Yemen, Kazakhstan, Afghanistan. For the specific list of Article XII Members, see WTO, *WTO Accessions 2018 Annual Report by the Director-General*, WT/ACC/33, WT/GC/196, 11 December 2018, p.39.

[341] To be specific, former soviet bloc countries which are now member states of the EU are: Bulgaria(2007), Croatia(2013), Czech Republic(2004), Estonia(2004), Hungary(2004), Latvia(2004), Lithuania(2004), Poland(2004), Romania(2007), Slovakia(2004), Slovenia(2004).

[342] Afghanistan joined the WTO on 29 July 2016, bringing its total membership to 164. As the date of 10 December 2018, there are in total 164 Members in the WTO, representing 98 per cent of world trade. Another 22 states or separate customs territories are seeking to join and conducting membership negotiations with existing Members. These 22 economies are: Algeria, Andorra, Azerbaijan, Bahamas, Belarus, Bhutan, Bosnia and Herzegovina, Comoros, Equatorial Guinea, Ethiopia, Iran, Iraq, Lebanese Republic, Libya, São Tomé and Principe, Serbia, Somalia, South Sudan, Sudan, Syrian Arab Republic, Timor Leste, Uzbekistan. WTO, *WTO Accessions 2018 Annual Report by the Director-General*, supra note 340, pp.15-18.

practice created a clear *de jure* second-tier membership for the countries concerned. Yet, from which countries such special commitments should be requested sometimes depends on capricious political concerns, rather than mere economic considerations. In general, transitional economies' accession to the international trade legal regime has further boosted their exports. This fact renders other countries not only more hesitant to concede giving up the availability of NME treatment, but also greatly reinforces attempts to increase and strengthen the use of this controversial treatment.

2. Relevant international rules

Existing international NME treatment rules can be subdivided into two groups: 1) provisions in generally applied international trade agreements, and 2) provisions in specific Members' accession legal documents. The first category comprises Article VI, Paragraph 1 of the GATT 1994 together with the second Ad Note to it, and Article 2.7 of the WTO AD Agreement. Article 2.2 of the WTO AD Agreement is also relevant to NME treatment since it ostensibly substantiates this treatment.[343] The WTO SCM Agreement, however, does not make any cross-reference to NME treatment to be applied in AD proceedings as was the case under the previous Subsidies Code. The second category encompasses special commitments in China, Vietnam and Tajikistan's accession legal documents to the WTO. These countries have made some specific commitments regarding NME treatment applicable to them in the negotiation of their accession in order to win WTO membership confronting existing Members' concern of potential economic threat brought about by their exports. These special commitments have served as the principal legal basis for easily-accessible and basically indisputable application of NME treatment regarding them.

2.1 Provisions in the GATT 1994

Article VI:1 of the GATT 1994 provides rules concerning the determination of dumping. Reiterating provisions of the GATT 1947, it sets that:

> *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 purpose 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*

[343] This thesis questions and rebuts the justifiability of NME treatment based on Article 2.2 of the WTO AD Agreement. Specific analysis and argument is given in Chapter 6.

(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.

The second Ad Note to Article VI:1 in Annex I "Notes and Supplementary Provisions" further stipulates that:

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 purpose 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.

These provisions simply repeat those in the GATT 1947 and the 1955 Interpretative Note to Article VI:1, though political-economic context has dramatically changed. Even early in the 1960s, the strict criteria regarding state trading and price fixing already could not conform to the reality. Nonetheless, this test is still preserved without any change in the GATT 1994 regardless of WTO Members' general implementation of more liberal economic policies. Specific methodologies to be applied to NME imports also still remain unspecified. Exactly the same provisions in the GATT 1947 had long been broadly interpreted to embrace various arbitrary practices of using surrogate country benchmarks for price comparison. In the WTO era, provisions as such are already commonly viewed as sufficiently justifying an investigating authority's derogation from standard methodologies and resort to surrogate benchmarks in determining normal value.[344] In general, these archaic provisions, which have resulted in chaotic NME treatment, are preserved verbatim without any modification.

2.2 Provisions in the WTO Anti-dumping Agreement

Given the simplicity of the GATT 1994 regarding AD matters, GATT Article VI needs to be read in conjunction with the WTO AD Agreement for its actual application.[345] Concerning NME treatment, however, the WTO AD Agreement does not significantly contribute to the clarification of relevant issues. Similar to previous AD Codes, Article 2.7 of the WTO AD Agreement also cross-refers to the GATT Supplementary Note and specifies that "this Article is without prejudice to the second Supplementary Provision to paragraph 1 of Article VI in Annex I to GATT 1994". It

[344] Appellate Body Report, *European Communities - Definitive Anti-dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, 15 July 2011, paras.285, 287.

[345] Sentence 2 Article 1 of the WTO Anti-dumping Agreement clearly specifies that "[t]he following provisions govern the application of Article VI of GATT 1994 in so far as action is taken under anti-dumping legislation or regulations". Furthermore, Article 18.1 stipulates: "[n]o specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement". The Appellate Body further noted that "Article VI of the GATT 1994 must be read together with the provisions of the Anti-Dumping Agreement". Appellate Body Report, *United States - Anti-dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, 28 August 2000, para.118.

incorporates the second Ad Note to Article VI:I into the AD Agreement.[346] The WTO AD Agreement therefore refrains from clearing up the chaotic situation of NME treatment application by making no contribution to the discipline set in the second Ad Note.

Nonetheless, the WTO AD Agreement refines provisions on the establishment of normal value in exceptional circumstances. To be specific, Article 2 of the Agreement specifies detailed rules concerning the determination of dumping. Paragraph 2 of it provides rules on dumping calculation methodologies applicable in exceptional circumstances. This paragraph sets that:

> *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.*

Different from previous AD Codes, Article 2.2 further clarifies some auxiliary issues relating to the application of these methodologies. Article 2.2.1.1 in particular makes clear what cost materials AD authorities should use for determining cost of production while constructing normal value. It stipulates:

> *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 investigation provided 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, cost shall be adjusted appropriately for those non-recurring items of costs which benefit future and/or current production, or for circumstances in which costs during the period of investigation are affected by start-up operations.*

The analogue country methodology was introduced by GATT contracting parties principally based on the allegation of constructing normal value. Article 2 of the WTO AD Agreement indeed makes some contribution to clarifying how normal value should be constructed. It especially requires that costs normally be calculated according to records kept by the exporter or producer under investigation insofar as the two legally specified conditions are satisfied. This requirement seems to have precluded the use of surrogate country benchmarks. Yet, as will be shown below

[346] Appellate Body Report, *European Communities - Definitive Anti-dumping Measures on Certain Iron or Steel Fasteners from China*, supra note 344, para.285.

in this chapter, divergent viewpoints have arisen in practice concerning the understanding of these provisions on eligible costs to be used for constructing normal value. Some understanding of these rules indeed leads to NME treatment based on normal value construction relying on surrogate benchmarks, which is considered to be WTO compatible.

2.3 Provisions in WTO Members' accession legal documents

In the first place, it should be recalled that at the outset of negotiating the establishment of the ITO, and later the GATT 1947, the main objective of the international society was to depoliticize international trade, achieving non-discrimination among trading partners and gradually reducing trade barriers.[347] The proposed multilateral trading system, moreover, was aimed to incorporate different types of countries, including both capitalist and socialist ones. No requirement of a country's domestic economic regime and no threshold of marketization was proposed for an economy to join the negotiation and the ultimately formed multilateral trading regime. It is the then disinterest of socialist countries that had led to the actual situation that the multilateral trading regime at that time was negotiated among and composed of only capitalist countries (Czechoslovakia and Cuba became GATT contracting parties before their entry into the socialist camp). Nonetheless, after the multilateral trading regime was established, extra special obligations were imposed on socialist countries in their accession to the regime, since their economic system was considered as inconsistent with the pattern previously conceived by GATT negotiating parties. The practice of requiring special commitments from NMEs was formed. And this practice is continued in the WTO era, since the WTO follows the conventional theory in international trade which "views the free market as the economic norm and treats NMEs as aberrations".[348]

In the WTO era, given the circumstance that former socialist countries as well as the majority of existing ones have undertaken market-oriented economic reforms, it is even clearer that the WTO welcomes the accession of market economy countries, open to transitional economies only if their economies are considered sufficiently driven by market forces and subject their acceptance of some additional obligations. Moreover, since the multilateral trading system has already made great achievements in reducing both tariff and non-tariff trade barriers and in boosting its Members' economic growth, the WTO actually raised its membership threshold for transitional economies. Special commitments additionally required for transitional economies' accession to the WTO go much further than those previously required in accession negotiations under the GATT 1947. They typically include not only transitional economies' acceptance of some particular arrangements or treatment applied to them, but also the furtherance of their market-oriented economic reform. Concerning the issue of accession, Article XII of the WTO Agreement to a large extent replicates the wording of the corresponding Article XXXIII of the GATT 1947.[349] It provides no details about the principles which should guide the accession

[347] Richard Toye, "The International Trade Organization" in Amrita Narlikar, Martin Daunton and Robert M. Stern eds. *The Oxford Handbook on the World Trade Organization*, supra note 120, p.93.

[348] Edmond M. Ianni, "State Trading: Its Nature and International Treatment", supra note 149, p.60.

[349] Article XII of the WTO Agreement, which is entitled "Accession" prescribes: " [a]ny State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to

process and places no limit on the terms and conditions which are to be developed through negotiations with current Members.[350] This looseness makes transitional economies "hostage to the requirements, sometimes excessive, of the existing WTO Members", which are proposed "based on the pretext of allegedly inadequate development of market relations in their economies".[351] Moreover, the requirement for additional commitments going beyond the "common denominator" of WTO Members, or put differently, the imposition of WTO-plus obligations, is considered by some as having created a second-tier membership in the WTO for transitional economies.[352]

In reality, which transitional economies should be obliged to provide special commitments and what kind depends on WTO Members' comprehensive deliberation of a series of economic and political factors, not limited only to an acceding country's economic regime. Up to now and specific to NME treatment, only China, Vietnam and Tajikistan have made special commitments in this regard in their respective accession protocols. Other transitional economies, including large ones such as Russia, Ukraine and Kazakhstan, succeeded in acceding to the WTO without providing any special commitments in this regard. Special NME treatment rules differ considerably from general ones. Even compared with those in the 1960s and 1970s, WTO-era special NME treatment rules have manifested considerable particularities.

2.3.1 China

China is the first WTO Member concerning which NME treatment is "agreed otherwise". The model set in its accession moreover is followed by subsequent negotiations of Vietnam's and Tajikistan's accession. Special NME treatment rules are written in Section 15 of the Protocol on the Accession of the People's Republic of China as a WTO-plus obligation of it since WTO Members' accession protocols form integral parts of the WTO Agreement.[353] This section deals explicitly with the issue of price comparability in determining subsidies and dumping. While subparagraph (b) addresses issues of measuring subsidy benefit, the rest of the provision is mainly concerned with price comparison methodologies applied in AD proceedings which reads:

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

be agreed between it and the WTO. Such accession shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto...". The corresponding Article, Article XXXIII of the GATT 1947 sets: "[a] government not party to this Agreement, or a government acting on behalf of a separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the matters provided for in this Agreement, may accede to this Agreement, on its own behalf or on behalf of that territory, on terms to be agreed between such government and the CONTRACTING PARTIES...".

[350] Alexander Polouektov, "'The Non-market Economy' Issue in International Trade in the Context of WTO Accession", supra note 133, p.4.

[351] Ibid, p.3.

[352] Ibid.

[353] Panel Report, *China - Measures related to the exportation of various raw materials*, WT/DS394/R, WT/DS395/R, WT/DS398/R, 5 July 2011, para.7.113.

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 Members 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 manufacture, production and sale of that product.

(b) .....

(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.

Regarding the meaning of the term "national law" in subparagraph (d), paragraph 149 of the Report of the Working Party on the Accession of China provides that: "[m]embers of the Working Party and the representative of China agreed that the term 'national law' in subparagraph (d) of Section 15 of the Draft Protocol should be interpreted to cover not only laws but also decrees, regulations and administrative rules". This paragraph though is not incorporated in China's Accession Protocol, and is therefore not legally binding, it explicitly and unambiguously states negotiating parties' intent and reflects the context under which this term was introduced.

NME treatment rules in China's Accession Protocol are much more complicated than those in the GATT 1994 and the WTO AD Agreement. They explicitly and unambiguously confirm the possibility of applying surrogate country methodologies regarding China, though the two most basic and crucial issues of NME treatment, i.e. criteria of market economy conditions and specific non-standard methodologies, are not clearly specified, but left to be determined under national discretion.

More specifically, subparagraph (a) of Section 15 refers to two scenarios under which different requirements concerning applicable price comparison methodologies are proposed.

According to this subparagraph, non-standard price comparison methodologies can be directly applied regarding imports of Chinese origin.[354] Specific applicable non-standard methodologies are not clearly specified, but described in a negative manner. Regardless of this vagueness, its legal implication is clear - to permit the use of any methodology that is not based on a strict comparison with domestic prices or costs in China. The only obligatory requirement imposed concerning surrogate country methodologies is stipulated in subparagraph (c). Accordingly, importing WTO Members have to notify the Committee on AD Practices of their use of specific non-standard methodologies. Investigating authorities, however, are obliged to employ standard methodologies, using Chinese prices or costs for comparison, if investigated producers successfully prove the prevalence of market economy conditions in the industry producing the like product with regard to the manufacture, production and sale of that product. The onus of proof is incumbent upon Chinese producers.[355] And what they need to prove is the prevalence of market economy conditions in the pertinent industry.[356] This arrangement differs substantially from corresponding disciplines in the GATT 1994 and the WTO AD Agreement, according to which it is the importing Members' responsibility to prove the existence of NME situation in another Member to justify their use of some non-standard methodology regarding it. This arrangement as such actually implies China's acquiescence in having the status of an NME in AD proceedings, which can naturally induce the application of surrogate country methodologies regarding it. Yet, opportunity is provided for individual Chinese producers to have standard methodologies applied to them, i.e. individual market economy treatment. Once they clearly show that market economy conditions prevail, standard methodologies must be used; otherwise, surrogate country methodologies are at national AD authorities' disposal. This arrangement differs from the clear-cut approach regarding NME treatment adopted by previous special accession commitments in the 1960s and 1970s. It takes account of the progress of China's economic reform, which already dismantled government controls of economic affairs to a considerable extent. It also endorses the already prevalent national practices of conferring individual market economy treatment to producers from NMEs.[357] Yet, it is worth mentioning that for individual market economy treatment to be obtained, it has to be proved that market economy conditions prevail in all three activities, manufacture, production and sale. It is not enough to prove the prevalence only in relation to sale.[358] Concerning manufacture and production, though the differences between them are not clear, both cover many aspects, including in particular the

[354] Appellate Body Report, *European Communities - Definitive Anti-dumping Measures on Certain Iron or Steel Fasteners from China*, supra note 344, para.287.
[355] Ibid, para.286.
[356] Panel Report, *European Union - Anti-dumping Measures on Certain Footwear from China*, WT/DS405/R, 28 October 2011, para.7.194.
[357] For example, in the EU, its Council Regulation(EC) No. 905/98 firstly introduced the possibility for individual producers in Russia and China to prove the prevalence of market economy conditions for the application of market economy rules concerning the determination of normal value of their exports. Later Council Regulation(EC) No. 2238/2000 further extended this opportunity to producers in Ukraine, Vietnam, Kazakhstan and any NME country which is a member of the WTO. Article 1, *Council Regulation(EC) No. 905/98 amending Regulation(EC) No 384/96 on protection against dumped imports from countries not members of the European Community*, OJ L 128, 30.4.98, p.18; Article 1, *Council Regulation(EC) No. 2238/2000 amending Regulation(EC) No. 384/96 on protection against dumped imports from countries not members of the European Community*, OJ L 257, 11.10.2000, p.2.
[358] Bernard O'Connor, "China and Market Economy Status III", International Economic Law and Policy Blog, 14 May, 2012, available at: http://worldtradelaw.typepad.com/ielpblog/2012/05/china-and-market-economy-status-iii.html.

costs of inputs, of the industry's activities.[359] Furthermore, competent authorities are left with a considerable discretionary margin in their determination of conferring individual market economy treatment, since not only criteria on market economy conditions are not specified, but the standards of "clear show" and "prevail" are also rather ambiguous. In general, the acquiescent NME status of China and the reverse of the burden of proof greatly facilitates the application of NME treatment regarding China.

The easily accessible NME treatment based on China's special commitments, however, is not permanently applicable, but is of a transitional nature. Subparagraph (d) provides for rules on the termination of subparagraph 15 (a).[360] The first sentence provides for the termination of special NME treatment regarding China's economy in its entirety based on China's self-demonstration of its whole economy as market-driven. Criteria for evaluation in this respect are to be determined by importing WTO Members, which however should have been incorporated in their national laws before the date of China's accession. The third sentence sets forth the termination of special NME treatment with respect to specific Chinese industries or sectors based on China's demonstration of the prevalence of market economy conditions therein. Again relevant criteria are to be decided by importing WTO Members. These two sentences are considered provisions for an early termination of subparagraph (a) with respect to China's entire economy or specific sectors or industries before 2016.[361] Conversely, the second sentence of this subparagraph sets the termination of special NME treatment regarding China 15 years after its accession, that is, on 11 December, 2016.[362] This expiry clause seemed quite promising for Chinese producers. In practice, however, it has aroused great controversy.[363] Nonetheless, this is the first time that the issue of expiration is specified in a country's special commitments on NME treatment. It is based on the fact that the country making such commitments is transitioning towards a full market economy. Once the special NME treatment rules expire, subsequent application of NME treatment has to be brought back to the normal trajectory.

Apart from the Accession Protocol, the Report of the Working Party on the Accession of China also explicitly deals with AD issues, which concerns not only China's commitments to secure substantially WTO-conformity of its own AD laws, but also other WTO Members' application of NME treatment to imports of Chinese origin. To be specific, rules regarding NME treatment are specified in paragraphs 150 and 151 of the Report. These rules are not integrated into China's Accession Protocol by its Section 1.2 and therefore are not legally binding.[364] However, they provide valuable information on the background of the negotiation and may influence interpretation of relevant rules in the Accession Protocol. These rules read:

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[359] Ibid.

[360] Appellate Body Report, *European Communities - Definitive Anti-dumping Measures on Certain Iron or Steel Fasteners from China*, supra note 344, para.289.

[361] Ibid.

[362] Ibid.

[363] Specific analysis of the controversy on this expiry is made in Chapter 5 of this thesis.

[364] The second sentence of Section 1.2 of the Protocol on the Accession of the People's Republic of China sets: "[t]his Protocol, which shall include the commitments referred to in paragraph 342 of the Working Party Report, shall be an integral part of the WTO Agreement." Yet, paragraph 342 of the Working Party Report does not refer to paragraphs 150 and 151 of the Report as binding commitments given by China in relation to certain specific matters. Section 1.2, *Protocol on the Accession of the People's Republic of China*, WT/L/432, 23 November 2001; paragraph 342, *Report of the Working Party on the Accession of China*, WT/ACC/CHN/49, 1 October 2001.

150. Several members of the Working Party noted that China was continuing the process of transition towards a full market economy. Those members noted that under those circumstances, in the case of imports of Chinese origin into a WTO Member, special difficulties could exist in determining cost and price comparability in the context of anti-dumping investigations and countervailing duty investigations. Those members stated that in such cases, the importing WTO Member might find it necessary to take into account the possibility that a strict comparison with domestic costs and prices in China might not always be appropriate.

151. The representative of China expressed concern with regard to past measures taken by certain WTO Members which had treated China as a non-market economy and imposed anti-dumping duties on Chinese companies without identifying or publishing the criteria used, without giving Chinese companies opportunity to present evidence and defend their interests in a fair manner, and without explaining rationale underlying their determinations, including with respect to the method of price comparison in the determinations. In response to these concerns, members of the Working Party confirmed that in implementing subparagraph (a)(ii) of Section 15 of the Draft Protocol, WTO Members would comply with the following:

(a) When determining price comparability in a particular case in a manner not based on a strict comparison with domestic prices or costs in China, the importing WTO Member should ensure that it had established and published in advance (1) the criteria that it used for determining whether market economy conditions prevailed in the industry or company producing the like product and (2) the methodology that it used in determining price comparability. With regard to importing WTO Members other than those that had an established practice of applying a methodology that included, inter alia, guidelines that the investigating authorities should normally utilize, to the extent possible, and where necessary cooperation was received, the prices or costs in one or more market economy countries that were significant producers of comparable merchandise and that either were at a level of economic development comparable to that of China or were otherwise an appropriate source for the prices or costs to be utilized in light of the nature of the industry under investigation, they should make best efforts to ensure that their methodology for determining price comparability included provisions similar to those described above.

(b) The importing WTO Member should ensure that it had notified its market-economy criteria and its methodology for determining price comparability to the Committee on Anti-Dumping Practices before they were applied.

(c) The process of investigation should be transparent and sufficient opportunities should be given to Chinese producers or exporters to make comments, especially comments on the application of the methodology for determining price comparability in a particular case.

(d) The importing WTO Member should give notice of information which it required and provide Chinese producers and exporters ample opportunity to present evidence in writing in a particular case.

(e) The importing WTO Member should provide Chinese producers and exporters a full opportunity for the defence of their interests in a particular case.

(f) The importing WTO Member should provide a sufficiently detailed reasoning of its

preliminary and final determinations in a particular case.

Paragraph 150 of the Working Party Report reveals that it is the concern about China's unfinished economic reforms towards a full market economy that has caused other WTO Members to request for China's special commitments on price comparability. The Report, however, does not give any explanation about what specific characteristics of China's economy, a transitional economy, materially influence comparability of both its prices and costs, how the comparability is affected, and under what condition this negative influence can be deemed as being overcome. Without such clarification, it is actually unclear why China was obliged to make special commitments regarding price comparability while there are still so many transitional economies that are not so required.

Paragraph 151, to the contrary, records China's concern about the arbitrary application of NME treatment in reality before its accession to the WTO, and details a series of requirements, both substantial and procedural ones, to be complied with for future application of this treatment regarding exports of Chinese origin. It requires importing WTO Members applying NME treatment to establish and publish in advance their criteria for evaluating market economy conditions and methodology for determining price comparability. Apart from the publication requirement, Paragraph 151 in itself does not clarify what specific criteria and methodology should be utilized. Regarding the methodology, it confirms AD authorities' use of one or more surrogate countries' prices and costs for comparison and sets down some guidelines for the selection of surrogate countries. The guidelines described reflect mainly the prevailing practices of the EU and the US. Relevant statements therefore actually validate established EU and US approaches in terms of using analogue country data to calculate dumping margins.[365] Paragraph 151 simply requires importing WTO Members' best efforts to meet the guidelines described or prescribed by it. No obligatory force is imposed. Moreover, it fails to clarify what prices and costs of a surrogate country and in which manner these should be relied upon for price comparison. After all, the working party report in itself is not a binding legal document, unless its stipulations are incorporated into the accession protocol. Nonetheless, some procedural requirements in Paragraph 151 concerning the application of NME treatment can be legally binding insofar as they are embodied also in the WTO AD Agreement's procedural rules. In general, China tried to tighten up the discipline of NME treatment in the Working Party Report and obtain relevant commitments from other WTO trading partners, which however was not achieved.[366]

China's commitments in this regard are special NME treatment rules, which regulate legal relations between particular subjects, i.e. China on the one side and other WTO Members on the other. Their legal force is superior to the general NME treatment rules according to the principle of *lex specialis derogat legi generali*. Section 15 also explicitly specifies in its chapeau the superiority of its provisions as general NME treatment rules shall apply to Chinese exports in consistent with special rules contained therein.

[365] Joris Cornelis, "China's Quest for Market Economy Status and Its Impact on the Use of Trade Remedies by the European Communities and the United States", *Global Trade and Customs Journal*, 2007, Vol.2, Issue 2, p.109.
[366] Yan Luo, *Anti-dumping in the WTO, the EU and China - The Rise of Legalization in the Trade Regime and its Consequences*, supra note 7, p.165.

It is noteworthy that it is in China's special commitments that the term "market economy" is for the first time referred to in a binding international legal document though similar terms have already been employed in national AD laws. The market and non-market economy dichotomy is therefore formally introduced into the international AD legal regime. China's special commitments though introduce the market and non-market economy dichotomy into international AD law, they do not touch upon clarifying the specific meaning of either term, not even in a vague manner. China's NME status is taken for granted. Criteria for evaluating market economy conditions depend completely on national discretion. The only relevant restriction imposed is that an importing Member's criteria for the evaluation of China's whole economy should be contained in its national law as the date of China's accession. The market and non-market economy dichotomy adopted simply significantly lowers the threshold for the application of special methodologies, especially when compared with the state trading and price fixing requirement in the second Ad Note to Article VI:1 GATT, which China's situation definitely does not meet. The threshold criteria for the application of special methodologies, moreover, are vague and flexible and can be freely determined by importing WTO Members.

Apart from market economy criteria, China's special commitments do not provide any clarification of the applicable surrogate country methodologies. The considerable discretionary margin conferred actually enables importing WTO Members' utilization of almost any criteria and methodologies of their choice. In fact, China's Accession Protocol has adopted such a legislative mode right to confirm and legalize the multifarious criteria and methodologies already established in national AD laws. An importing WTO Member therefore only needs to make the slightest modification to ensure WTO-conformity of its AD law and practices confronting China's acquisition of WTO membership. It is pointed out that after the establishment of the WTO, a number of WTO Members retained or adopted a new NME treatment which obviously diverged from the language of the WTO AD Agreement.[367] In order not to be challenged by acceding economies labeled by them as NMEs in WTO dispute settlement procedures risking losing such cases, existing WTO Members allegedly had no other option but to impose terms of accession on NME treatment as described above.[368] Right from the beginning, the aim of special NME treatment rules is not to specify clearly relevant criteria and methodologies to constrain national practices. The WTO panels and AB examine municipal laws only for one specific purpose, to assess their conformity with relevant WTO obligations.[369] Since China's special commitments authorize WTO Members' enactment of market economy criteria and NME methodologies in a free manner, the specific content of Members' AD laws in these two respects cannot be inconsistent with WTO rules and therefore non-justiciable within the WTO legal regime.[370] Regardless of how "unfair" China deems relevant national provisions, it cannot legally argue that an importing WTO Member, by establishing its own standards, fails to meet its WTO obligations.[371] China can only politically argue that it has been treated less favorably or

[367] Alexander Polouektov, "'The Non-market Economy' Issue in International Trade in the Context of WTO Accession", supra note 133, p.3.
[368] Ibid.
[369] Yan Luo, *Anti-dumping in the WTO, the EU and China - The Rise of Legalization in the Trade Regime and its Consequences*, supra note 7, p.166.
[370] Ibid, pp.168-169.
[371] Ibid.

unfairly.[372]

WTO Members are held to have used WTO accession obligations to steer the direction of China's economic reform, since they do not take for granted that China will naturally evolve into a full market economy.[373] The market economy test embodied in China's special NME treatment commitments is also held to function as an important lever to encourage its market-oriented economic reform.[374] However, the diversified market economy tests in different Members together with the considerable arbitrariness embodied in the application of these tests have damped down China's interest in pursuing market economy status through passing these tests.

The negotiation of China's accession lasted for 14 years and 9 months, during which a series of issues were discussed, which led to considerable amount of so-called WTO-plus commitments made by China.[375] During this process, special NME treatment regarding China was one of the toughest negotiating topics. The bargaining of this issue run through the whole negotiation.[376] The ultimately established special NME treatment rules as described above have become the most principal legal basis for the application of NME treatment in practice. Among all special commitments provided by China, those on NME treatment are generally considered to be the most far reaching compromise and significant sacrifice it had made for its accession.[377] Negotiation of China's accession was conducted against the backdrop of other former Soviet countries' eagerness to join the WTO. This situation is pointed to result in WTO Members' intent to impose more rigorous terms for China's accession, since its accession terms were increasingly regarded as a template for other transitional economies.[378] This viewpoint gains some support from the following practices of introducing special NME treatment rules in Vietnam's and Tajikistan's accession.

2.3.2 Vietnam

Vietnam officially acceded to the WTO on January 11th, 2007.[379] Compared with China, its economic size is much smaller, economic threat due to its exports accordingly much weaker. However, given its status as a socialist country transitioning towards a full market economy,

[372] Ibid.

[373] Mark Wu, "The WTO and China's Unique Economic Structure", in Benjamin L. Liebman, Curtis J. Milhaupt eds., *Regulating the Visible Hand?: The Institutional Implications of Chinese State Capitalism*, Oxford University Press, November 16, 2015, p.325.

[374] Edwin Vermulst, Juhi Dion Sud, Simon J. Evenett, "Normal Value in Anti-Dumping Proceedings against China Post-2016: Are Some Animals Less Equal Than Others?", *Global Trade and Customs Journal*, Vol.11, Issue 5, 2016, pp.221-228.

[375] WTO, *WTO Accessions: 2018 Annual Report by the Director-General*, supra note 340, p.41.

[376] PENG Delei, "'Nonmarket Economy Status of' of China after 2016: Argument, Study and Anticipation", *Journal of International Trade*, Issue 5, 2015, pp.166-176.

[377] Ibid, Rui Pan, "China's WTO Membership and the Non-Market Economy Status: discrimination and impediment to China's foreign trade", *Journal of Contemporary China*, Vol.24, No.94, 2015, pp.742-757; Henry Gao, "China's Participation in the WTO: A Lawyer's Perspective", *Singapore Year Book of International Law*, Vol.11, 2007, p.55.

[378] Henry Gao, "China's Participation in the WTO: A Lawyer's Perspective", ibid, p.47; Nicholas R. Lardy, *Integrating China into the Global Economy*, Brookings Institution Press, Washington, D.C., 2002, p.63.

[379] WTO, *Notification of Acceptance and Entry into Force of the Protocol on the Accession of the Socialist Republic of Vietnam*, WT/Let/552, 19 December 2006.

special commitments regarding NME treatment were still imposed on it in the accession negotiations. Paragraph 254 of the Working Party Report on the Accession of Vietnam explicitly records WTO Members' concern in this regard:

Several Members noted that Vietnam was continuing the process of transition towards a full market economy. Those Members noted that under those circumstances, in the case of imports of Vietnamese origin into a WTO Member, special difficulties could exist in determining cost and price comparability in the context of anti-dumping investigations and countervailing duty investigations. Those Members stated that in such cases, the importing WTO Member might find it necessary to take into account the possibility that a strict comparison with domestic costs and prices in Vietnam might not always be appropriate.

Moreover, Paragraph 255 of the Working Party Report sets out clearly Vietnam's special commitments concerning NME treatment which are nearly identical to those made by China. Specifically, these provisions provide:

255. The representative of Vietnam confirmed that, upon accession, the following would apply - 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 exports from Vietnam into a WTO Member consistent with the following:

(a) In determining price comparability under Article VI of the GATT and the Anti-Dumping Agreement, the importing WTO Member shall use either Vietnamese 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 Vietnam 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 Vietnamese 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 Vietnam 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) .....

(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 Vietnam 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 the date of the accession. In any event, the provisions of subparagraph (a)(ii) shall expire on 31 December 2018. In addition, should Vietnam 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.

Except for the different date of automatic expiry which is explicitly stipulated in the report, there is no other significant modification in Vietnam's special commitments compared with China's. These commitments have been incorporated into paragraph 2 of the Protocol on the Accession of the Socialist Republic of Vietnam and are therefore legally binding.[380]

2.3.3 Tajikistan

Tajikistan is the third country that has provided special commitments on NME treatment in accession negotiations. It formally became a member of the WTO on 2 March 2013.[381] It is the newest WTO Member which has offered such commitments. In the negotiation of Tajikistan's accession, the Report of the Working Party did not take note of other WTO Members' concern of Tajikistan's economic regime which questioned the comparability of its domestic prices and costs and led to its provision of special NME treatment commitments. Instead, it straightforwardly recorded these commitments in Paragraph 164 of the Report:

The representative of Tajikistan confirmed that, upon accession, the following would apply - Article VI of the GATT 1994, the WTO 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 exports from Tajikistan 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 Tajikistan's 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 Tajikistan 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 Tajikistan's 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 Tajikistan 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.

Once Tajikistan has established, under the national law of the importing WTO Member, that

[380] The second sentence of paragraph 2 of the Protocol of Accession of the Socialist Republic of Vietnam sets: "[t]his Protocol, which shall include the commitments referred to in paragraph 527 of the Working Party Report, shall be an integral part of the WTO Agreement." Paragraph 527 of the Report of the Working Party on the Accession of Vietnam sets: "...The Working Party took note of the commitments given by Vietnam in relation to specific matters which are reproduced in paragraphs ... 255 ... of this Report. The Working Party took note that these commitments had been incorporated in paragraph 2 of the draft Protocol of Accession of Vietnam to the WTO." Paragraph 2, *Protocol on the Accession of the Socialist Republic of Vietnam*, WT/L/662, 15 November 2006. Paragraph 527, *Report of the Working Party on the Accession of Vietnam*, WT/ACC/VNM/48, 27 October 2006.

[381] WTO, *Notification of Acceptance and Entry into Force of the Protocol on the Accession of the Republic of Tajikistan*, WT/Let/878, 7 February 2013.

it is a market economy, the provisions of sub-paragraph (a) shall be terminated provided that the importing WTO Member's national law contains market economy criteria as of the date of accession. In any event, the provisions of sub-paragraph (a)(ii) shall expire 15 years after the date of accession. In addition, should Tajikistan 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 sub-paragraph (a) shall no longer apply to that industry or sector. The Working Party took note of these commitments.

The unconditional expiry of automatically applied NME treatment to Tajikistan is to take effect 15 years after the date of accession, exactly the same as China's commitments. Actually, all wording employed in Tajikistan's Working Party Report to describe its special commitments on NME treatment is almost identical to that previously used for China's. These commitments, similar to those made by Vietnam, though stipulated in the working party report, a non-legally binding document as such, are incorporated in Paragraph 2 of Tajikistan's Accession Protocol together with some other paragraphs of the report.[382] These commitments therefore constitute an integral part of Tajikistan's WTO obligation.

Relevant provisions in China's Accession Protocol have served as a model in the negotiation of rules in Vietnam's and Tajikistan's accession legal documents. The latter two's special commitments on NME treatment simply copied the Chinese pattern regarding not only the description of the methodologies to be applied, the precondition for the application of different methodologies, the adoption of the market and non-market economy dichotomy, the reporting obligation of other WTO Members, but also the different scenarios concerning the termination of NME status in AD proceedings.[383] The interpretation of Chinese rules undeniably will greatly influence the understanding of similar rules in the latter two's accession legal documents.

3. Principal national NME treatment practices

The legal characterization of both general and particular international NME treatment rules in international law is problematic as well as low key since these rules are imprecise, either vaguely phrased allowing for controversial international, or explicitly worded to give considerable margin for national discretion. Thus, WTO Members have been implementing divergent national NME treatment rules and practices. To show the arbitrariness of actual NME treatment, suffice it to analyze the practices of two main WTO Members, those of the US and the EU. While the EU

[382] The second sentence of paragraph 2 of the Protocol on the Accession of the Republic of Tajikistan sets: "[t]his Protocol, which shall include the commitments referred to in paragraph 351 of the Working Party Report, shall be an integral part of the WTO Agreement." Paragraph 351 of the Report of the Working Party on the Accession of Tajikistan sets: "... The Working Party took note of the assurances and commitments given by Tajikistan in relation to specific matters which are reproduced in paragraphs ... 164 ... of this Report. The Working Party took note that these commitments had been incorporated in paragraph 2 of the Protocol on the Accession of the Republic of Tajikistan to the WTO." Paragraph 2, *Protocol on the Accession of the Republic of Tajikistan*, WT/L/872, 11 December 2012; Paragraph 351, *Report of the Working Party on the Accession of the Republic of Tajikistan*, WT/ACC/TJK/30, 6 November 2012.

[383] Though importing WTO Members' obligation to notify the NME methodologies adopted is not specified in Tajikistan's working party report, according to Article 16.5 of the WTO AD Agreement, they still have the obligation to notify their domestic AD procedures to the Committee on AD Practices.

was the first to directly employ the market and non-market economy dichotomy in AD legislation to differentiate countries for the application of different price comparison methodologies, the US was the first to explicitly use, and then legally specify, surrogate country methodologies. As powerful trading Members, both economies are also principal users of NME treatment in reality. Their legislation and practices moreover greatly influence other Members' legislative and executive choice in this regard. Yet, one thing worth mentioning is that not all Members are active NME treatment users. Some Members do not even have AD laws.[384] Some though are equipped with AD laws, but seldom use them, not to mention their application of NME treatment.[385] Those transitional economy Members, against whose exports NME treatment is frequently utilized, in particular, rarely enact and use NME treatment against each other.[386]

3.1 The US

US AD law far precedes the formation of international AD rules and was based on a structure and terminology which differed significantly from those subsequently employed in the international AD legal regime. Moreover, it was not until the US' acceptance of the Tokyo round AD Code, that it became legally committed to bring its AD legislation into full conformity with international rules. In the WTO era, it is even clearer that US AD legislation is under the full constraint of international AD rules, which are part of the single undertaking of the WTO legal regime.[387] Hence, a suspected violation of international AD rules by the US is open to challenge in the WTO's dispute settlement regime involving mandatory consultations and legally binding rulings and recommendations by the DSB.

Concerning NME treatment, the US AD authorities were the first to explicitly use surrogate country methodologies for dumping calculation regarding NME exports, i.e. in the case *bicycles*

[384] As at 24 October 2018, the following Members notified the WTO that they have no AD legislation: Afghanistan, Angola, Belize, Benin, Botswana, Brunei Darussalam, Burkina Faso, Burundi, Cambodia, Chad, Congo, Côte d'Ivoire, Eswatini, Gabon, The Gambia, Ghana, Guinea, Guyana, Haiti, Hong Kong, Lao People's Democratic Republic, Liechtenstein, Macao, Madagascar, Maldives, Mali, Myanmar, Namibia, Nepal, Papua New Guinea, Seychelles, Sri Lanka, Suriname, Switzerland, Togo, Tonga, Vanuatu. Several other Members submitted no notification to the WTO concerning their AD legislation. WTO, *Report (2018) of the Committee on Anti-dumping Practices*, G/L/1270, G/ADP/25, 29 October 2018, pp.5-8.

[385] Concerning data of specific amounts of AD measures adopted by WTO Members, see WTO statistics on anti-dumping, Anti-dumping Measures: By Reporting Member 01/01/1995 - 31/12/2018, available at: https://www.wto.org/english/tratop_e/adp_e/AD_MeasuresByRepMem.pdf.

[386] For example, while acceding the WTO, Lao's Republic had no legislation authorizing the application of AD measures. The AD legislative proceedings in Armenia, Kyrgyzstan, Moldova were still on going. Georgia and the Former Yugoslavia Republic of Marcedonia though had equipped themselves with AD legislation before their accession, they had never used it. Paragraph 99, Report of the Working Party on the Accession of Lao PDR to the WTO, WT/ACC/LAO/45, 1 October, 2012; Paragraph 105, Report of the Working Party on the Accession of the Republic of Armenia, WT/ACC/ARM/23, 26 November 2002; Paragraph 68, Report of the Working Party on the Accession of the Kyrgyz Republic, WT/ACC/KGZ/26, 31 July 1998; Paragraph 97, Report of the Working Party on the Accession of the Republic of Moldova, WT/ACC/MOL/37, 11 January 2001; Paragraph 77, Report of the Working Party on the Accession of Georgia to the WTO, WT/ACC/GEO/31, 31 August 1999; Paragraph 119, Report of the Working Party on the Accession of the Former Yugoslavia Republic of Marcedonia, WT/ACC/807/27, 26 September 2002.

[387] Article II.2 of the Agreement Establishing the World Trade Organization sets: "[t]he agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to as 'Multilateral Trade Agreements') are integral parts of this Agreement, binding on all Members". The WTO AD Agreement is included in Annex 1A therefore an integral part of the single undertaking of the WTO legal regime.

from Czechoslovakia in 1960.[388] With respect to the US NME treatment legislation, as pointed out by Francis Snyder, its historical development is complex due to the tug of war between the US legislative and executive organs in AD legislation. While the former tried to hold the legislative choice of trade policy firmly in its hand, the latter struggled to legalize its own investigating practices to a large extent, disagreements which resulted in conflicting statutory and regulatory rules.[389] In the WTO era, however, the US NME treatment legislation has matured to form a basically stable and unified legal regime. This regime is equally applied to NME cases concerning both WTO Members and non-members. It is based principally on US AD authorities' investigating experience.

3.1.1 Explicit NME treatment

In US AD law, explicit NME treatment rules are stipulated in Sections 771 and 773 of its Tariff Act of 1930.[390] Section 771 (18) of the Act deals with issues concerning the identification of NME countries. It reads as follows:

> ***(18) Nonmarket economy country***
>
> ***(A) In general***
>
> *The term "nonmarket economy country" means any foreign country that the administering 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.*
>
> ***(B) Factors to be considered***
>
> *In making determinations under subparagraph (A) the administering authority shall take into account -*
>
> *(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, and*
>
> *(vi) such other factors as the administering authority considers appropriate.*
>
> ***(C) Determination in effect***
>
> *(i) Any determination that a foreign country is a nonmarket economy country shall remain*

[388] Department of the Treasury, *Bicycles from Czechoslovakia*, Determination of Sales at Less Than Fair Value, Fed. Reg. Vol.25, 1960, p.6657.

[389] Francis Snyder, *The EU, the WTO and China - Legal Pluralism and International Trade Regulation*, supra note 36, pp.242-248.

[390] The Tariff Act of 1930 is codified in Title 19 Customs Duties, Chapter IV of the US Code. Subtitle IV of this Chapter directly concerns countervailing and antidumping duties, which specifically includes sections 1671-1677n. Sections 771 and 773 of the Tariff Act of 1930 correspondingly are codified in Section 1677. "Definition; special rules" and Section 1677b "Normal value" of the US Code respectively.

in effect until revoked by the administering authority.

(ii) The administering authority may make a determination under subparagraph (A) with respect to any foreign country at any time.

(D) Determinations not in issue

Notwithstanding any other provision of law, any determination made by the administering authority under subparagraph (A) shall not be subject to judicial review in any investigation conducted under part II of this subtitle.

(E) Collection of information

Upon request by the administering authority, the Commissioner of Customs shall provide the administering authority a copy of all public and proprietary information submitted to, or obtained by, the Commissioner of Customs that the administering authority considers relevant to proceedings involving merchandise from nonmarket economy countries. The administering authority shall protect proprietary information obtained under this section from public disclosure in accordance with section 1677f of this title.

Evidently, US legislation has provided for a relatively comprehensive set of rules concerning the determination of NME countries, which however simultaneously reserve considerable latitude for administrative discretion. Subparagraph (A) of Section 771 (18) firstly gives directly a US definition of nonmarket economy country, which in particular confirms that identification in this regard rests completely with the US administering authority's determination. Subparagraph (B) then provides a list of criteria for the administering authority's determination of NME countries, which aims to operationalize the abstract definition and transparentize determination in this regard. These criteria specifically refer to the convertibility of a foreign country's currency, its wage rates formation, openness to foreign investments, government ownership or control of means of production, government control over the allocation of resources and the price and output decisions of enterprises. All these determinants are factors concerning government intervention the US regards as significant in influencing the operation of a market economy. The list of criteria moreover is open-ended. A saving clause is set at the end of subparagraph (B) to allow for the administering authority's taking into consideration any other factors it deems appropriate to use for identifying NME countries. Indeed, in reality, the US Department of Commerce has developed a number of additional factors falling into the purview of item (6). Some exemplary ones are the existence and operation of security exchange, customs, anti-monopoly laws, and anti-dumping laws.[391] This seemingly explicit list, however, by no means serves as basis for clear and predictable determination of NME countries. Firstly, the list *per se* is not exhaustive, which substantially permits the administering authority's introduction of unlimited additional requirements. Secondly, what the list embraces are not requirements, but simply some variables relating to government intervention. The criteria are formulated in an undefined manner by employing the wording "the extent to which", "the extent of", rather than some definitive account of circumstances impeding the operation of a market economy. Thirdly, the administering authority is merely required to deliberate a foreign country's overall situation in terms of all these factors, but not to apply them cumulatively in a specific case. It is therefore sufficient to make a determination relying on parts of these criteria. Overall, no clear instruction

[391] Alexander Polouektov, "'The Non-market Economy' Issue in International Trade in the Context of WTO Accession", supra note 133, p.18.

is provided. The administering authority basically has unlimited discretionary latitude in making relevant decisions. Consequently, the overall evaluation process can be rather arbitrary.

Subparagraph (C) of Section 771 (18) specifies that a determination of a country's NME status can be made by the administering authority with respect to any foreign country at any time. Once such a determination is made, it shall remain in effect until it is revoked by the administering authority. Subparagraph (D) further determines that the administering authority's determination of NME status is not subject to judicial review. Regardless of the administrative nature of decisions in this regard, they are completely immune from any judicial organ's review or supervision. It therefore should be no surprise that such decisions are largely political in nature and outcomes. Therefore, in general US bureaucrats possess limitless discretion in deciding a country's NME status. Since the early 1990s, eleven countries in Eastern Europe and the former Soviet Union have been graduated from NME status, including Poland (1993), the Czech Republic (1998), Slovakia (1999), Hungary (2000), Latvia (2001), Kazakhstan (2002), Russia (2002), Romania (2002), Estonia (2003), Lithuania (2003), and Ukraine (2006).[392] Countries currently designated as NMEs are China, Vietnam, as well as nine former Soviet states: Armenia, Azerbaijan, Belarus, Georgia, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan, and Uzbekistan.[393] Armenia, Georgia, Kyrgyzstan, and Moldova are WTO Members providing no special NME treatment commitments.

Section 773 of the US Tariff Act of 1930 specifies rules on the determination of normal value. Subsection (c) of it specially stipulates rules concerning the establishment of normal value for NME imports. It sets as below:

(c) Nonmarket economy countries

(1) In general

If -

(A) the subject merchandise is exported from a nonmarket economy country, and

(B) the administering authority finds that available information does not permit the normal value of the subject merchandise to be determined under subsection (a) of this section,

the administering authority shall determine the normal value of the subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise and to which shall be added an amount for general expenses and profit plus the cost of containers, coverings, and other expenses. Except as provided in paragraph (2), the valuation of the factors of production shall be based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the administering authority.

(2) Exception

If the administering authority finds that the available information is inadequate for purposes of determining the normal value of subject merchandise under paragraph (1), the administering authority shall determine the normal value on the basis of the price at

[392] K. William Watson, "Will Nonmarket Economy Methodology Go Quietly into the Night? US Antidumping Policy toward China after 2016", *Policy Analysis*, Cato Institute, Number 763, October 28, 2014, p.14, note 17.
[393] Ibid, p.15, note 18.

which merchandise that is -

(A) comparable to the subject merchandise, and

(B) produced in one or more market economy countries that are at a level of economic development comparable to that of the nonmarket economy country,

is sold in other countries, including the Unites States.

(3) Factors of production

For purposes of paragraph (1), the factors of production utilized in producing merchandise include, but are not limited to -

(A) hours of labour required,

(B) quantities of raw materials employed,

(C) amounts of energy and other utilities consumed, and

(D) representative capital cost, including depreciation.

(4) Valuation of factors of production

The administering authority, in valuing factors of production under paragraph (1), shall utilize, to the extent possible, the prices or costs of factors of production in one or more market economy countries that are -

(A) at a level of economic development comparable to that of the nonmarket economy country, and

(B) Significant producers of comparable merchandise.

(5) Discretion to disregard certain price or cost values

In valuating the factors of production under paragraph (1) for the subject merchandise, the administering authority may disregard price or cost values without further investigation if the administering authority has determined that broadly available export subsidies existed or particular instances of subsidization occurred with respect to those price or cost values or if those price or cost values were subject to an antidumping order.

The US AD law sets the factors of production approach as its primary methodology for establishing normal value of NME exports. According to this approach, normal value of imports from NMEs should be determined by evaluating the factors of production utilized in producing the subject merchandise in a surrogate market economy country or countries, which should be added with amounts for general expenses, profit, cost of containers, coverings, and other expenses. While selecting surrogate market economy countries, the administering authority is required to choose, to the extent possible, an appropriate country which is at a level of economic development comparable to that of the NME country and a significant producer of comparable merchandise. The primary indicator used by the US to measure economic comparability is *per capita* GNI (Gross National Income).[394] Concerning "significant producers" and "comparable merchandise", no definition and further clarification is given. What is clear is that "comparable merchandise" encompasses a larger set of products than "like product".[395] These two abstract terms provide broad administrative discretion in practice. Moreover, the two statutory selection

[394] US Department of Commerce Memorandum, "List of Surrogate Countries for Antidumping Investigations and Reviews from the People's Republic of China", August 2, 2018, p.1; US Department of Commerce Memorandum, "List of Surrogate Countries for Antidumping Investigations and Reviews from the Socialist Republic of Vietnam", August 2, 2018, p.1; Import Administration Policy Bulletin 04.1, "Non-Market Economy Surrogate Country Selection Process", available at: https://enforcement.trade.gov/policy/bull04-1.html.

[395] Ibid.

requirements are not strictly obligatory, as the statute requires that they be met only "to the extent possible".[396] The specific facts of each case can be rather peculiar. The availability and quality of information concerning the evaluation of factors in a potential surrogate country moreover weighs heavily in the selection process in practice. All these points enable and ensure the administering authority's exercise of discretionary power on a case-specific basis. The DOC's regulations attempt to clarify the statute's general guidance regarding the factors of production approach.[397] Yet, the regulatory rules are still far from enough to make application of this approach clear. Plenty of issues are still left for the administering authority to decide in practice. In exceptional circumstances where the factors of production methodology is inapplicable, the administering authority can resort to other surrogate country methodologies. Normal value can be established based on the prices at which comparable merchandise produced in one or more market economy countries is sold in other countries, including the United States. In this case, the surrogate market economy countries should also be at a level of economic development comparable to that of the exporting NME country.

3.1.2 Implicit NME treatment — particular market situation

Apart from explicit NME treatment rules, US AD law also contains some other rules which enable its administering authority's use of NME treatment. Thus, section 773 (a)(4) of the US Tariff Act of 1930 allows for the administering authority's construction of the normal value of the subject merchandise when it determines that the normal value cannot be determined based on domestic prices of foreign like products.[398] One essential requirement for comparable domestic sales prices is that they should be in the ordinary course of trade.[399] Section 771(15) defines "ordinary course of trade" as meaning "the conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to merchandise of the same class or kind".[400] It furthermore specifies some examples of sales and transactions outside the ordinary course of trade. One of these explicitly given examples is situations in which the administering authority determines that the particular market situation prevents a proper comparison with the export price or constructed export price.[401] This prerequisite for the administering authority's resort to constructed value is vaguely worded, which further explicitly permits the administering authority's discretionary decision in each specific case. It adequately substantiates the US administering authority's reliance on the existence of arbitrarily determined NME conditions to disregard domestic prices and resort to normal value construction.

[396] Import Administration Policy Bulletin 04.1, "Non-Market Economy Surrogate Country Selection Process", supra note 394.
[397] 19 C.F.R. § 351.408 - Calculation of normal value of merchandise from nonmarket economy countries.
[398] Section 773(a)(4) Use of constructed value specifies: "[i]f the administering authority determines that the normal value of the subject merchandise cannot be determined under paragraph (1)(B)(i), then, notwithstanding paragraph (1)(B)(ii), the normal value of the subject merchandise may be the constructed value of that merchandise, as determined under subsection (e) of this section".
[399] According to Section 773(a)(1)(B)(i) of the Tariff Act of 1930, domestic sales price is "the price at which the foreign like product is first sold (or, in the absence of a sale, offered for sale) for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level of trade as the export price or constructed export price".
[400] The first sentence, Section 771(15), Tariff Act of 1930.
[401] The second sentence, Section 771(15), Tariff Act of 1930.

Concerning the construction of normal value, the US AD law sets specific provisions in Sections 773 (e) and (f). Section 773 (e) clearly specifies the composition of the constructed value, which shall include the cost of materials and fabrication, the selling, general and administrative expenses and profits, and the cost of package.[402] Section 773 (f)(1)(A) requires that costs shall normally be calculated on the records of the exporter or producer of the merchandise, if such records are kept 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 merchandise.[403] Nonetheless, the second last sentence of Section 773 (e) explicitly states that if a particular market situation exists such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the costs of production in the ordinary course of trade, the administering authority may use another calculation methodology under this part or any other calculation methodology.[404] The term 'particular market situation' is here employed to indicate a circumstance of ineligible costs of production, which again is ambiguously described, allowing for discretionary decision in practice. More importantly, under this ambiguous circumstance, the administering authority is allowed unlimited discretion in choosing normal value calculation methodologies, which include not only statutorily specified ones, but also any other not stipulated in law. Discretionary margin as such undoubtedly allows for the administering authority's use of surrogate country value for establishing normal value. Different from explicit NME treatment rules, relying on Sections 773 (a) and (e), the US administering authority is able to apply NME treatment without identifying and labeling a specific country as an NME country. In US AD law, therefore, NME treatment can theoretically be applied to any country on a case-specific basis. The US AD rules as described above increase substantially the availability of NME treatment.

Furthermore, it is worth mentioning that by a recent amendment to, *inter alia*, the Tariff Act of 1930 by the Trade Preferences Extension Act of 2015 a series of rules on particular market situation were added to the US AD law.[405] Title V of this Act is entitled "improvements to antidumping and countervailing duty laws". This title is also authorized to be shortly cited as the "American Trade Enforcement Effectiveness Act".[406] Section 504 of this title targets amendments relating to particular market situation. It introduces several significant amendments, which in particular include the following two: (1) the supplement of the existence of particular market situation as a statutory case of sales and transactions outside the ordinary course of trade;[407] and (2) the insertion of the sentence conferring upon the administering authority unlimited authority in choosing normal value calculation methodology in particular market situation where the costs of production are not in the ordinary course of trade.[408] These two provisions, as

[402] Section 773(e) "Constructed value", Tariff Act of 1930.
[403] Section 773(f)(1)(A), Tariff Act of 1930.
[404] The second last sentence, Section 773 (e), Tariff Act of 1930.
[405] Trade Preferences Extension Act of 2015, Pub. L. No.114-27, 114th Congress, 129 Stat. 362, June 29, 2015.
[406] Section 501, Trade Preferences Extension Act of 2015.
[407] To be specific, Section 504(a) of the Trade Preferences Extension Act of 2015 provides: "[d]efinition of Ordinary Course of Trade. - Section 771(15) of the Tariff Act of 1930 (19 U.S.C. 1677(15)) is amended by adding at the end the following: '(C) Situations in which the administering authority determines that the particular market situation prevents a proper comparison with the export price or constructed export price.'"
[408] To be specific, Section 504(c)(2) of the Trade Preferences Extension Act of 2015 provides: "by striking the flush text at the end and inserting the following: 'For purposes of paragraph (1), if a particular market situation exists

analyzed before, play a significant role in enabling the administering authority's resort to NME treatment.

In reality, the US DOC applied this amendment firstly in an AD administrative review of imports of certain oil country tubular goods (OCTG) from Korea.[409] In this case, the DOC determined that a particular market situation existed in Korea which distorted its OCTG producers' costs of hot-rolled coil and electricity inputs.[410] It made this affirmative determination by collectively taking into account the four particular market situation allegations put forward by the petitioners. These four allegations were: (1) subsidies from the government of Korea that benefit Korean producers of hot-rolled steel, (2) flooding of unfairly-traded low-priced hot-rolled steel imports from China to Korea, (3) "strategic alliances" between Korean suppliers of hot-rolled steel and Korean OCTG producers, (4) intervention by the Korean government in the electricity market.[411] The US DOC decided that these four distortions cumulatively led to a particular market situation in Korea under which its OCTG producers' costs of production, especially those of hot-rolled coil, the primary input in producing OCTG, were not in the ordinary course of trade.[412] While constructing normal value, the DOC adjusted the mandatory respondent's reported costs of hot-rolled coil upwardly by a net domestic subsidization rate calculated on the basis of its existing CVD regarding hot-rolled steel from Korea.[413] This practice led to a significant increase in the dumping margin.[414] As to the other three factors, i.e. imports of Chinese hot-rolled steel, strategic alliances and government involvement in the electricity market, no particular market situation adjustment was made since the DOC was unable to quantify their impact on the costs.[415] In subsequent administrative reviews of certain OCTG from Korea, the DOC continued its affirmative determination of the existence of a particular market situation in Korea with respect to costs based on the same accounts.[416] It again upwardly adjusted the

such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade, the administering authority may use another calculation methodology under this subtitle or any other calculation methodology...'"

[409] Department of Commerce, *Certain Oil Country Tubular Goods from the Republic of Korea: Final Results of Antidumping Duty Administrative Review*; *2014-2015*, Fed. Reg. Vol.82, No.72, Monday, April 17, 2017, p.18105.

[410] Department of Commerce, Issues and Decision Memorandum for the Final Results of the 2014-2015 Administrative Review of the Antidumping Duty Order on Certain Oil Country Tubular Goods from the Republic of Korea, April 10, 2017, p.40.

[411] Ibid, p.30.

[412] Ibid, p.40.

[413] Ibid, p.42.

[414] The Preliminary Results of this administrative review decided an AD duty rate of 8.04% for the NEXTEEL Co., Ltd relying on constructed value of its exports without making any particular market situation adjustment. In the Final Results, however, the AD duty rate was raised to 24.02% after the particular market situation adjustment was made. Department of Commerce, *Certain Oil Country Tubular Goods from the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review*; *2014-2015*, Fed. Reg. Vol.81, No.199, Friday, October 14, 2016, 71074; Department of Commerce, *Certain Oil Country Tubular Goods from the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2014-2015*, supra note 409.

[415] Department of Commerce, Issues and Decision Memorandum for the Final Results of the 2014-2015 Administrative Review of the Antidumping Duty Order on Certain Oil Country Tubular Goods from the Republic of Korea, supra note 410, p.43.

[416] Department of Commerce, Issues and Decision Memorandum for the Final Results of the 2015-2016 Administrative Review of the Antidumping Duty Order on Certain Oil Country Tubular Goods from The Republic of Korea, April 11, 2018, pp.16-22; Department of Commerce, Decision Memorandum for the Preliminary Results of the 2016-2017 Administrative Review of the Antidumping Duty Order on Certain Oil Country Tubular Goods from the Republic of Korea, October 3, 2018, pp.19-23.

reported costs of hot-rolled coil by a net domestic subsidization rate.[417] This practice of adjusting distorted costs of production based on a particular market situation departs significantly from the US DOC's historical practice.

Later in the AD administrative review concerning imports of steel nails from Korea, the DOC however negated the existence of a particular market situation in Korea with respect to costs of steel and electricity due to the lack of persuasive evidence.[418] In this case, three similar accounts substantiating the particular market situation allegation as those in the OCTG case were put forward by the petitioners, with the exception of the one concerning subsidies to steel production from the government of Korea.[419] It is exactly the lack of this factor, a quantifiable evidence of price distortion on which the final particular market situation adjustment can be based, that led to the DOC's decision that the petitioner made only general allegations without a tangible effect of price distortion and an affirmative particular market situation determination was therefore unwarranted.[420]

Nonetheless, in several subsequent AD cases concerning imports of Korean welded pipes of divergent species, the DOC resumed its affirmative determination of the existence of particular market situation in Korea with respect to costs.[421] It continued the affirmative determination since in these cases virtually the same four particular market situation allegations as those in the Korean OCTG case were presented and the evidenced facts of the four allegations had remained largely unchanged.[422] On account of a particular market situation in costs, upward adjustment was made based on net domestic subsidization rate of hot-rolled steel. No further particular market situation adjustment was made due to the DOC's inability to quantify the impact of other factors on price distortion. The US DOC also confirmed the existence of a particular market situation in Turkey in its final affirmative determination in the less-than-fair-value investigation of large diameter welded pipe from Turkey.[423] In this case, the three particular market situation allegations raised were: (1) the government's control of Erdemir, the largest producer of flat-rolled steel in Turkey, and its affiliate Isdemir, (2) Turkish subsidies on the hot-rolled coil and plate inputs, (3) Turkish imports of hot-rolled coil and plate from Russia, as a result of Chinese overcapacity.[424] These three factors largely resembled those in the Korea cases. The DOC again

[417] Ibid.
[418] Department of Commerce, Issues and Decision Memorandum for the Final Results of the 2014-2016 Administrative Review of the Antidumping Duty Order on Certain Steel Nails from the Republic of Korea, January 19, 2018, pp.7-11.
[419] Ibid.
[420] Ibid.
[421] Department of Commerce, Issues and Decision Memorandum for the Final Results of Antidumping Duty Administrative Review of Circular Welded Non-Alloy Steel Pipe from the Republic of Korea; 2015-2016, Jun 7, 2018, pp.11-19; Department of Commerce, Issues and Decision Memorandum for the Final Results of the 2015-2016 Administrative Review of the Antidumping Duty Order on Welded Line Pipe from Korea, July 11, 2018, pp.12-18; Department of Commerce, Issues and Decision Memorandum for the Final Affirmative Determination in the Less-Than-Fair-Value Investigation of Large Diameter Welded Pipe from the Republic of Korea, February 19, 2019, pp.12-15.
[422] Ibid.
[423] Department of Commerce, Issues and Decision Memorandum for the Final Affirmative Determination in the Less-Than-Fair-Value Investigation of Large Diameter Welded Pipe from the Republic of Turkey, February 19, 2019, pp.7-10.
[424] Ibid.

upwardly adjusted reported hot-rolled steel costs only for subsidies.[425] Defendants' costs of production were adjusted for two purposes in all these cases. First, while constructed value was relied upon as the basis for normal value calculation due the lack of viable comparison market sales, distorted costs of production were adjusted for establishing normal value.[426] Second, a particular market situation adjustment to costs was also made by the DOC for its conduction of the cost of production test, which aims to measure if comparison market sales have been made below cost for the exclusion of these sales from calculating normal vale.[427] Both usages put forward an additional requirement for costs, i.e. that they should not be distorted especially due to government intervention. No matter costs are adjusted for the conduction of the cost of production test or the direct establishment of normal value, they both aim to rectify the distortion in costs, and inflate the dumping margin.

The US DOC continuously develops its analysis of and adjustment for particular market situations. The two AD investigations concerning imports of biodiesel from Argentina and Indonesia respectively call for special scrutiny.[428] In these two cases, the US DOC found the existence of a particular market situation both with respect to home market sales of biodiesel and the costs of production of biodiesel. Firstly, the DOC determined that the domestic biodiesel markets in Argentina and Indonesia were distorted on account of both the governments' imposition of mandated quotas and the regulated pricing system on domestic biodiesel sales and transactions.[429] Secondly, it decided the domestic markets of the main inputs for biodiesel, soybean in Argentina's case and crude palm oil in Indonesia's case, to be distorted due to the two countries' imposition of export taxes and levies on these inputs.[430] Such taxes and levies were considered to impede significantly external trade and competitive pricing, result in surplus of soybeans and crude palm oil in the domestic market, which depressed raw material prices for biodiesel producers below world market prices.[431] The DOC did not require government involvement to directly affect prices of inputs so that an export tax regime as such was deemed adequate for its making of an affirmative particular market situation determination with respect to costs.[432] The existence of a particular market situation distorting prices of raw materials also contributed to the DOC's confirmation of the existence of a particular market situation in domestic sales of biodiesel.[433] While calculating normal value, the US DOC firstly disregarded home market sales prices of biodiesel on account of a particular market situation in sales. It resorted to constructed value. While constructing normal value, the DOC rejected reported costs

[425] Ibid, p.9.
[426] For example, in the cases of *Korean OCTG*, *Korean welded line pipe*.
[427] For example, in the cases of *Korean circular welded pipe*, *Korean large diameter welded pipe.*
[428] Department of Commerce, Biodiesel from Indonesia: Final Determination of Sales at Less Than Fair Value, Fed. Reg. Vol.83, No.41, Thursday, March 1, 2018, 8835; Department of Commerce, Biodiesel from Argentina: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances, In Part, Fed. Reg. Vol.83, No.41, Thursday, March 1, 2018, 8837.
[429] Department of Commerce, Issues and Decision Memorandum for the Final Affirmative Determination in the Antidumping Duty Investigation of Biodiesel from Indonesia, February 20, 2018, pp.11-15; Department of Commerce, Issues and Decision Memorandum for the Final Affirmative Determination in the Antidumping Duty Investigation of Biodiesel from Argentina, February 20, 2018, pp.16-18.
[430] Memorandum of biodiesel from Indonesia, ibid, pp.21-24; Memorandum of biodiesel from Argentina, ibid, pp.21-23.
[431] Ibid.
[432] Memorandum of biodiesel from Indonesia, ibid, p.22.
[433] Memorandum of biodiesel from Indonesia, ibid, p.15; Memorandum of biodiesel from Argentina, supra note 429, p.17.

of soybean and crude palm oil respectively but utilized their word market prices as a substitute.[434] This practice precisely reflects NME treatment since it also relies on surrogate country benchmarks to establish normal value on account of government intervention. It is noteworthy that the US has adopted this practice regardless of existing WTO rulings on *EU - biodiesel from Argentina* and *EU - biodiesel from Indonesia*, which already judged the surrogate use of world market prices for soybeans and crude palm oil to redress price distortions caused by export taxes on these inputs as WTO-inconsistent.[435] These WTO rulings for one thing are not targeting US practices. For another, the US DOC has held that WTO decisions do not supersede US law and "only Congress and the Administration can decide whether to implement a WTO panel recommendation and, if so, how to implement it".[436]

Overall, the US DOC's evaluation of particular market situations for cost adjustment is conducted arbitrarily. In the Korean OCTG case, the first such case, the DOC initially determined in its preliminary decision that no particular market situation existed since the petitioners were not able to reach the high evidentiary bar for an affirmative decision in this regard.[437] Yet, in the absence of any change of the evidence and facts, it drastically changed its attitude in the final decision by holding that the evidence with respect to the four particular market situation allegations taken as a whole, rather than being examined individually, could reasonably lead to the conclusion that a particular market situation existed in Korea.[438] This change has led to others' question that the DOC's determination might have been influenced by improper political intervention.[439] The DOC's deliberation of the "strategic alliances"-allegation moreover clearly reflected the arbitrariness in this process. Without further analyzing whether the alliances distorted prices of hot-rolled coil, the DOC simply inferred that they might have created distortions in the prices of hot-rolled coil in the past, and might continue to affect hot-rolled coil pricing in a distortive manner during the instant period of review and in the future.[440] It even held that it is the DOC's experience that strategic alliances may impact the way customer-supplier relationships are structured and contribute to the existence of a particular market situation.[441] In addition, the US DOC seems to have adopted an approach that as long as quantifiable evidence of price distortion is presented, regardless of whether it *per se* is a sufficient evidence, it can be taken as a whole with some other of itself inadequate contributing evidence for the DOC to make an affirmative determination of there being a particular market situation.

The particular market situation cases analyzed above foretell a developing trend in the US

[434] Memorandum of biodiesel from Indonesia, ibid, p.24; Memorandum of biodiesel from Argentina, ibid, p.21.
[435] Appellate Body Report, *European Union - Anti-dumping Measures on Biodiesel from Argentina*, WT/DS473/AB/R, 6 October 2016, para.6.82; Panel Report, *European Union - Anti-dumping Measures on Biodiesel from Indonesia*, WT/DS480/R, 25 January 2018, para.7.34.
[436] Memorandum of biodiesel from Indonesia, supra note 429, p.24; Memorandum of biodiesel from Argentina, supra note 429, p.23.
[437] Department of Commerce, Decision Memorandum for the Preliminary Results of the Antidumping Duty Administrative Review: Certain Oil Country Tubular Goods from the Republic of Korea, October 5, 2016, pp.13-16.
[438] Memorandum of Korean OCTG administrative review 2014-2015, supra note 410, p.40.
[439] See for example, Memorandum of Korean OCTG administrative review 2015-2016, supra note 416, pp.31-32; Memorandum of Korean circular welded pipe, supra note 421, pp.24-25; Memorandum of Korean welded line pipe, supra note 421, pp.25-26.
[440] See for example, Memorandum of Korean OCTG administrative review 2016-2017, supra note 416, p.20; Memorandum of Korean large diameter welded pipe, supra note 421, p.13.
[441] See for example, Memorandum of Korean circular welded pipe, supra note 421, p.24.

AD practices to adjust investigated producers' reported costs of production to determine normal value when the exporting country's government intervenes in the input market. This practice has emerged as the standard practice. It will probably be increasingly relied upon in the future when the US will more and more confer market economy status upon transitional economies. This is because through the particular market situation approach, the US DOC can achieve a result similar to that resulting from explicit NME treatment without designating a country NME, dependent largely on its discretion. When Russia was granted market economy status by the US DOC on June 6, 2002, the DOC stated in the official memorandum explaining Russia's new status that "the Department will examine prices and costs within Russia, utilizing them for the determination of normal value when appropriate or disregarding them when they are not".[442] The particular market situation provisions right provide a most convenient approach for the DOC's rejection of Russian, as well as other market economy, respondents' input costs.

It is worth mentioning also that the US DOC has taken imports of Chinese steel products as a contributing factor for its affirmative particular market situation determination. It reasoned that due to "significant overcapacity in Chinese steel production, which stems in part from the distortions and interventions prevalent in the Chinese economy, the Korean steel market has been flooded with imports of cheaper Chinese steel products, placing downward pressure on Korean domestic steel prices".[443] The effect of China's overcapacity in steelmaking is not disputed and therefore a formal finding of dumping or subsidization concerning imports of Chinese steel is not necessary.[444] This practice is rather unique since it actually takes distortions derived from a third country, rather than of the exporting country, into an investigating authority's account of determining the existence of a particular market situation with respect to an input. It is the government of a third country exporting the subject input that is interfering its economy, not the government of the subject exporting country. However, the government of the exporting country is required to actively take trade defense measures against imports of the low-priced inputs concerned to avoid being adversely targeted by the US.[445] If AD measures are imposed to ensure fairness, what AD measures target here is unfairness resulting from the importation of low-priced input materials, i.e. unfairness caused by a third country government. Actually, in that case it is hard to see how one can say that there is any unfairness between investigated producers and an importing country's domestic producers in terms of their steel costs, since steelmaking overcapacity is a phenomenon that has global distortive effects of depressing world steel prices. It should be noted that according to US practice, third country distortions alone cannot be the basis for an affirmative particular market situation determination.[446] Even though a particular market situation in an input market is confirmed, no

[442] Department of Commerce, Memorandum concerning the inquiry into the the status of the Russian Federation as a non-market-economy country under the US AD antidumping law, June 6, 2002; cited also in Issue and Decision Memorandum: magnesium metal from the Russian Federation: final determination of sales at less-than-fair value, February 24, 2005, 70 Fed. Reg. 9041.

[443] See for example, Memorandum of Korean OCTG administrative review 2014-2015, supra note 410, p.41; Memorandum of Koran circular welded pipe, supra note, p.12.

[444] Memorandum of Korean circular welded pipe, supra note 421, pp.15-16.

[445] In the *Korean OCTG case*, the petition in particular argued that Korea has granted the People's Republic of China market economy status and does not impose remedies against Chinese imports, which has resulted in the PRC flooding the Korean market with unfairly traded hot-rolled steel. Memorandum of Korean OCTG administrative review 2014-2015, supra note 410, p.32.

[446] See in particular the case antidumping duty investigation of steel concrete reinforcing bar from Taiwan.

adjustment is made to address the price effect of excess capacity since such effect can hardly be reasonably quantified. The AD petitioners used to suggest several modes of adjustment to take account of the impact of overcapacity, all of which were rejected by the DOC.[447] Nonetheless, the US DOC's deliberation of third country distortions in its determination of a particular market situation with respect to inputs can still have a profound actual influence. The AD measures imposed in this case apply indirectly to the third country, which is not exporting the subject merchandise to the US. They penalize an exporting country for not reining in imports of low-priced inputs with its own trade defense mechanism, if any. This practice as such may influence the cross-border movement of input materials, especially Chinese steel. The development of this practice deserves special attention.

3.2 The EU

Antidumping is an integral part of the EU's common commercial policy and an activity falling within the EU's exclusive competence. The first AD law, EEC Regulation No. 459/68 entered into force on 1 July 1968.[448] The drafting of this first AD law was undertaken simultaneously with the negotiation and conclusion of the first specialized international AD agreement - the Kennedy round AD Code, of which the EC was a signatory. Regulation No. 459/68 therefore closely followed its structure, and to a large extent employed the same wording and terminology as the international AD Code.[449] From the beginning, the EC's framework AD law was based on international AD rules.[450] The EC later frequently amended its existing AD law, or promulgated new basic AD regulation, to take account of subsequent new international AD agreements. The GATT negotiation rounds are observed to be "the principal institutional motor of the periodic changes in EC AD law".[451] In ensuring conformity of their respective internal AD legislation with international AD rules, the US and the EC adopted different approaches. Whereas the US only modified its existing law where necessary to incorporate international AD norms in its domestic legislation, the EU transposed the language of international AD rules into its own AD legislation to the extent possible.[452] Due to such extensive transposition, the EU AD regulations enacted after the establishment of the WTO is principally moulded upon the WTO AD Agreement, rather than upon previous AD regulations.[453] Though the EU AD legislation shares basically the same structure as the WTO AD Agreement and employs most of its terminology, EU AD rules have,

Department of Commerce, Issues and Decision Memorandum for the Final Affirmative Determination in the Antidumping Duty Investigation of Steel Concrete Reinforcing Bar from Taiwan, July 20, 2017, pp.7-10.

[447] For example, the use of import prices of Mexican hot-rolled coil, the use of current rates from the AD order on hot-rolled steel from China, the use of subsidy determined by the EU regarding Chinese hot-rolled steel.

[448] Regulation (EEC) No. 459/68 of the Council of 5 April 1968 on Protection against Dumping or the Granting of Bounties or Subsidies by Countries which are not Members of the European Economic Community, OJ L 93/1, 17.4.1968, pp.80-90.

[449] Pierre Didier, *WTO Trade Instruments in EU Law: Commercial Policy Instruments: Dumping, Subsidies, Safeguards, Public procurement*, London: Cameron, May 1999, p.192.

[450] Yan Luo, *Anti-dumping in the WTO, the EU and China — The Rise of Legalization in the Trade Regime and its Consequences*, supra note 7, p.108.

[451] Francis Snyder, *The EU, the WTO and China - Legal Pluralism and International Trade Regulation*, supra note 36, p.262.

[452] Recital 5, Council Regulation (EC) No. 3283/94 of 22 December 1994 on Protection against Dumped Imports from Countries not Members of the European Community, OJ L 349, 31.12.1994, p.1.

[453] Yan Luo, *Anti-dumping in the WTO, the EU and China — The Rise of Legalization in the Trade Regime and its Consequences*, supra note 7, p.110.

nonetheless, been frequently amended to meet its own changing trade policy needs.

At the outset, NME treatment rules in EU AD law were fully based on international AD law even on most of its wording in this regard. Nonetheless, the EU soon developed terms and provisions reflecting its own practices and conforming to its own interests and policy needs. Generally speaking, the EU NME treatment rules in the WTO era exhibit many distinctive features. Some of them go far beyond relevant international rules. In EU AD law, NME treatment rules can also be categorized as explicit and implicit. Both have undergone significant changes after the establishment of the WTO. In fact, on 20 December 2017, the EU amended its NME treatment rules again in reaction to the expiry of certain NME treatment rules in China's accession protocol.[454] Alongside with amendments to existing NME treatment rules, the EU introduced some new norms dealing implicitly with NME treatment. In-depth analysis of the 2017 amendments and of these new NME treatment rules is made in Chapter 5, which deals specifically with major WTO Members' reaction to the changed circumstances upon the expiry of the NME treatment rules in China's accession protocol. First, however, other NME treatment rules in EU AD law prevalent for decades will be examined.

3.2.1 Explicit NME treatment

Ever since the enactment of Council Regulation (EC) No. 3283/94, the EC's first basic AD regulation in the WTO era, explicit NME treatment rules have always been stipulated in Article 2(7) of the basic regulation. This article has been amended several times to cater for the EU's policy needs, based on which the EU Commission has exercised the explicit NME treatment. Before the significant 2017 amendment, the newest version of Article 2(7) in Regulation (EU) 2016/1036 reads as follows:

> *(a) In the case of imports from non-market-economy countries, the normal value shall be determined on the basis of the price or constructed value in a market economy third country, or the price from such a third country to other countries, including the Union, or, where those are not possible, on any other reasonable basis, including the price actually paid or payable in the Union for the like product, duly adjusted if necessary to include a reasonable profit margin.*
>
> *An appropriate market-economy third country shall be selected in a not unreasonable manner, due account being taken of any reliable information made available at the time of selection. Account shall also be taken of time limits. Where appropriate, a market-economy third country which is subject to the same investigation shall be used.*
>
> *The partied to the investigation shall be informed shortly after its initiation of the market-economy third country envisaged and shall be given 10 days to comment.*

[454] Regulation (EU) 2017/2321 of the European Parliament and of the Council of 12 December 2017 Amending Regulation (EU) 2016/1036 on Protection against Dumped imports from Countries not Members of the European Union and Regulation (EU) 2016/1037 on Protection against Subsidised Imports from Countries not Members of the European Union, OJ L 338, 19.12.2017, pp.1-7.

(b) In anti-dumping investigations concerning imports from the People's Republic of China, Vietnam and Kazakhstan and any non-market-economy country which is a member of the WTO at the date of the initiation of the investigation, the normal value shall be determined in accordance with paragraphs 1 to 6, if it is shown, on the basis of properly substantiated claims by one or more producers subject to the investigation and in accordance with the criteria and procedures set out in point (c), that market-economy conditions prevail for this producer or producers in respect of the manufacture and sale of the like product concerned. When that is not the case, the rules set out under point (a) shall apply.

(c) A claim under point (b) must be made in writing and contains sufficient evidence that the producer operates under market-economy conditions, that is if:

— decisions of firms regarding prices, costs and inputs, including for instance raw materials, cost of technology and labour, 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,

— 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,

—the production costs and financial situation of firms are not subject to significant distortions carried over from the former non-market-economy system, in particular in relation to depreciation of assets, other write-offs, barter trade and payment via compensation of debts,

—the firms concerned are subject to bankruptcy and property laws which guarantee legal certainty and stability for the operation of firms, and

— exchange rate conversions are carried out at the market rate.

A determination whether the producer meets the criteria referred to under this point shall normally be made within seven months of, but in any event not later than eight months after, the initiation of the investigation, after the Union industry has been given an opportunity to comment. That determination shall remain in force throughout the investigation. The Commission shall provide information to the Member States concerning its analysis of claims made pursuant to point (b) normally within 28 weeks of the initiation of the investigation.

(d) When the Commission has limited its investigation in accordance with Article 17, a determination pursuant to points (b) and (c) of this paragraph shall be limited to the parties included in the investigation and any producer that receives individual treatment pursuant to Article 17(3).

The EU maintains a statutory list of NME countries, the amendment of which requires EU legislation, rather than merely an administrative decision as the US AD law permits. Yet, since the establishment of the WTO, the EU has modified this list frequently to conform with the changing international context and to cater for its own economic and political needs, though statutory criteria for its assessment in this regard are absent.[455] In the 2016 regulation, the footnote to

[455] Concerning the change of the list of NMEs, see for example Council Regulation (EC) No. 905/98 of 27 April 1998 amending Regulation (EC) No. 384/96 on protection against dumped imports from countries not members

"non-market-economy countries" embraces Albania, Armenia, Azerbaijan, Belarus, Georgia, Kyrgyzstan, Moldova, Mongolia, North Korea, Tajikistan, Turkmenistan and Uzbekistan in the EU's scope of NMEs. Subparagraph (b) provides producers from China, Vietnam and Kazakhstan the possibility to avail themselves of individual market economy treatment based on their successful demonstration of the prevalence of market economy conditions with respect to their manufacture and sale of the like product concerned in accordance with prescribed procedural rules. If no such effort is made or effort in this regard fails, surrogate benchmarks shall be used for establishing normal value of imports from these three countries. Therefore, China, Vietnam and Kazakhstan are also essentially treated as NMEs according to the 2016 basic AD regulation.

Subparagraph (a) specifies applicable surrogate benchmarks to be used for establishing normal value in NME cases as well as the sequence of their application. In practice, the EU Commission enjoys a certain degree of discretion in selecting a specific method. They sometimes even employ several different methods in combination for the establishment of normal value in one case.[456] Concerning the selection of surrogate market economy third countries, the EU AD law puts forward both substantive and procedural requirements. In particular it requires an appropriate market economy third country to be selected in a not unreasonable manner. This requirement is of course rather vague and subjective. In practice, the EU Commission has developed a series of criteria they deem of particular significance to ensure the appropriateness and reasonableness of a selection. These criteria include principally: comparability of the products produced by the exporting NME country and the reference country, comparability of their production volume, representativeness of domestic sales to independent customers in the reference country as compared to exports of the product concerned originating in the NME country, competition in the reference country, comparability of the production process or the structure of cost of production, comparability of access to raw materials, components of energy in the NME country and in the reference country, readiness of producers in analogue countries to cooperate with the EU Commission.[457] These criteria do not need to be all fulfilled for the Commission's selection of a specific surrogate country. The satisfaction of some of them, which are most pertinent confronting the circumstances of a specific AD case, is sufficient to justify the selection of a particular country. The majority of the items in the criteria are economic factors which aim to ensure comparability of the two markets with respect to the production and sales of the produce concerned. The one concerning the readiness of foreign enterprises' cooperation, however, is a practical factor purporting to ensure the feasibility of a specific selection. Yet, in reality it is this practical factor that decisively determines the final selection of a surrogate

of the European Community, OJ L 128, 30.4.1998, p.18; Council Regulation (EC) 2238/2000 of 9 October 2000 amending Regulation (EC) No. 384/96 on protection against dumped imports from countries not members of the European Community, OJ L 257, 11.10.2000, p.2.

[456] An example case in this regard is *Ferchimex SA v. Council of the European Union.* Concerning this case, the court held that "*that provision cannot be interpreted as precluding the institutions from determining normal value in a specific case by means of combined use of the methods provided for in Article 2(5)(a)(i) and (ii), if that combination does in fact make it possible to obtain a result which is more reliable and more representative*", Case T-164/94 *Ferchimex SA v Council* [1995] ECR II-02681, para.82. This ruling though was given on the basis of the 1988 basic regulation, it can also serve as a significant guidance under the following new regulations since their accounts of the surrogate benchmarks have remained substantially unchanged compared those of the 1988 regulation.

[457] Wolfgang Müller, Nicholas Khan, Tibor Scharf, *EC and WTO Anti-dumping Law — A Handbook,* supra note 11, pp.216-225.

country in an AD case.[458] In addition, there are also some further criteria which are considered by the Commission as relevant in the selection. These further criteria include: similarity with regard to dependency on components used in the manufacturing process of the product concerned, comparability of export markets for the product concerned, especially exports to the Community, comparability of the use of the product concerned in the NME country and the reference country.[459] Different from the US AD law, which requires surrogate values to come from a country at a comparable level of economic development as the investigated NME, the EU AD law proposes no requirement for comparability in this regard. In EU practice, it is therefore common for the Commission's selection of countries differing significantly in economic development level to substitute the same NME country. For example, in determining normal value of Chinese imports, the EU Commission used to use a wide variety of countries, including India, Brazil, Turkey, Indonesia, Thailand, Malaysia, Argentina, South Africa as well as Taiwan, Korea, Canada, Japan, Norway, the US and the EU itself, as a substitute.[460] In overall, given the complexity of the reality and the impediment embodied in the selection process, the EU AD Commission enjoys considerable discretion in determining the final choice of a surrogate country. Imperfection in comparability between the selected country and the NME country is then to be addressed by AD authorities' adjustment to normal value. This process further introduces more arbitrariness.

According to the 2016 basic AD regulation, the EU provides for statutory individual market economy treatment to producers from China, Vietnam, Kazakhstan, and any NME country which is a Member of the WTO. Producers from these countries have to prove the prevalence of market economy conditions with respect to their manufacture and sale of the like product concerned for their successful avail of this individual market economy treatment. The individual market economic treatment was firstly introduced by Council Regulation (EC) No. 905/98.[461] It was introduced in light of and to take account of the significant progress Russia and China had made in reforming their economic regimes.[462] The 1998 regulation accordingly deleted Russia and China from the statutory list of NME countries. But since this individual market economy treatment is just an exception, this ostensible removal of Russia and China from the NME list did not substantially changed their NME status in EU AD law. With the change of the world economic and legal circumstances, Council Regulation (EC) No. 2238/2000 further extended the applicability of this individual market economy treatment to Ukraine, Vietnam, Kazakhstan and any NME country which is a member of the WTO at the date of the initiation of the investigation.[463] Correspondingly, Ukraine, Vietnam and Kazakhstan were deleted from the

[458] Ibid, p.225.
[459] Ibid, p.225.
[460] Ibid, p.225-226; Yan Cai, Eun-Mi Kim, "Analyzing China's Non-market Economy Status: A Focus on Anti-dumping Measures", *Journal of International Trade & Commerce*, Vol.12, No.4, August 2016, p.141; Cecilia Bellora & Sébasttien Jean, "Granting Market Economy Status to China in the EU: An Economic Impact Assessment", CEPII Policy Brief No. 11, September 2016, p.3; Van Bael & Bellis, *EU Anti-Dumping and Other Trade Defence Instruments*, fifth edition, Kluwer Law International BV, the Netherlands, 2011, pp.147-149.
[461] Council Regulation (EC) No. 905/98 of 27 April 1998 Amending Regulation (EC) No. 384/96 on Protection against Dumped Imports from Countries not Members of the European Community, OJ L 128, 30.4.1998, p.18.
[462] Recital 4, ibid.
[463] Recitals (4) (5) and (6), Article 1, Council Regulation (EC) No. 2238/2000 of 9 October 2000 Amending Regulation (EC) No. 384/96 on Protection against Dumped Imports from Countries not Members of the European Community, OJ L 257, 11.10.2000, p.2.

statutory list of NME countries. Council Regulation (EC) No. 1972/2002 and Council Regulation (EC) No. 2117/2005 further deleted Russia and Ukraine respectively from the applicable scope of the individual market economy treatment.[464] This deletion conversely substantially confers upon these two countries market economy legal status in EU AD law. This change was made in view of the very significant progress Russia and Ukraine made toward the establishment of market economy conditions in their respective economies, which was recognized by the EU in its public conclusions of the Russia-EU Summit on 29 May 2002 and the Ukraine-EU Summit on 1 December 2015.[465]

An important aspect of the individual market economy treatment is that it introduces for the first time some statutory criteria for differentiating market and non-market economy circumstances into EU AD law, the first legislation to explicitly use the market and non-market economy dichotomy. Without giving any definition and criteria in this regard, the EU assessment of market and non-market economies had long remained a 'black box'. These EU criteria on market economy conditions though apparently apply only to certain producers' demonstration of the prevalence of market economy conditions with respect to their individual production and sales process, they shed some light on the EU's overall conception of this classification. The EU market economy conditions criteria refer to several aspects of an enterprise's operation and a country's overall economic regime, including production and sales autonomy of an enterprise, accounting affairs, inheritance from the former NME system, the provision and implementation of bankruptcy and property laws, and the currency exchange. These criteria are exhaustive and they have to be met cumulatively. Although the five EU criteria look straightforward, they are still not formulated in a cleat and objective manner. The EU case handlers still "have broad administrative discretion to interpret whether a company meets each condition, particularly with respect to the first three".[466] The EU individual market economy treatment requires only for producers' proof of the prevalence of market economy conditions with respect to their individual production and sales activities, rather than the whole industry or economy. Yet, enterprises do not operate in a vacuum. It is highly questionable how an enterprise can operate in a market-oriented manner while the whole industry or economy is significantly distorted. Such case, if found, is likely to be very rare. In practice, the most common grounds for refusing individual market economy treatment have been the non-fulfillment of one of the first three criteria of Article 2(7)(c) of the basic AD regulation.[467] Nonetheless, the individualistic exceptional market economy treatment in EU AD law significantly benefits EU producers in NMEs, including in China, especially via foreign-invested joint ventures, since they would have the possibility of lowering AD duties imposed specifically on their exports regardless of the overall NME status of their host countries.[468] Regulation (EU) 2017/2321 amended significantly Article

[464] Article 1, paragraph (4), Council Regulation (EC) No. 1972/2002 of 5 November 2002 Amending Regulation (EC) No. 384/96 on Protection against Dumped Imports from Countries not Members of the European Community, OJ L 305, 7.11.2002, p.1; Article 1, Council Regulation (EC) No. 2117/2005 of 21 December 2005 Amending Regulation (EC) No. 384/96 on Protection against Dumped Imports from Countries not Members of the European Community, OJ L 340, 23.12.2005, p.17.

[465] Recital (5), Council Regulation (EC) No. 1972/2002, recital (2), Council Regulation (EC) No. 2117/2005, ibid.

[466] Edwin A Vermulst, Folkert Graafsma, "Recent EC Anti-dumping Practice Towards China and Vietnam: the Great Leap Backward?", *International Trade Law and Regulation*, Vol.12, No.5, 2006, p.124.

[467] Barbara Barone, "In-depth analysis: one year to go: the debate over China's market economy status (MES) heats up", European Parliament, Director-general for external policies, policy department, December, 2015, p.8.

[468] Stephen Green, "China's quest for market economy status", Briefing Note, The Royal Institute of International

2(7) by, *inter alia*, striking out text of subparagraphs (b), (c) and (d).[469] That is to say, the individual market economy treatment is now deleted from EU AD law. Nonetheless, this treatment used to be an important part of the EU NME treatment legal regime, which contributes to our understanding of the EU's overall attitude towards NME treatment.

3.2.2 Implicit NME treatment

Apart from Article 2(7), some other provisions in EU AD law also provide a legal basis for disregarding domestic prices and costs for determining normal value in cases of significant government intervention in the economy. Thus, Article 2(3) of the 2016 EU basic AD regulation specifies:

> *When there are no or insufficient sales of the like product in the ordinary course of trade, or where because of the particular market situation such sales do not permit a proper comparison, the normal value of the like product shall be calculated on the basis of the cost of production in the country of origin plus a reasonable amount for selling, general and administrative costs and for profits, or based on the export prices, in the ordinary course of trade, to an appropriate third country, provided that these prices are representative.*
>
> *A particular market situation for the product concerned within the meaning of the first subparagraph may be deemed to exist, inter alia, when prices are artificially low, when there is significant barter trade, or when there are non-commercial processing arrangements.*

Article 2(5) of the basic AD regulation further provides specific rules on the determination of costs, which are eligible to be used in constructing normal value. The first two subparagraphs stipulate that:

> *Costs shall normally be calculated on the basis of records kept by the party under investigation, provided that such records are in accordance with the generally accepted accounting principles of the country concerned and it is shown that the records reasonably reflect the costs associated with the production and sale of the product under consideration.*
>
> *If costs associated with the production and sale of the product under investigation are not reasonably reflected in the records of the party concerned, they shall be adjusted or established on the basis of the costs of other producers or exporters in the same country or, when such information is not available or cannot be used, on any other reasonable basis, including information from other representative markets.*

In conjunction these two articles provide the legal basis for NME treatment. Firstly, the existence of particular market situation enables investigating authorities to abandon domestic prices for price comparison and to resort instead to constructed normal value. For identifying a

Affairs, Asia Programme, May 2004, p.5.

[469] Article 1(2), Regulation (EU) 2017/2321, supra note 454.

particular market situation, Article 2(3) only sets out a non-exhaustive list of examples and therefore confers investigating authorities with considerable discretionary margin.[470] The listed case of "when prices are artificially low" moreover actually directly denotes NME circumstances since the principal argument against the use of NME prices is that these prices are artificially low due to government intervention. The language *per se* does not clarify any specific particular market situation since it provides neither any yardstick for the evaluation of whether the prices are too low, nor any criteria for the determination of artificiality. This account allows for AD authorities' arbitrary taking of cheap domestic transactions in transitional economies as conducted in particular a market situation and then exclude them from price comparison. Secondly, while constructing normal value, Article 2(5) permits AD authorities' nonuse of the recorded costs of the investigated party if they think these costs do not reasonably reflect the costs associated with the production and sale of the product under investigation. It requires the AD authorities to adjust or reestablish the costs of production using surrogate information.[471] It in particular explicitly confirms the use of information from other representative markets, which arguably introduces the leeway for AD authorities' use of surrogate country values. This route of resorting to NME treatment seems to be twisty and complex. It requires the investigating authority to prove a series of matters for its final recourse to surrogate benchmarks. However, the basic AD regulation has employed ambiguous terms and phrases, such as "particular market situation", "artificially low", "reasonably reflect", "not available or cannot be used", "any other reasonable basis", to confer investigating authorities discretion. NME treatment through this approach is therefore easily available. Moreover, compared with NME treatment based on designating a specific country directly as an NME country, NME treatment through this approach is much more flexible. It theoretically can be applied to any country on a case specific basis. And no specific requirement concerning applicable surrogate benchmarks is put forward either.

In practice, the EU AD authorities have actively invoked these provisions for their resort to surrogate values in constructing normal value in many cases. Russia has been the primary EU target of this application of NME treatment. The EU AD authorities have applied the surrogate country techniques mainly regarding imports of its energy-intensive products, such as chemical and steel products. This is because prices of natural gas in Russia are heavily regulated by the state to remain at an "abnormally low" level - far below the export prices of gas from Russia and market prices paid in unregulated markets.[472] Recorded costs of gas of investigated Russian

[470] This point of view is also expressly conveyed in recital 3 of the Council Regulation (EC) No. 1972/2002. Its last sentence reads: "*[o]bviously, any clarification given in this context cannot be of an exhaustive nature in view of the wide variety of possible particular market situations not permitting a proper comparison.*"

[471] This opinion is also explicitly confirmed in recital 4 of the Council Regulation (EC) No. 1972/2002. Its last sentence specifies: "*[t]he relevant data can be used either for adjusting certain items of the records of the party under consideration or, where this is not possible, for establishing the costs of the party under consideration*."

[472] See for example: Council Regulation (EC) No. 1891/2005 of 14 November 2005 amending Regulation (EEC) No. 3068/92 imposing a definitive anti-dumping duty on imports of potassium chloride originating in Belarus, Russia or Ukraine, OJ L 302, 19.11.2005, p.17, recital 30; Council Regulation (EC) No. 954/2006 of 27 June 2006 imposing definitive anti-dumping duty on imports of certain seamless pipes and tubes, of iron or steel originating in Croatia, Romania, Russia and Ukraine, OJ L175, 29.6.2006, p.14, recitals 94-95; Council Regulation (EC) No. 1911/2006 of 19 December 2006 imposing a definitive anti-dumping duty on imports of solutions of urea and ammonium nitrate originating in Algeria, Belarus, Russia and Ukraine following an expiry review pursuant to Article 11(2) of Regulation (EC) No. 384/96, OJ L365, 21.12.2006, p.32, recital 58; Council Regulation (EC) No. 238/2008 of 10 March 2008 terminating the partial interim review pursuant to Article 11(3) of Regulation (EC) No.384/96 of the anti-dumping duty on imports of solutions of urea and ammonium nitrate originating in Russia, OJ L 75, 18.3.2008,

producers are therefore deemed by EU AD authorities as not reasonably reflecting gas costs regardless of the fact that they are the costs actually incurred by the producers recorded in accordance with generally accepted accounting principles of Russia.[473] EU AD authorities then will adjust the costs of gas by substituting Russian domestic prices with surrogate country prices, either Russian export prices for gas or prices of gas from some other representative market.[474]

It is worth noting that as mentioned above in the Council Regulation (EC) No. 1972/2002 the EU deleted Russia from the applicable scope of individual market economy treatment, substantially conferring upon it market economy status. It is also exactly this amending regulation that inserted the second subparagraph to Article 2(3), which defines "particular market situation", and the second subparagraph to Article 2(5), which mandates the use of surrogate country information, i.e. the two provisions jointly allowing for implicit NME treatment.[475] It is therefore obvious that the amendments to Articles 2(3) and 2(5) seek precisely to enable the EU AD authorities to continue using the surrogate country techniques *vis-a-vis* Russia on a case-specific, rather than country-specific, basis. It is pointed out that the new amendment is notably used toward Russia to sanction its dual pricing system for gas - a system whereby different prices for the same input are set depending on whether it is destined to export, or to the domestic market, in which case the price is set below export or world market prices to increase competitiveness of domestic industries.[476] In fact, around 2000, even prior to the date Russia was granted market economy status, cost adjustment as such had already been applied to Russia, as evidenced by cases such as *aluminium foil from China and Russia*[477] and *Silicon from Russia*.[478] Following the 2002 amendment, the authorities have systematically rejected the actual cost data set in a "regulated market". In fact, the requirement for undistorted market prices of major inputs mirrors one requirement in the first criterion for evaluating the prevalence of market economy conditions in Article 2(7)(c), i.e. costs of major inputs substantially reflect market values. An ironic

p.16, recitals 21, 24; Council Regulation (EC) No. 236/2008 of 10 March 2008 concerning terminating the partial interim review pursuant to Article 11(3) of Regulation (EC) No. 384/96 of the anti-dumping duty on imports of ammonium nitrate originating in Russia, OJ L 75, 18.3.2008, p.2, recital 18; Council Regulation (EC) No. 907/2007 of 23 July 2007 repealing the anti-dumping duty on imports of urea originating in Russia, following an expiry review pursuant to Article 11(2) of Regulation (EC) No. 384/96, and terminating the partial interim reviews pursuant to Article 11(3) of such imports originating in Russia, OJ L 198, 31.7.2007, p.7, recital 33; Commission Implementing Regulation (EU) 2015/110 of 26 January 2015 imposing a definitive anti-dumping duty on imports of certain welded tubes and pipes of iron or non-alloy steel originating in Belarus, the People's Republic of China and Russia and terminating the proceeding for imports of certain welded tubes and pipes of iron or non-alloy steel originating in Ukraine following an expiry review pursuant to Article 11(2) of Council Regulation (EC) No. 1225/2009, OJ L 20, 27.1. 2015, recital 69.

[473] See for example: Council Regulation (EC) No. 1891/2005, ibid, recital 32; Council Regulation (EC) No. 954/2006, ibid, p.15, recitals 94, 96, 98; Council Regulation (EC) No. 1911/2006, ibid, recital 58; Council Regulation (EC) No.238/2008, ibid, recitals 23, 24; Council Regulation (EC) No. 236/2008, ibid, p.3, recitals 19, 20, 21.

[474] See for example: Council Regulation (EC) No. 1891/2005, ibid, recital 31; Council Regulation (EC) No. 954/2006, ibid, recital 97; Council Regulation (EC) No. 1911/2006, ibid, recital 58; Council Regulation (EC) No.238/2008, ibid, recital 21; Council Regulation (EC) No. 236/2008, ibid, recital 19; Council Regulation (EC) No. 907/2007, supra note 472, recital 34; Commission Implementing Regulation (EU) 2015/110, supra note 472, recital 69.

[475] Article 1, paragraphs 2 and 3, Council Regulation (EC) No 1972/2002, supra note 464.

[476] Stéphanie Noël, "Why the European Union must dump so-called 'non-market economy' methodologies and adjustments in its anti-dumping investigations", *Global Trade and Customs Journal*, Vol.11, Issue 7&8, p.301.

[477] Council Regulation (EC) No. 950/2001 of 14 May 2001 imposing a definitive anti-dumping duty on imports of certain aluminium foil originating in the People's Republic of China and Russia, OJ L 134, 17.5.2001, p.1.

[478] Council Regulation (EC) No. 2229/2003 of 22 December 2003 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of silicon originating in Russia, OJ L 339, 24.12.2003, p.3.

situation was created whereby despite Russia's full market economy status, it is still easily subject to surrogate methodologies.

The NME treatment style technique mandated by Article 2(5) is used against imports from countries that have a comparative advantage as a result of the abundance of raw materials or energy. Apart from Russia, it has also been relied upon in AD proceedings against natural resource-endowed countries such as Argentina, Algeria, Croatia, Indonesia and Ukraine.[479] Concerning imports of biodiesel from Argentina and Indonesia, like the US, the EU AD authorities also regarded domestic prices of principal raw materials for producing biodiesel in these two countries, soy bean and crude palm oil respectively, as distorted.[480] The EU authorities considered that the "differential export tax" system in Argentina and Indonesia, which levies a higher tax on the exports of raw materials than on the exports of the final product, i.e. biodiesel, depressed effectively domestic prices of the main raw material inputs in both countries to an artificially low level.[481] The relevant recorded costs of biodiesel producers in both countries were therefore deemed to not reasonably reflect the costs of production and were adjusted on the basis of some reference prices of those main raw materials corresponding to the level of international prices in normal value construction.[482]

It flows from the foregoing that the EU AD authorities have continuously taken abnormally or artificially low prices of raw materials as implying that an exporting producer's recorded costs of those raw materials are not reasonably reflecting the costs associated with the production and sale of the product concerned. These abnormally or artificially low prices have to be lower in comparison with the prices of the raw materials concerned in some other representative market, in particular with their export prices or world market prices. And they should be regulated or somehow distorted. The distortive government intervention does not need to act directly upon the prices of the raw materials concerned.[483] Indirect government policies, such as the differential export tax system, are also sufficient to justify a finding of distortion. The recorded actually incurred costs will then be adjusted on the basis of prices of inputs in some other representative market. This systematic practice of the EU AD authorities has been confirmed by the General Court of the European Union.[484] However, its conformity with the WTO AD

[479] See for example: Council Regulation (EC) No. 954/2006, supra note 472; Council Regulation (EC) No. 1911/2006, supra note 472; Council Regulation (EC) No. 237/2008 of 10 March 2008 terminating the partial interim review pursuant to Article 11(3) of Regulation (EC) No. 384/96 of the anti-dumping duty on imports of ammonium nitrate originating, inter alia, in Ukraine, OJ L 75, 18.3.2008, p.8; Council Regulation (EC) No. 240/2008 of 17 March 2008 repealing the anti-dumping duty on imports or urea originating in Belarus, Croatia, Libya and Ukraine, following an expiry review pursuant to Article 11(2) of Regulation (EC) No. 384/96, OJ L 75, 18.3.2008, p.33.

[480] Council Implementing Regulation (EU) No. 1194/2013 of 19 November 2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of biodiesel originating in Argentina and Indonesia, OJ L 315, 26.11.2013, p.2, recitals 38, 66.

[481] Ibid, recitals 35, 69. In the case of Argentina, the AD investigation found that during the investigation period the export taxes on soya beans and soya bean oil were higher than that on biodiesel by 20.42 percentage points and 17.42 percentage points, respectively. For Indonesia, the export taxes on crude palm oil and biodiesel were 15-20% and 2-5%, respectively.

[482] Ibid, recitals 30, 34, 37, 68.

[483] Ibid, recital 72.

[484] See for example Judgment of the General Court (Eighth Chamber) of 7 February 2013, Case T-235/08, *Acron OAO and Dorogobuzh OAO v. Council of the European Union*, paras.44, 46; Judgment of the General Court (Eighth Chamber) of 7 February 2013, Case T-118/10, *Acron OAO v. Council of the European Union*, paras.51, 53;

Agreement has been challenged. The EU's practices in this regard has already triggered WTO disputes including *EU - cost adjustment methodologies (Russia)*, *EU - biodiesel (Argentina)*, *EU -biodiesel (Indonesia)*, *EU - cold-rolled flat steel from Russia*.[485] Moreover in the two biodiesel cases, the AB ruled the EU's practices of adjusting recorded actually incurred costs on the basis of surrogate market prices to be WTO inconsistent. This is because the requirement of "reasonably reflect the costs associated with the production and sale of the product under consideration" in Article 2.2.1.1 of the WTO AD Agreement was interpreted to implying not the costs *per se* to be reasonable but the action of reflect be reasonable.[486] Moreover, it is emphasized that Article 2.2 of the WTO AD Agreement and Article VI:1(b)(ii) of the GATT 1994 further require normal value to be constructed on the basis of costs of production "in the country of origin", which should reflect conditions prevailing in that country regardless of the presented government-led distortion in its upstream input market.[487]

3.3 Concluding remarks

NME treatment has developed significantly in the WTO era, while the international AD legal regime has remained unchanged. Compared with national practices in the GATT period, WTO era NME treatment practices present more questions concerning the legitimacy and legality of this treatment.

First, criteria adopted by WTO Members to differentiate market and non-market economies, or market and non-market economy conditions, have gone far beyond factors relating to price comparability in AD proceedings initially posed by Soviet economies.[488] Diversified macroeconomic requirements other than central planners' control of pricing and trading decisions are put forward under the disguise of the abstract notions of "normal value" and "fairness". Legislators, however, have overlooked, either intentionally or unconsciously, the significance of these requirements in ensuring price comparability in AD proceedings, a mechanism having its own particular and limited aims in international trade law, rather than an all-in trade defense tool. Furthermore, the impartiality of national AD authorities when conducting NME tests is also highly questionable, let alone the rationality of these criteria used by them. If factors like unfettered foreign investment and free float of currency exchange rate are dispositive, we can easily find that a number of generally recognized market economies' fail the

Judgment of the General Court (Eighth Chamber) of 7 February 2013, Case T-84/07, *EuroChem Mineral and Chemical Company OAO (EuroChem MCC) v. Council of the European Union*, paras.58, 60; Judgment of the General Court (Eight Chamber) of 7 February 2013, Case T-459/08, *EuroChem Mineral and Chemical Company OAO (EuroChem MCC) v. Council of the European Union*, paras.65, 67.

[485] DS474: *European Union - cost adjustment methodologies and certain anti-dumping measures on imports from Russia*; DS494: *European Union - cost adjustment methodologies and certain anti-dumping measures on imports from Russia (second complaint)*; DS473: *European Union - anti-dumping measures on biodiesel from Argentina*; DS480: *European Union - anti-dumping measures on biodiesel from Indonesia*; DS521: *European Union - anti-dumping measures on certain cold-rolled flat steel products from Russia*.

[486] Appellate Body Report, *European Union - Anti-dumping measures on biodiesel from Argentina*, WT/DS473/AB/R, 6 October, 2016, paras.6.17, 6.19, 6.20, 6.37, 6.39.

[487] Panel Report, *European Union - Anti-dumping measures on biodiesel from Indonesia*, WT/DS480/R, 25 January, 2018, paras.7.30.

[488] K. William Watson, "It's Time to Dump Nonmarket Economy Treatment", supra note 118, p.3.

tests.[489] The considerable discretionary margin embodied in market or non-market economy tests, however, gives AD authorities great flexibility to make their decision in this regard to cater for political and economic needs. Moreover, WTO Members have made their decision in this regard in defiance of international AD rules, since Members neither provide special NME treatment commitments nor satisfy the strict state trading and price fixing criteria are also frequently categorized as NMEs.

Secondly, for NME imports, investigating authorities resort to surrogate market economy approximation to establish normal value. Yet, no matter how strict the criteria for selecting surrogate country values are, market economy conditions in the substituted country can hardly be simulated. What surrogate country benchmarks establish is merely some highly subjective fictitious values far from capable of reliably revealing normal value of NME imports. Moreover, in reality, the final selection of surrogate country data depends principally on the availability of relevant enterprises' cooperation, rather than the rationality in terms of comparability. It is always the best information available that is ultimately utilized for establishing normal value, instead of most comparable data in existence. Discrepancies in market conditions of the substituted and the reference countries which influence comparability are to be rectified by AD authorities' adjustment to the finally selected surrogate data. Yet, the identification of deficiencies in comparability as well as the corresponding adjustments required are both subjectively determined. Based on all these accounts, there is no wonder why the use of surrogate benchmarks always leads to increased normal value, and contributes to affirmative dumping determination and higher dumping margin.

Thirdly, the unconscionable amount of bureaucratic discretion embodied in NME treatment renders this legal regime highly questionable in terms of ensuring transparency, predictability and legal certainty. Hardly can NME exporters estimate in advance normal value of their products for them to correctly price their export transactions to avoid AD duties.[490] An investigating authority's reliance on NME treatment frequently results in unpredictable punitive tariffs based on fictitious prices and fantastic assumptions.[491] According to a metaphor employed to illustrate the irrationality of NME treatment, this trade policy is equivalent to charging a driver for speeding on a road with no posted speed limits, based instead upon the limits posted at some other road which is chosen after the driver has been stopped.[492] It is impossible for NME exporters to know if they are dumping when conducting the exporting transactions since they have no way of knowing which surrogate values the investigating authorities will ultimately pick. WTO Members' implementation of diversified national NME treatment legal regimes further exacerbates the state of unpredictability. A specific NME exporter may confront divergent AD

[489] K. William Watson, "Will Nonmarket Economy Methodology Go Quietly into the Night? US Antidumping Policy toward China after 2016", supra note 392, pp.6-8.
[490] Richard Lockridge, "Doubling Down in Non-market Economies: the Inequitable Application of Trade Remedies against China and the Case for a New WTO Institution", *Southern California Interdisciplinary Law Journal*, Vol. 24, 1.10.2015, pp.249-288.
[491] K. William Watson, "Will Nonmarket Economy Methodology Go Quietly into the Night? US Antidumping Policy toward China after 2016", supra note 392, p.4; Barbara Barone, "In-depth analysis: one year to go: the debate over China's market economy status (MES) heats up", supra note 467, p.7; Daniel Ikenson, "Nonmarket Nonsense: US Antidumping Policy toward China", Trade Briefing Paper, No.22, Cato Institute, March 7, 2005.
[492] David Palmeter, *The WTO as a Legal System: Essays on International Trade Law and Policy*, London: Cameron May, 2007, p.20.

determinations and AD duties regarding export transactions conducted by it under the same condition.

Lastly, the practices of adjusting state-distorted costs of inputs included in the normal value of the imported end products in practice is called cost adjustment methodology, or input cost adjustment methodology.[493] This methodology provides for AD authorities' implicit use of NME treatment. Yet, NME treatment based on cost adjustment methodology bears some distinctive characteristics. It firstly targets government intervention, which can take place at any stage of the value chain, in the input market rather than sales of the end products. It rectifies government intervention in upstream raw materials market by adjusting prices of input acquired under non-market terms to undistorted market level. That is to say, what is actually acted against is input dumping, which is a particularly sensitive issue in the case of imports of products for which the cost of raw materials or energy accounts for a large share of the total cost of production. Secondly, what AD authorities focus on in cost adjustment is whether input prices are distorted due to state action. However, there can be countless government policies which distort input prices. State-led distortions in input prices do not necessarily influence price comparability in AD investigations. Nor are they indicative of the existence of a non-market economy. Thirdly, since cost adjustment is based merely on state-led distortions to input prices, rather than a country's overall non-market economic regime, it in fact facilitates the use of and broadens the applicable scope of NME treatment. It allows for the use of the NME methodology *vis-a-vis* not only command economies and transitional economies featured with lingering state influence, but also market economies on a flexible case specific basis. NME treatment based on cost adjustment also increases normal value, inflates dumping margin, and consequently enhances trade barriers against goods produced with low-priced inputs. Its application embodies significant arbitrariness and unpredictability as explicit NME treatment. Nonetheless, this technique is being increasingly legalized and applied, getting popular in the US, the EU and many other jurisdictions.[494] But it is questionable if this country-neutral methodology is justifiable under international AD law. The legality of NME treatment, both explicit and implicit, confronting the changing international legal environment is analyzed in detail in following chapters.

[493] Sherzod Shadikhodjaev, "Input cost adjustments and WTO anti-dumping law: a closer look at the EU practice", *World Trade Review*, Vol.18, Issue 1, January 2019, pp.81-107; Christian Tietje, Bernhard Kluttig, and Martina Franke, "Cost of production adjustments in anti-dumping proceedings: challenging raw material inputs dual pricing systems in EU anti-dumping law and practice", *Journal of World Trade*, Vol.45, Issue 5, 2011, pp.1071-1102.

[494] Weihuan Zhou, "Australia's anti-dumping and countervailing law and practice: an analysis of current issues incompatible with free trade with China", *Journal of World Trade,* Vol.49, Issue 6, pp.975-1010; Panel Report, *Ukraine - Anti-dumping measures on ammonium nitrate*, WT/DS493/R, 20 July 2018.

Chapter 5 The Changing International Legal Environment regarding Non-market Economy Treatment

1. Expiry of NME treatment rules in WTO Members' accession legal documents

Provisions on NME treatment in WTO Members' accession legal documents are transitional, i.e. they will expire upon the satisfaction of agreed conditions, either the fulfillment of some substantial criteria on market economy conditions or the mere passage of a certain period of time. These provisions are special commitments provided by certain countries, i.e. China, Vietnam and Tajikistan, allowing NME treatment to be applied to their exports subject to specified terms and conditions. As analyzed before, in practice they have acted as the principal legal basis for the application of NME treatment. The expiry of these provisions implies therefore significant change of the international legal basis of NME treatment. Specifically, concerning the issue of expiry, Section 15, subparagraph (d) of China's accession protocol stipulates:

> *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.*

This subparagraph provides directly for the termination of automatically applied NME treatment regarding either China's whole economy or a specific sector or industry of it contingent on China's demonstration of prevalence of market economy conditions according to national criteria. Moreover, it provides also for the expiry of certain NME treatment provisions merely on the elapse of a certain period of time - in China's case, 15 years after its accession. Rules concerning termination of automatically applied NME treatment can also be found in Vietnam's and Tajikistan's accession legal documents, to be precise, Paragraph 225(d) and Paragraph 164 of Vietnam's and Tajikistan's accession working party reports respectively. Except that the specific expiry dates indicated are different, the latter two countries' working party reports have employed exactly the same wording as that stipulated in China's accession protocol concerning

the issue of expiry.[495]

In general, these provisions seem to be quite clear and concise, especially those describing the expiry scenario based simply on the passage of a certain period of time. However, it is exactly the stipulation of this scenario that has caused huge disputes and heated debates among WTO Members while confronting the looming deadline in China's accession protocol - the earliest such expiry. Though controversy in this regard is manifested as a legal dispute, which revolves around how to correctly interpret relevant legal rules, the rise and prolongation of this dispute is deeply rooted in relevant political and economic context, most notably, the current sluggish global economic recovery and China's rise under government planning in the last decades. Relevant disputes firstly and currently concern only implication of the expiry provisions in China's accession protocol. However, clarification of the interpretation of pertinent Chinese provisions definitely will directly determine the legal effect of later expiry of similar Vietnamese and Tadzhik provisions.

2. Controversy regarding the effect of the expiry

Concerning the expiry of special NME treatment rules subject to the passage of time, relevant provisions are quite plain but succinct - "**in any event**, the provisions of subparagraph (a)(ii) **shall** expire 15 years after the date of accession" in the cases of China and Tajikistan, and "**in any event** ... **shall** expire on 31 December 2018." [emphasis added] in Vietnam's case.[496] According to the seemingly unambiguous language employed, expiry in this regard is definitive.

Initially, there was a consensus among WTO Members regarding the reading of this expiry provision and the implication this expiry would have in China's case.[497] Everyone, not only in China but also in the US and the EU, seemed to agree that China would automatically acquire market economy status after the transitional period, i.e. from 11 December 2016 onwards.[498] However, as the expiry date drew near, diametrically opposing viewpoints arose, directly challenging what everyone had understood for over 10 years as uncontroversial that the NME treatment permission would expire at the end of 2016, and rendering this expiry issue rather contentious. As early as 2011, Bernard O'Connor, a US trade lawyer, firstly stirred up the dispute

[495] For details about pertinent provisions in Vietnam's and Tajikistan's accession legal documents, see sections 2.3.2 and 2.3.3 of Chapter 4 "WTO Era Non-market Economy Treatment Rules and Practices" of this thesis.

[496] Subparagraph(d), Section 15, Protocol on the Accession of the People's Republic of China, WT/L/432, 23 November 2001; Paragraph 255(d), Report of the Working Party on the Accession of Vietnam, WT/ACC/VNM/48, 27 October 2006; Paragraph 164, Report of the Working Party on the Accession of the Republic of Tajikistan, WT/ACC/TJK/30, 6 November 2012.

[497] Concerning the US government's initial official stance, see for example, "Summary of US - China Bilateral WTO Agreement, November 15, 1999", available at: https://clintonwhitehouse4.archives.gov/WH/New/WTO-Conf-1999/factsheets/fs-004.html; Concerning the EU's initial official attitude, see for example, the Council of the EU, "Proposal for a Council decision establishing the Community position within the Ministerial Conference set up by the Agreement establishing the Word Trade Organization on the accession of the People's Republic of China to the Word Trade Organization", COM (2001) 517 final, 2001/0218 (CNS), Brussels, 19.9.2001.

[498] Joris Cornelis, "China's Quest for Market Economy Status and its Impact on the Use of Trade Remedies by the European Communities and the United States", supra note 365, pp.105-115; Helena Detlof, Hilda Fridh, "The EU Treatment of Non-Market Economy Countries in Anti-dumping Proceedings", *Global Trade and Customs Journa*l, Vol.2, Issue 7/8, 2007, pp.265-281.

by arguing that China's market economy status was not automatic and seeking to rebut the previously commonly agreed automatic acquisition opinion as an urban myth.[499] After his representative contention, debates between both sides escalated as the 2016 deadline approached, which later even led to divergent government stances regarding this issue. The US and the EU, *inter alia*, gradually changed their official position and accordingly, as will be demonstrated below, have adopted different previously unexpected action in response to the advent of the expiry, which undeniably is inseparable from relevant political-economic context. China, however, considered their changed attitudes and especially adopted legal reaction, to have violated relevant international AD rules. And China has submitted complaints to the DSB of the WTO immediately after the expiry of the transitional period against the US and the EU respectively.[500]

The intensive discussion triggered by this expiry in reality is not limited to legal interpretation of relevant rules. It actually also concerns issues such as containing China's rise as a state capitalist economy, and modernizing the overall multilateral trading legal regime. This chapter, however, is focused on issues in respect to the reading of Section 15 of China's accession protocol, investigating the genuine intent of contracting parties concerning this expiry. As the wording of the second sentence of subparagraph (d) clearly demonstrates, it is not contested that subparagraph (a)(ii) will expire after the passage of the deadline. What is disputed is the legal effect the expiry of this subparagraph will have. In general, there are two basic viewpoints. One holds that no substantive change will be caused regarding NME treatment applied to China. This standpoint bluntly and strongly refutes China's automatic acquisition of market economy status based on previously unheard arguments, viewing this automatic acquisition as a misunderstanding of relevant rules and arguing that NME treatment can be continued regarding China based still on its special commitments.[501] The other firmly supports China's automatic acquisition of market economy status after 11 December 2016, defending it as an inviolable legal right of China.[502] Some scholars also propose a compromise solution - the shift-of-burden

[499] Bernard O'Connor, "Market-economy status for China is not automatic", VOX CEPR Policy Portal, 27 November 2011, available at: https://voxeu.org/article/china-market-economy; Bernard O'Connor, "China and Market Economy Status III", supra note 358.

[500] DS515: *United States - Measures related to price comparison methodologies;* DS516: *European Union - Measures related to price comparison methodologies.*

[501] For example, Bernard O'Connor, "The myth of China and market economy status in 2016", NCTM Association d'avocats, 2015, p.1, available at: https://worldtradelaw.typepad.com/files/oconnorresponse.pdf; Laurent Ruessmann, Jochen Beck, "2016 and the Application of an NME Methodology to Chinese Producers in Anti-dumping Investigations", *Global Trade and Customs Journa*l, Vol. 9, Issue 10, 2014, pp.457-463; Jorge Miranda, "Interpreting Paragraph 15 of China's Protocol of Accession", *Global Trade and Customs Journal*, Vol.9, Issue 3, 2014, pp.94-103.

[502] For example, Stéphanie Noël, "Why the European Union Must Dump So-called 'Non-market Economy' Methodologies and Adjustments in Its Anti-dumping Investigations", supra note 476, pp.296-305; Edwin Vermulst, Juhi Dion Sud, Simon J. Evenett, "Normal Value in Anti-Dumping Proceedings against China Post-2016: Are Some Animals Less Equal Than Others?", supra note 374, pp.212-228; Christian Tietje, Nowrot Karsten, "Myth or reality? China's market economy status under the WTO antidumping law after 2016", *Policy Papers on Transnational Economic Law*, No.34, Transnational Economic Law Research Center, December 2011; Folkert Graafsma, Elena Kumashova, "*In re* China's Protocol of Accession and the Anti-Dumping Agreement: Temporary Derogation or Permanent Modification?", *Global Trade and Customs Journal*, Vol.9, Issue 4, 2014, pp.154-159; Rao Weijia, "China's market economy status under WTO anti-dumping laws after 2016", *Tsinghua China Law Review*, Vol.5, 2013, pp.151-165; Brian Gatta, "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*, Vol.9, Issue 4, 2014, pp.165-172.

approach, which argues that China is still subject to NME treatment on the basis of importing countries' national criteria on NME conditions, China's satisfaction of which however has to be proved by the investigating WTO Member.[503] This contention actually lacks a clear and sound legal basis, as will be shown below.

2.1 Relevance of China's actual economic regime

Controversy concerning the expiry of China's NME status firstly concerns the relevance of China's actual economic regime with the end of the NME status for China. Opinions against China's automatic acquisition of market economy status after the deadline base their arguments on both legal and factual points. From the legal perspective, it is pointed out that there is no deadline, no provision of any date in WTO agreements and China's accession protocol, after which China will acquire automatically market economy status.[504] What is agreed and explicitly specified to happen at the end of 2016 is barely the expiry of a very specific provision of Section 15 of China's accession protocol, i.e. subparagraph (a)(ii) of it.[505] The rest of China's special commitments in this regard remain and continue to apply. Interpreting the expiry of subparagraph (a)(ii) as China's automatic acquisition of market economy status is criticized as "reading something that is not there", "negating all the other provisions", "a misunderstanding shared by many in China, the EU and the US", and "an urban myth that seems to have gone global while all relevant legal text are readily available to all".[506] The first and the third sentences of subparagraph (d) conversely provide explicitly for the expiry of the whole subparagraph (a) with respect to China's entire economy or a specific sector or industry of it respectively. Consequently, they clearly deal with China's entire or partial graduation into a market economy. Both sentences base the expiry of subparagraph (a) on substantive condition of the prevalence of market economy conditions in China according to WTO authorized national criteria. These two sentences will not expire. In view of these two sentences, China's acquisition of market economy status after the deadline without proving it indeed is a market economy is pointed out to be simply an unrealistic delusion.[507]

From the factual perspective, China by no means is considered to be a real market economy by either the US or the EU according to their criteria. Its market is viewed to be still under substantial influence of the government, with prices and costs being distorted by government

[503] For example, Terence P. Stewart, William A. Fennell, Stephanie M. Bell, Nicholas J. Birch, "The Special Case of China: Why the Use of a Special Methodology Remains Applicable to China after 2016", *Global Trade and Customs Journal*, Vol.9, Issue 6, 2014, pp.272-279; Ritwik Bhattacharya, "Three viewpoints on China's non-market economy status", *Trade, Law and Development*, Vol.9, No.2, 2017, pp.188-196; Theodore R. Posner, "A Comment on Interpreting Paragraph 15 of China's Protocol of Accession by Jorge Miranda", *Global Trade and Customs Journal*, Vol.9, Issue 4, 2014, pp.146-153.

[504] Bernard O' Connor, "The myth of China and market economy status in 2016", supra note 501.

[505] Alan H. Price, Timothy C. Brightbill, D. Scott Nance, "China can still be treated as a nonmarket economy after 2016", Law360, New York, October 16, 2015, p.1; Jorge Miranda, "Interpreting Paragraph 15 of China's Protocol of Accession", supra note 501; Laurent Ruessmann, Jochen Beck, "2016 and the Application of an NME Methodology to Chinese Producers in Anti-dumping Investigations", supra note 501; Terence P. Stewart, William A. Fennell, Stephanie M. Bell, Nicholas J. Birch, "The Special Case of China: Why the Use of a Special Methodology Remains Applicable to China after 2016", supra note 503.

[506] Bernard O' Connor, "Market-economy status for China is not automatic", supra note 499.

[507] Bernard O' Connor, "The myth of China and market economy status in 2016", supra note 501.

fiats rather than set by free market forces. As analyzed before, both the US and the EU have adopted their own criteria on market or non-market economy conditions, which are permitted under the authorization of WTO rules. After China's accession to the WTO, it had formally applied several times for the EU's recognition of it as a market economy country by demonstrating China's fulfillment of the EU's criteria on market economy conditions, with the last such application publicly made in 2008.[508] Yet, China's application in this regard was all denied, since the EU Commission was not satisfied with China's fulfillment of all five of its criteria.[509] Gradually, China gave up its effort of pursuing market economy status through the EU's domestic legal approach, largely due to the non-transparent, biased and non-technocratic nature of the EU's assessment.[510] China's discontinuation of engagement in this regard resulted also from its realization of the looming 2016 deadline, which weakened the significance of such endeavour. As the deadline approached, confronting the heated controversy, the EU proactively made its negative determination that China was not a market economy according to its criteria. In May 2016, the EU Parliament voted against granting China market economy status in a non-binding resolution passed by 546 votes to 28, with 77 abstentions, and requested the Commission to handle possible AD duties strictly.[511] The EU trade commissioner, Cecilia Malmström, also repeatedly stated on different occasions that China is far from being a market economy.[512] In the case of the US, its latest evaluation of China's market economy status in AD proceedings prior to the 2016 expiry date was conducted in 2006, in an AD investigation concerning certain lined paper products imported from China.[513] The final result of it was that China was still not a market economy country.[514] Since then, it has employed NME treatment in all AD proceedings, including original investigations and administrative reviews, regarding China. Apart from the statutory test, some US authorities also asserted prior to the expiry that China is not currently a market economy and is not on the path to become one in the near future.[515] Consequently, both Members share a common clear and firm stance of identifying China as an NME. Scholars also

[508] EC Commission, Commission Staff Working Document on Progress by the People's Republic of China towards Graduation to Market Economy Status in Trade Defence Investigations, Brussels, 19/09/2008, SEC(2008) 2503 final.

[509] Ibid; see also Barbara Barone, "In-depth analysis: one year to go: the debate over China's market economy status (MES) heats up", supra note 467, p.10; Business Europe, "China's Market Economy Status", position paper, December 2015, p.3.

[510] Edwin Vermulst, Juhi Dion Sud, Simon J. Evenett, "Normal Value in Anti-Dumping Proceedings against China Post-2016: Are Some Animals Less Equal Than Others?", supra note 374, p.224.

[511] European Parliament, "European Parliament resolution of 12 May 2016 on China's market economy status (2016/2667(RSP))", P8_TA(2016)0223, 12 May 2016, available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0223+0+DOC+XML+V0//EN.

[512] Cecilia Malmström, "The future of EU trade policy", Brussels, 24 January 2017, available at: http://trade.ec.europa.eu/doclib/docs/2017/january/tradoc_155261.pdf; European Commission, "Speech: trade defence and China: taking a careful decision", given by Cecilia Malmström, Commissioner for Trade, Brussels, 17 March 2016, available at: http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154363.pdf.

[513] Memorandum, Antidumping duty investigation of certain lined paper products from the People's Republic of China ("China") - China's status as a non-market economy ("NME"), August 30, 2006, available at: https://enforcement.trade.gov/download/prc-nme-status/prc-lined-paper-memo-08302006.pdf.

[514] Ibid.

[515] See for example: US - China Economic and Security Review Commission, Chapter 1, Section 2, "State-owned enterprises, overcapacity, and China's market economy status", in *2016 Annual Report to Congress*, November 2016, pp.114-119; US - China Economic and Security Review Commission, Hearing on China's Shifting economic realities and implications for the United States, oral testimony of Alan Price, February 24, 2016; US - China Economic and Security Review Commission, Hearing on China's shifting economic realities and implications for the United States, written testimony of Wentong Zheng, February 24, 2016; Office of the US Trade Representative, 2016 Report to Congress on China's Compliance, January 2017, pp.100-106.

have confirmed that there are multiple reasons that the Chinese economic structure today is unique and not reflective of those found in other market-oriented capitalist systems.[516]

It should be noted, however, that dissenting arguments based on China's actual economic regime have mixed up the superficial meaning of NME status and its genuine legal implications in international law. From the literal perspective, NME status refers directly to whether a country's economy is substantially market-driven or government-led, concerning which there can be widely divergent national criteria and highly subjective decisions. In legal context, however, this term has been conferred with specific particular implications. NME status relates to concrete legal rights and obligations rather than some equivocal, if not arbitrary, assessment. The division of economies into market and non-market ones bares legal significance only in AD law and it concerns merely the application of different price comparison methodologies. NME status, if will be remembered, refers purely to a country's status of being subject to surrogate country methodologies in AD proceedings due to considerable government intervention deemed to exist in its economy, which renders its domestic prices and costs unreliable for price comparison. For a country's acquisition of market economy status, it does not need to specify directly that this specific country will gain this status. It is the discontinuation of surrogate country methodologies generally applied to it that indicates its acquisition of market economy status. And this discontinuation can be based either on the country's meet of some substantive requirement on a country's economic regime or not. The first and the third sentences of Section 15, subparagraph (d) of China's accession protocol, for example, exactly subject the end of generally applied surrogate country methodologies regarding China to its meet of national criteria on market economy conditions. These two sentences, however, cannot naturally lead to the conclusion that the expiry set in the second sentence of subparagraph (d) cannot have the effect of conferring China market economy status based simply on the passage of 15 years from its accession. The crux of the issue is whether the expiry of mere subparagraph (a)(ii) provided by the second sentence, rather than the whole subparagraph (a), also has the effect of terminating surrogate country methodologies automatically applied to China. If the answer is yes, then China acquires automatically the status of a market economy immediately as the 15-year period elapses. The effect of the expiry of subparagraph a(ii) depends on how relevant provisions should be interpreted, rather than WTO Members' national evaluation of China's substantial transformation into a real market economy.

Concerning the classification of market and non-market economies in an economic sense, there is actually no international standard. And countries are free to make their classification in this regard based on their own criteria. They can call any country a market or non-market economy based on their assessment, or even any other name they prefer. However, WTO Members cannot freely link their assessment in this respect with the application of surrogate country methodologies in AD proceedings, since the latter is a subject of international AD law. Only a country's general subjection to surrogate country methodologies indicates its legal status of an NME. Conflating the economic meaning and the legal implication of NME status commonly

[516] Mark Wu, "The WTO and China's Unique Economic Structure" in Benjamin L. Liebman, Curtis J. Milhaupt eds., *Regulating the Visible Hand?: The Institutional Implications of Chinese State Capitalism*, Oxford University Press, November 16, 2015, pp.328-334.

leads to some non-legal professionals' misunderstanding of the current disputes concerning China's acquisition of market economy status. In order to avoid confusion, some later literature then refrains from using the language of China's acquisition of market economy status to indicate the change of China's legal status in AD law, but directly employs the change of the price comparison methodologies regarding Chinese exports due to the passage of the 15-year's transitional period to accentuate the essence of this matter of affair. For example, the two complaints China submitted to the DSB concerning its disputes with the US and the EU respectively on this matter both are entitled with "measures related to price comparison methodologies", rather than "China's acquisition of market economy status".[517] In the whole documents, China also does not mention its previous NME status and its destined ME status.[518] What China expects and argues for is the end of surrogate country methodologies regarding Chinese exports, rather than other Members' recognition that China is running a genuine market economic regime from the 2016 deadline onwards. The disputes have nothing to do with a magic change of China's economic regime overnight. Concerning the nature of its economic regime, China has left it to be judged by individual countries, since a clear and precise division of market and non-market economies can hardly be made. China itself also refrains from making any self-recognition on this matter. In the *EC - fasteners* case, China submitted that China's Accession Protocol merely authorizes WTO Members to apply a temporary and limited derogation from certain rules of the Anti-dumping Agreement concerning the determination of normal value, but its submission in no way contains any general acknowledgement that it is an NME.[519] What paragraphs 150 and 151 of the working party report document is merely that certain, not all, WTO Members considered China as an NME. The notification requirement in subparagraph (c) requires also only the special methodologies used for normal value calculation to be reported, rather than the criteria on market economy conditions. All these aspects reveal that what China's special commitments really concern is price comparison methodologies, but not China's actual economic regime.[520]

In practice, WTO Members distinguish between market and non-market economy countries according to their own national standards and correspondingly apply different dumping calculation methodologies regarding them, with surrogate country methodologies being automatically applicable to NME imports. How WTO Members should calculate dumping regarding imports from other Members is regulated by international AD law. Their subjection of WTO Members identified by them as NMEs to automatically applicable surrogate country methodologies, therefore, has to be based on the permission of international AD law. With respect to China, Vietnam and Tajikistan, this permission is clear. They have committed in their accession to be directly subject to surrogate country methodologies in AD proceedings and have thereby conferred upon other WTO Members the discretion to enact their own standards for

[517] Request for Consultation by China, *United States - Measures related to price comparison methodologies*, WT/DS515/1, G/L/1169, G/ADP/D115/1, 15 December 2016; Request for Consultation by China, *European Union - Measures related to price comparison methodologies*, WT/DS516/1, G/L/1170, G/ADP/D116/1, 15 December 2016.

[518] Ibid.

[519] Appellate Body report, *European Communities: Definitive anti-dumping measures on certain iron or steel fasteners from China*, supra note 344, para.86.

[520] Edwin Vermulst, Juhi Dion Sud, Simon J. Evenett, "Normal Value in Anti-Dumping Proceedings against China Post-2016: Are Some Animals Less Equal Than Others?", supra note 374, p.218.

evaluating the prevalence of market economy conditions, based on which surrogate country methodologies should be disregarded. Here, a connection is established between the application of surrogate country methodologies and a country's actual economic regime as market or non-market oriented assessed at the importing country's discretion. However, for WTO Members providing no such commitments, other Members cannot subject them to surrogate country methodologies for these countries are assessed to be NMEs according to their national criteria, unless it can be proved that GATT Article VI or the WTO AD Agreement also provides a sound legal basis for this practice. Moreover, even for China, Vietnam and Tajikistan, their special commitments described above can also expire due to the mere passage of the specified transitional period, as elaborated before, depending on how relevant provisions should be interpreted to give effect to the expiry of subparagraph (a)(ii) in China's case. If it is confirmed that these special commitments do expire after the specified deadline, once the deadline passes, they should be equally treated as other Members of the WTO. WTO Members have to find another legal basis in international AD law authorizing their use of their own NME standards to determine the application of surrogate country methodologies.

2.2 Interpretation of relevant provisions to give effect to the expiry

The second sentence of subparagraph (d) stipulates: "[**i**]**n any event**, the provisions of subparagraph (a)(ii) **shall** expire 15 years after the date of accession", emphasis added. It states clearly that the expiry of subparagraph (a)(ii) after the 15th anniversary of China's accession is definitive and unconditional, not contingent on China's satisfaction of any prerequisite, including in particular its satisfactory transition into a real market economy according an importing Member's national criteria. The second sentence of subparagraph (d) is distinguishable from its adjacent two sentences, the first and the third sentences thereof, as the latter two provide for the expiry of the whole subparagraph (a) while the former clearly terminates only subparagraph (a)(ii). The expiry caused by the mere passage of a deadline has left the chapeau of subparagraph (a) and the provisions of subparagraph (a)(i) remaining in force. It is held that this difference in expired provisions and accordingly the remaining effective provisions must be given meaningful legal significance.[521]

Regarding interpreting the remaining provisions, a logical corollary has been developed which goes as below. The chapeau of subparagraph (a) clearly says that competent authorities "shall" (emphasis added), 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. It therefore clearly provides for the possibility of using surrogate benchmarks in China's case.[522] This chapeau has to be read in conjunction with its following subordinate provisions since its authorization of resorting to either Chinese or surrogate benchmarks is explicitly required to be "based on the following rules". It has been argued that the term "based on" here "is not the

[521] Alan H. Price, Timothy C. Brightbill, D. Scott Nance, "China can still be treated as a nonmarket economy after 2016", supra note 505, p.2.
[522] Bernard O' Connor, "China and Market Economy Status III", supra note 358.

same as applying the rule rigidly as set out in the subparagraph."[523] Relying on broad AB interpretation, the term "based on" does not have the same limited meaning as "in compliance with".[524] It is not a requirement that the competent authority acts only on the basis of the elements that follow that term in the text. Rather, the competent authority needs to take into account the elements that follow without preventing it from doing something more.[525] That is to say, logic leaps can be introduced to explain how "based on" should work. In the current case, the chapeau of subparagraph (a), subparagraph (a)(i) and subparagraph (a)(ii) are pointed to form a quasi-syllogism, with subparagraph (a)(i) dealing with the scenario of the producers under investigation 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, and subparagraph (a)(ii) dealing with the opposite scenario that the producers cannot do so.[526] The proposition in subparagraph (a)(i) connect the precondition of the producers' successful demonstration of the prevalence of market economy conditions with the outcome of having Chinese prices or costs being obliged to be used. The proposition in subparagraph (a)(ii) connects the opposite scenario with the outcome of having benchmarks outside China being applicable. After subparagraph (a)(ii) expires, the proposition in subparagraph (a)(i) alone cannot give any instruction regarding price comparison in the opposite case.[527] It obliges neither the use of surrogate nor Chinese benchmarks if the producers under investigation fail to clearly show the prevalence of market economy conditions. However, since the chapeau, which is considered to be the major proposition, clearly provides for two alternatives, the absence of any express instruction in this scenario is viewed to simply imply that competent authorities are free to choose either alternative, surrogate or Chinese benchmarks in this case.[528] In short, interpreting the term "based on" as not requiring applying subparagraph (a)(i) rigidly as it stipulates and reading it as a proposition in light of the major proposition in the chapeau can lead to the conclusion that surrogate country methodologies are still directly applicable to Chinese exports. The remaining provisions of subparagaph (a) are able to substantiate unchanged NME treatment regarding China.[529]

The argument that the chapeau and (i) of subparagraph (a) can also act as the legal basis for NME treatment is further bolstered by the wording of the third sentence of subparagraph (d), which terms subparagraph (a) in its entirety as "non-market economy provisions", not simply subparagraph (a)(ii).[530] Some scholars have therefore opined that in the drafters' view, subparagraph (a) contains NME provisions in addition to the provisions of subparagraph (a)(ii), and "accordingly there must be scenarios other than those contemplated in subparagraph (a)(ii)

[523] Bernard O' Connor, "The myth of China and market economy status in 2016", supra note 501, p.4.
[524] Aegis Europe,"Market Economy Status for China: The proper legal interpretation of China's WTO Accession Protocol", available at: https://static1.squarespace.com/static/5537b2fbe4b0e49a1e30c01c/t/568f7c28a128e65d0d3e16fe/1452244009701/The+proper+legal+interpretation+of+China%E2%80%99s+WTO+Accession+Protocol.pdf, relevant AB reports cited are *EC - Measures concerning meat and meat products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, 16 January, 1998, para.163 and EC - Trade description of sardines, WT/DS231/AB/R, 26 September 2002, para.242.
[525] Ibid.
[526] Ritwik Bhattacharya, "Three Viewpoints on China's Non-market Economy Status", supra note 503, p.193.
[527] Ibid.
[528] Ibid.
[529] Jorge Miranda, "Interpreting Paragraph 15 of China's Protocol of Accession", supra note 501, pp.94-103.
[530] Theodore R. Posner, "A Comment on Interpreting Paragraph 15 of China's Protocol of Accession by Jorge Miranda", supra note 503, p.149.

in which an NME methodology may be applied after 11 December 2016".[531] However, interpreting the expiry of subparagraph (a)(ii) as terminating surrogate country methodologies automatically applicable to China would render subparagraph (a)(i) superfluous, since why the producers under investigation need to clearly show the prevalence of market economy conditions if domestic prices or costs in China must be relied upon from the right beginning.[532] Such interpretation substantially negates any significance of the remaining provisions of subparagraph (a), which are explicitly segregated to remain in force forever. Therefore, "if the surviving text is to have any meaning, then it cannot be the case that there is no circumstance in which an NME methodology can be applied".[533]

The drafters are considered to have seen a clear distinction between referring to the expiry of subparagraph (a) and of subparagraph (a)(ii). Only the substantial transformation into market economy conditions can lead to the expiry of the whole NME provisions - subparagraph (a).[534] Repetition of the same distinction in Vietnam's and Tajikistan's accession legal documents further evidences that the drafters chose their words deliberately.[535] To equate the expiry of subparagraph (a)(ii) with the expiry of subparagraph (a) in its entirety also invalidates drafters' intentional differentiation in this regard.

WTO Members actually hope to continue their NME treatment regarding China based on the remaining provisions of subparagraph (a).[536] The above reasoning, however, bears an obvious defect - it deprives the second sentence of subparagraph (d) of all significance since the expiry it prescribes leads to no legal consequences. Subparagraph (a)(ii) is essentially also rendered superfluous since provisions of the chapeau and (i) already can justify the use of a methodology not based on a strict comparison with domestic prices or costs in China when the producers under investigation cannot clearly show the prevalence of market economy conditions. A dilemma arises - to nullify the distinction of expired provisions made in subparagraph (d) and the remaining provisions of subparagraph (a), or to deprive the legal significance of the second sentence of subparagraph (d) and provisions of subparagraph (a)(ii).

To give each word and provision in a treaty effect is a requirement of the interpretation principle - the principle of effectiveness or *effet utile*. This principle is considered by some as a well-recognized general rule of treaty interpretation, especially confirmed in the AB's practice of treaty interpretation, which requires that treaty text be interpreted in good faith to give full effect to the intention of the parties.[537] According to this principle, it is presumed that the

[531] Ibid.
[532] Ibid.
[533] Ibid.
[534] Ibid, pp.146-153.
[535] Jorge Miranda, "Interpreting Paragraph 15 of China's Protocol of Accession", supra note 501, p.96.
[536] WTO, 2017 News Items, dispute settlement, DS516: European Union - Measures related to price comparison methodologies, https://www.wto.org/english/news_e/news17_e/dsb_21mar17_e.htm, and https://www.wto.org/english/news_e/news17_e/dsb_03apr17_e.htm.
[537] Isabelle Van Damme, *Treaty Interpretation by the WTO Appellate Body*, Oxford University Press, New York, 2009, p.275. Concerning exemplary cases, see: Appellate Body Report, *Japan - Taxes on alcoholic beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 4 October, 1996, p.12; Appellate Body Report, *Canada - Certain measures affecting the renewable energy generation sector*, WT/DS412/AB/R, para.5.57; Appellate Body Report, *United States - Restrictions on Imports of Cotton and Man-made Fiber Underwear*, WT/DS24/AB/R, 10 February 1997, p.16; Appellate Body Report, *Argentina - Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, 14

drafters intended that each word and provision in a treaty must be given effect and no word or provision may be treated as or rendered superfluous.[538] The interpretation of a provision should not empty the chapeau of its contents and deprive the remaining paragraphs of their meaning.[539] The effectiveness principle also calls for non-redundancy, according to which instances of logical tautology must be avoided, i.e., a norm must not prescribe the same state of affairs as another norm that exists independently of it.[540]

The principle of effectiveness, however, is not specified in the text of the VCLT. What is most pertinent to this principle are the elements of "good faith" and "object and purpose" under Article 31.1 of the VCLT.[541] It is the AB that developed this principle in WTO jurisprudence, when it stated that a treaty interpreter "must give meaning and effect to all the terms of the treaty" and "is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility".[542] The AB's "creation" of an interpretation rule, *per se*, is highly problematic. The AB currently is precisely criticized by the US to have added or diminishes the rights and obligations provided in the covered agreements through its clarifications of WTO provisions.[543] Both panels and the AB must be guided by the rules of treaty interpretation set in the VCLT, rather than creating their own.[544] The AB also said that the principle of effectiveness requires that a treaty be read and interpreted "as a whole" and "harmoniously".[545] This clarification is more faithful to the VCLT. The interpretative principle of effectiveness as elaborated above by no means is a customary rule of interpretation in public international law required in Article 3.2 of the DSU for dispute settlement. Furthermore, understanding the principle of effectiveness as requiring for giving effect to all words and provisions in a treaty is not supported by treaty drafting practices, since a lot of written agreements contain words that are repetitive or superfluous. China's protocol of accession, not only its Section 15, is pointed to be an example in this regard, since it was badly worded and poorly drafted even considered to be a drafting disaster and an embarrassment to the WTO.[546]

December 1999, paras.81; Appellate Body Report, *Korea - Definitive Safeguard Measures on Imports of Certain Dairy Products*, WT/DS98/AB/R, 14 December 1999, para.81; Appellate Body Report, *United States - Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R, 2 January 2002, para.338; Appellate Body Report, *United States - Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R, 16 January 2003, para.271; Appellate Body Report, *Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/R, WT/DS113/AB/R, 13 October 1999, para.133.

[538] Appellate Body Report, *United States - Standards for reformulated and conventional gasoline*, WT/DS2/AB/R, April 29, 1996, p.23.

[539] Ibid.

[540] Ulf, Linderfalk, *On the Interpretation of Treaties - The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties*, Springer Netherlands, 2007, p.110.

[541] Asif H. Qureshi, *Interpreting WTO Agreements: Problems and Perspectives*, Cambridge University Press, August 9, 2012, p.13.

[542] Appellate Body Report, *United States - Standards for reformulated and conventional gasoline*, supra note 538, para.23.

[543] European Commission, "Concept paper: WTO modernization", p.14, available at: http://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf.

[544] Appellate Body Report, *India - Patent protection for pharmaceutical and agricultural chemical products*, WT/DS50/AB/R, 19 December 1997, para.46.

[545] Appellate Body Report, *Korea - Definitive Safeguard Measures on Imports of Certain Dairy Products*, supra note 537, para.81; Appellate Body Report, *Argentina - Safeguard Measures on Imports of Footwear*, supra note 537, para.81.

[546] Anon and Julia Qin's comments to Bernard O'Connor "When Will China's NME Status End?", 29 November, 2011, available at: http://worldtradelaw.typepad.com/ielpblog/2011/11/when-will-chinas-nme-status-end.html.

What should be respected in reading rules in China's accession protocol, including Section 15, is customary rules on treaty interpretation codified principally in Article 31 of the VCLT.[547] This article stipulates: "[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".[548] Article 3.2 of the DSU also requires the WTO DSB to clarify existing provisions of the covered agreements in accordance with customary rules of interpretation of public international law.[549] While interpreting special NME treatment rules in China's accession protocol, it is emphasized that they should be interpreted in light of the overall systematic structure of Section 15, the interplay of its provisions and its drafting history.[550] In particular, it is required to bear in mind that the whole Section 15 in China's accession protocol is an exception to normal rules of the WTO ADA, with subparagraph (a) and (d) substantially modifying the rules that would otherwise apply, and based on this context, Section 15 cannot be read in a too liberal manner.[551]

The chapeau of subparagraph (a) states that it shall apply "based on" subparagraphs (a)(i) and (ii). The ordinary meaning of "based" is "an underlying fact or condition".[552] The chapeau therefore does not operate independently, but must be read in conjunction with subparagraphs (a)(i) and (ii) to see how different methodologies can be used in different scenarios. It is legally insignificant on its own.[553] It in particular cannot be understood that the chapeau alone directly authorizes other Members' use of external benchmarks regarding China.[554] Subparagraph (a)(ii) describes a scenario, i.e. the producers under investigation cannot clearly show that market economy conditions prevail in relevant industries, and specifies the permitted methodologies under this scenario, i.e. a methodology not based on a strict comparison with domestic prices or costs in China can be used. Most importantly, this provision does not merely prescribe the permitted methodologies in a specific scenario. It substantially establishes China's default NME legal status in AD proceedings, since it confirms that Chinese imports can be directly subject to surrogate country methodologies if no effort is made to prove the prevalence of market economy conditions or such effort is failed. The decision of whether to resort to surrogate country benchmarks and the judgment of whether the prevalence of market economy conditions is clearly shown are both left to importing Members' national discretion. Subparagraph (a)(ii) therefore is believed to be the key provision where the authority to use an NME methodology actually resides.[555] It is viewed to be the true legal basis for derogation from the general

[547] Appellate Body Report, *China - Measures related to the exportation of various raw materials*, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R, 30 January 2012, para.278.
[548] Article 31, 1969 Vienna Convention on the Law of Treaties, UNTS Vol.1155, p.331.
[549] Article 3.2, Understanding on Rules and Procedures Governing the Settlement of Disputes.
[550] Edwin Vermulst, Juhi Dion Sud, Simon J. Evenett, "Normal Value in Anti-Dumping Proceedings against China Post-2016: Are Some Animals Less Equal Than Others?", supra note 374, p.216.
[551] Stéphanie Noël, "Why the European Union Must Dump So-called 'Non-market Economy' Methodologies and Adjustments in Its Anti-dumping Investigations", supra note 476, p.299.
[552] Bryan A. Garner *et al.* eds., *Black's Law Dictionary*, 9th edition, West, St. Paul, 2009, p.171.
[553] David Kleimann, "The Vulnerability of EU Anti-Dumping Measures against China after December 11, 2016", supra note 119, p.4.
[554] Rao Weijia, "China's market economy status under WTO anti-dumping laws after 2016", supra note 502, p.161.
[555] K. William Watson, "It's Time to Dump Nonmarket Economy Treatment", supra note 118, p.2; Jean-François Bellis's presentation at the Workshop on "Market Economy Status for China after 2016?" organized by the European Parliament, Director-General for External Policies, Policy Department, for the Committee on

obligation to use domestic prices or costs.[556]

Subparagraph (a)(i) depicts the other scenario - the producers under investigation clearly show that market economy conditions prevail in relevant industries, and it obliges an importing country to use Chinese prices or costs for comparison in this case. This provision ostensibly merely describes a condition under which importing Members must apply standard methodologies regarding China. However, it should be read in light of the systematic structure of subparagraph (a), and especially its relation with (a)(ii), so as to reveal its real meaning and significance aimed by the drafters. As analyzed above, subparagraph (a)(ii) substantially confirms China's default legal status as an NME in AD proceedings and authorizes other Members' direct derogation from standard price comparison methodologies in China's case. In this context, subparagraph (a)(i) actually provides for Chinese producers a chance to have a normal methodology being applied to them regardless of China's overall legal status as an NME.[557] This provision confirms relevant national practices already existent at the time of China's accession negotiation. It in essence provides for an exception to the exception set by subparagraph (a)(ii). While (a)(ii) provides for other Members' derogation from standard methodologies in China's case, (a)(i) obliges their fallback to the standard route in the specified circumstance. It is introduced clearly to benefit Chinese producers.[558] It cannot be read into imposing some obligation on Chinese producers, especially cannot be interpreted as implicitly authorizing the use of NME methodologies to determine normal value in the opposite scenario in conjunction with the chapeau of subparagraph(a), which is an expired exception laid out by subparagraph (a)(ii).[559] The material content of subparagraphs (a)(i) and (a)(ii), provisions of which are phrased in reverse logic, is not identical.[560] In general, subparagraph (a) basically contains two opposing scenarios and specifies the application of price comparison methodologies under each of them. Provisions concerning these two scenarios, however, are not isolated but correlated with each other. More important, they are not on the same footing in meaning, since (a)(i) is actually an exception to (a)(ii). Isolated narrow text reading of subparagraph (a)(i) misleads public understanding of the purpose and objective underlying these provisions.

The second sentence of subparagraph (d) sets the definitive and unconditional expiry of subparagraph (a)(ii) after the passage of 15 years from China's accession. What is destined to expire here is precisely the provision authorizing other Members' direct application of surrogate country methodologies regarding China and confirming China's given NME legal status. After this provision expires, there will be no authorization of automatically applicable NME treatment

International Trade, Brussels, 28 January 2018; Edwin Vermulst, Juhi Dion Sud, Simon J. Evenett, "Normal Value in Anti-Dumping Proceedings against China Post-2016: Are Some Animals Less Equal Than Others?", supra note 374, p.215.

[556] Rao Weijia , "China's market economy status under WTO anti-dumping laws after 2016", supra note 502, p.164.

[557] Ibid.

[558] K. William Watson, "It's Time to Dump Nonmarket Economy Treatment", supra note 118, p.2.

[559] Henry Gao, "If you don't believe in the 2012 myth, do you believe in the 2016 myth?", *WTO and China*, 20 November 2011, available at: http://wtoandchina.blogspot.com/2011/11/if-you-dont-believe-in-2012-myth-do-you.html.

[560] David Kleimann, "The Vulnerability of EU Anti-Dumping Measures against China after December 11, 2016", supra note 119, p.4.

regarding China.[561] The chapeau though mentions the use of a methodology not based on a strict comparison with Chinese prices or costs, it in itself does not authorize NME treatment since the effectiveness of the chapeau is conditioned on the satisfaction of the prerequisites in (a)(i) and (a)(ii).[562] While (a)(ii) loses its legal effect after 15 years, the remaining (a)(i) stipulates only what will happen if the producers under investigation clearly show the prevalence of market economy conditions.[563] It does not refer to what will happen in other circumstances. It cannot be read as specifying the sole circumstance under which standard methodologies are obliged and implicitly indicating that in other circumstances surrogate country methodologies are at the investigating authorities' disposal. Such a reading substantially interprets (a)(i) as authorizing other Members' direct taking of China as an NME and their automatic application of surrogate country methodologies, which is the intent embodied in (a)(ii). The expiration concerned cannot convert the drafters' purpose of introducing (a)(i) to accord Chinese producers an opportunity to have standard methodologies being applied into an implicit authorization of NME treatment.[564] This interpretation actually also implies that China committed in its accession negotiation to be treated directly as an NME forever, a condition that it unlikely would have agreed.

Though the second sentence sets only the expiry of subparagraph (a)(ii), the remaining chapeau and (a)(i) actually lose legal significance simultaneously with this expiry due to their relation with (a)(ii). Subparagraph (a)(i) in essence is a derogation from subparagraph (a)(ii). If the agreed NME treatment regarding China in subparagraph (a)(ii) *per se* is ended, why the exception to it is still needed? If all Chinese producers are directly entitled to standard methodologies, why they need to meet the condition in (a)(i) to obtain this right? The chapeau will also become meaningless because the condition its application rests on no longer exists. The reason why the drafters have not explicitly specified the expiry of the whole subparagraph (a) is pointed to be just a mistake in the drafting, and it is opined that if one mulls over the details, he will find that the rest provisions do not survive.[565] Some conversely reveal that negotiators had intentionally reserved the rest provisions since the expiry clause was originally drafted to apply to the entire subparagraph (a), but later changed to set a deadline only for a specific subparagraph (a)(ii).[566] Yet, it is commented that the rest provisions are probably retained to differentiate the expiry based on the mere passage of 15 years from that based on China's substantial graduation into a market economy in the sense that the former scenario actually does not prevent a Member's continuation of calling China an NME.[567] But, in any case, directly applicable surrogate country methodologies should be terminated regarding China.[568] Some commentators have tried to give legal significance to the remainder of the provisions by arguing that section 15(a)(i) provides for an extra remedy to Chinese manufactures in case an importing Member continues to use

[561] Stéphanie Noël, "Why the European Union Must Dump So-called 'Non-market Economy' Methodologies and Adjustments in Its Anti-dumping Investigations", supra note 476, p.300.
[562] Ibid, p.299.
[563] Ibid, p.300.
[564] Henry Gao, "If you don't believe in the 2012 myth, do you believe in the 2016 myth?", supra note 559.
[565] Donald Clarke's comment to Bernard O'Connor, "When Will China's NME Status End?", December 27, 2011, available at: https://worldtradelaw.typepad.com/ielpblog/2011/11/when-will-chinas-nme-status-end.html.
[566] Barbara Barone, "In-depth analysis: one year to go: the debate over China's market economy status (MES) heats up", supra note 467, p.10.
[567] Edwin Vermulst, Juhi Dion Sud, Simon J. Evenett, "Normal Value in Anti-Dumping Proceedings against China Post-2016: Are Some Animals Less Equal Than Others?", supra note 374, p.218.
[568] Ibid.

external benchmarks for Chinese imports after 2016.[569] This interpretation, however, is highly questionable since positing it against the assumption of a Member's unfulfillment of its international obligation in itself is strange. In this case, China can simply request for consultations with relevant Members, initiate a WTO lawsuit, or even pursue retaliation to push the Member to faithfully implement its obligation. Moreover, this interpretation does not conform with the interpretation of pertinent provisions in light of the drafters' intent. As long as the chapeau and subparagraph 15(a)(i) survives, controversy is unavoidable since there is always the risk that one will read them in isolation from the already expired subparagraph (a)(ii).

The first and the third sentences of subparagraph (d) also provide for two expiry scenarios, both of which are based on China's proof of its genuine transformation, either its whole economy or a specific sector of it, into market economy conditions. Such a requirement, however, cannot exert any influence on the expiry specified in the second sentence since this sentence explicitly and clearly sets that the expiry shall happen in any event 15 years after China's accession. No room is left for WTO Members' discretion, including in particular their assessment of China's market conditions according to their own standards. The only requirement for this expiry is the passage of 15 years. Since the expiry of subparagraph (a)(ii) as explained above has the actual effect of depriving effectiveness of the whole subparagraph (a), ending China's NME status after the 2016 deadline, the other two sentences are pointed to actually grant China opportunities to terminate its automatic NME status in its entirety or regarding a specific sector of it prior to 2016.[570] Definition and criteria of market or non-market economies are stipulated only in WTO Members' national AD legislation. International trade rules never engage in this matter of affair. China's special commitments confer upon other Members wide discretion to enact their own criteria and conduct their own tests in determining whether to grant China earlier market economy status. Though considerable discretion is conferred, the first sentence of subparagraph (d) explicitly requires that criteria for evaluating China's whole economy should have been introduced before China's accession to the WTO. The EU's five criteria, the unfulfillment of all of which is commonly invoked by the EU to substantiate its continuation of treating China as an NME, however, are not criteria for the assessment of China's whole economy introduced before its accession. Some scholars categorize criteria on market economy conditions into MES (market economy status) criteria and MET (market economy treatment) criteria and further point out that those stipulated in EU AD law are MET criteria.[571] The EU AD law actually is not equipped with MES criteria, which are required in the proviso to have been introduced prior to China's accession to be effective.[572] Argument against China's market economy status based on MET criteria *per se* is not legally justifiable. Moreover, the requirement for effective MES criteria to be existent at the time of China's accession actually further substantiates China's acquisition of market economy status 15 years after its accession. This is because for countries equipped with no effective MES criteria, the contention that China cannot acquire market economy status unless it qualifies for this status under WTO Members national criteria actually indicates its permanent status as an

[569] Rao Weijia, "China's market economy status under WTO anti-dumping laws after 2016", supra note 502, p.167.
[570] Appellate Body Report*, European Communities: Definitive anti-dumping measures on certain iron or steel fasteners from China*, supra note 344, para.289.
[571] Edwin Vermulst, Juhi Dion Sud, Simon J. Evenett, "Normal Value in Anti-Dumping Proceedings against China Post-2016: Are Some Animals Less Equal Than Others?", supra note 374, p.215.
[572] Ibid.

NME in these countries. This will be an extremely egregious reading of China's special commitments, which amounts to unilateral and illegal expanding of the scope of China's commitments.[573]

The conclusion that automatically applicable surrogate country methodologies unconditionally terminated regarding China 15 years after its accession is also supported by the negotiating history of relevant provisions. It is pointed out that earlier drafts of China's accession protocol merely contained the two clauses of the current subparagraphs (a)(i) and (a)(ii) without the chapeau, which was added much later by the US.[574] This drafting history reveals that the chapeau was inserted only "to reiterate the conditional options of the importing Member, instead of obligating it to use alternative methodologies".[575] Opposite argument is proposed that the fact that the US negotiated for its insertion makes it likely that the chapeau was intended to have some effect.[576] This understanding yet is too abstract and it cannot prove the intended effect for the insertion is to authorize NME treatment.

The Report of the Working Party on China's Accession records various of issues that were raised in the course of negotiating China's protocol of accession and memorizes some commitments made by China or existing WTO Members. It therefore provides for a context for interpreting the protocol. Paragraph 151 of the Report in particular records China's concerns in the negotiation about the way in which WTO Members had applied their NME treatment to Chinese goods. In response to these concerns, "members of the Working Party confirmed that in implementing subparagraph (a)(ii) of Section 15 of the Draft Protocol, WTO Members would comply with the following...".[577] Since paragraph 151 refers only to the implementation of subparagraph (a)(ii) of Section 15, this implies that subparagraph (a)(ii) is the provision through which the negotiating parties intended to authorize NME treatment, rather than the whole subparagraph (a), especially not the chapeau in conjunction with subparagraph (a)(i).[578]

The contemporaneous opinion of other WTO Members at the time China's protocol was concluded provides also for important context to reveal the drafters' real intent. China firstly negotiated its accession terms and conditions individually and bilaterally with its main trading partners which are WTO Members, in particular the US.[579] The bilateral US-China trade agreement was later rolled into China's accession package of conditions. The formulation of what later became Section 15 of the Protocol also firstly showed up in draft text from mid-2000, following bilateral trade dialogues between China and the US as this issue was considered to be of particular importance to both.[580] It is recalled that Section 15 was drafted by the USTR and

[573] Ibid, p.215.
[574] Rao Weijia, "China's market economy status under WTO anti-dumping laws after 2016", supra note 502, p.163.
[575] Ibid.
[576] Bernard O' Connor, "The Myth of China and Market Economy Status in 2016", supra note 501, p.3-4.
[577] Paragraph 151, Report of the Working Party on the Accession of China, WT/ACC/CHN/49, 10 October 2001.
[578] Theodore R. Posner, "A Comment on Interpreting Paragraph 15 of China's Protocol of Accession by Jorge Miranda", supra note 503, p.149.
[579] Esther Lam, *China and The WTO: a long march towards the rule of law*, Kluwer Law International, The Netherlands, 2009, pp.71-75.
[580] "Language for Draft Protocol and Working Party Report Emanating from the US-China Bilateral Agreement", Informal WTO Secretariat Document, 15 June, 2000, available at: http://www.insidetrade.com.

became part of the bilateral agreement in November 1999 and then adopted by the Protocol without revision.[581] There are several occasions where US senior government officials, including the secretary of Commerce and the US Trade Representative, formally stated their understanding of Section 15. In 2000, while considering whether to extend unconditional MFN treatment to China, then secretary of Commerce William M. Daley stated in a hearing before the Ways and Means Committee of the US House of Representatives that "China has agreed to guarantee our right to continue using our current methodology (treating China as a non-market economy) in AD cases for fifteen years after China's accession to the WTO".[582] The congressional testimony of the US Trade Representative Charlene Barshefsky at the same hearing was nearly identical.[583] The report later issued by the Ways and Means Committee to accompany the legislation extending unconditional MFN treatment to China summarized key elements of China's accession protocol and stated among other things that China had committed to "accept the use by the United States of certain antidumping provisions (over a transitory period)".[584] Four years after China's accession, the United States Government Accountability Office issued a report which discussed the eventual elimination of the NME methodology. In that report, it cited "officials at the Office of the US Trade Representative" as stating that "[a]fter 2016, the ability of WTO members to continue using third-country information in AD calculations involving China would be governed by generally applicable WTO rules".[585] Consequently, in earlier times after China's accession, US government officials formally agreed that China's commitment to NME treatment is transitional and none of them asserted that this authorization survives even after the transitory period. Other WTO Members also used to publicly voice their official position of the transitory nature of special NME treatment regarding China on various occasions. For example, in *EC - Fasteners* the EU argued that Section 15 of China's accession protocol entitles it to treat China as an NME until 2016.[586] In the EU court case T-512/09 *Rusal Armenal v. Council*, the Council of the EU also stated that China and Vietnam had negotiated a deadline beyond which WTO Members are required to treat them as market economies.[587] In that case the EU General Court moreover affirmatively interpreted Section 15(d) in its judgment issued on 5th November 2013 as containing a cut-off date after which the special commitments on particular methodologies would be repealed.[588]

In the case *EC - Fasteners*, the AB provided some legal interpretation of pertinent rules in Section 15 and expressed its stance on the 2016 expiry issue. The AB stated that "paragraph 15(d)

[581] See Julia Qin's comment to Bernard O' Connor's article "When Will China's NME status End?", 28 November, 2011, available at: http://worldtradelaw.typepad.com/ielpblog/2011/11/when-will-chinas-nme-status-end.html; Barbara Barone, "In-depth analysis: one year to go: the debate over China's market economy status (MES) heats up", supra note 467, p.9.

[582] US Government Printing Office, Accession of China to the WTO, Hearing before the Committee on Ways and Means, House of Representatives, 106th Congress, 2nd Session, 3 May, 2000, p.36.

[583] Ibid, p.49.

[584] US House of Representative, Permanent Normal Trade Relations with the People's Republic of China, House of Representatives, No.106-632, 106th Congress, 2nd Session, 22 May, 2000, p.11.

[585] United States Government Accountability Office, *US - China Trade: Eliminating Nonmarket Economy Methodology Would Lower Antidumping Duties for Some Chinese Companies*, GAO-06-231, January 10, 2006, p.27.

[586] Appellate Body report, *European Communities: Definitive anti-dumping measures on certain iron or steel fasteners from China*, supra note 344, paras. 25, 361.

[587] Judgment of the General Court, Case T-512/09 *Rusal Armenal ZAO v. Council of the European Union*, 5 November, 2013, para.30.

[588] Ibid, para.47.

of China's Accession Protocol establishes that the provisions of paragraph 15(a) expire 15 years after the date of China's accession (that is, 11 December 2016)".[589] It also clarified that paragraph 15(a) contains special rules for the determination of normal value in antidumping investigations involving China.[590] This is the first time that the AB outlined its stance on the controversial 2016 expiry issue in a WTO verdict. Its statement in this report seems to confirm that subparagraph (a) in its entirety no longer applies after 2016 and no assessment of China's market conditions is needed, which actually clearly supports China's automatic acquisition of market economy status after 2016. China also feels vindicated for its assertion in this regard. However, the significance of this AB statement is rather limited and should not be exaggerated.[591] The ruling was made by the AB to adjudicate China's specific claim of the EU's violation of international trade rules by imposing country-wide, rather than individual, AD duties on NME exports. It just additionally touched upon the expiry issue concerned, which was not disputed in this specific case. The AB's statement in this regard therefore merely constitutes a non-binding *obiter dictum*, dealing with an interpretative question that it did not need to reach in order to address the issue at hand.[592] The AB did not seriously deliberate the expiry issue. Its interpretation is questionable in particular since it failed to distinguish between the "expiry of subparagraph 15(a)" and the "expiry of subparagraph 15(a)(ii)" and therefore should not be viewed with much significance. The issue of the effect of the expiry in 2016 is still open to debate. Moreover, it is noteworthy that the tendency of the AB to draft advisory opinions on issues not necessary to resolve a dispute is also one of the criticisms it is now confronting.[593]

Concerning interpreting international AD rules, there is one particular interpretation rule, Article 17.6(ii) of the ADA. This provision requires a dispute settlement panel to "interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law", and states thereafter that "[w]here the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations". This interpretation rule deals with circumstances of vague AD norms that allow for more than one interpretation. It in itself is highly questionable if a specific provision concerned can be read as genuinely allowing for more than one permissible interpretation in accordance with customary interpretation rules. It is even more problematic while applying this rule in the current dispute. For one thing, it does not fall under the applicable scope of Article 17.6(ii) of the ADA since this article deals merely with the interpretation of a relevant provision of the ADA, rather than all international AD rules including those embodied in a specific country's accession legal documents. For another, the dispute concerned is not a circumstance of the type contemplated in the prerequisite of Article 17.6(ii). In the current case, though disputes exist, hardly can we say that the two entirely incompatible interpretations both

[589] Appellate Body report, *European Communities: Definitive anti-dumping measures on certain iron or steel fasteners from China*, supra note 344, para.289.
[590] Ibid.
[591] Jorge Miranda, "Interpreting Paragraph 15 of China's Protocol of Accession", supra note 501, p.101; Alan H. Price, Timothy C. Brightbill, D. Scott Nance, "China can still be treated as a nonmarket economy after 2016", supra note 505, p.3.
[592] Jorge Miranda, ibid.
[593] USTR, *The President's 2018 Trade Policy Agenda*, p.26, available at: https://ustr.gov/sites/default/files/files/Press/Reports/2018/AR/2018%20Annual%20Report%20I.pdf.

are permissible according to customary interpretation rules. The AB has urged caution in reliance on Article 17.6(ii). It stressed that the second sentence applies only after a panel has interpreted the text at issue in accordance with customary rules of interpretation of public international law and determined for itself that the text at issue does admit more than one permissible interpretation.[594]

2.3 The shift of burden argument

Confronting the two contradicting positions on China's automatic acquisition of market economy status after 2016, some have proposed a shift of burden argument to try to strike a compromise.[595] According to this viewpoint, the chapeau of 15(a) read in conjunction with 15(a)(i) is sufficient to justify the employment of surrogate country methodologies in certain circumstances of which 15(a)(ii) provides only for one such circumstance.[596] It is argued that Section 15(a)(ii) deals merely with the burden of proof, presuming the existence of NME conditions in China unless disproved by Chinese producers in an industry.[597] Once 15(a)(ii) expires, this presumption is taken away. It however does not mean that China therefore has to be treated as a market economy in all circumstances since the remaining provisions do not expire. There are still scenarios where methodologies not based on a strict comparison with Chinese prices or costs can be utilized. Simply China's presumed NME status is ended. Thereafter, importing countries have to prove the prevalence of NME conditions in relevant industries or sectors for their resort to surrogate country benchmarks. According to the logic of this argument, the true effect of the 2016 expiry is to reverse the burden of proof, tasking the importing country that seeks to treat China as an NME with demonstrating that the individual industries or sectors remain under NME conditions after December 11, 2016.[598] Subparagraph (a)(i), according to this argument, is not concerned with the matter of the burden of proof. It instead provides for Chinese producers the right to proactively prove that pertinent industries are under market economy conditions so as to oblige importing countries' use of Chinese domestic prices or costs. The burden of proof is discharged from them from the 2016 deadline onwards.

Such interpretation firstly gives effect to provisions of subparagraph (a) remaining after 2016 by confirming the applicability of surrogate country methodologies regarding China after the deadline. Secondly, it answers the question of what circumstances allow for the use of surrogate country methodologies after that date. It gives effect to the second sentence of subparagraph (d) by introducing the shift of burden as the change caused by the expiry embodied in this sentence, rather than arguing for *status quo ante.* The threshold for the use of surrogate country methodologies is undeniably raised since they cannot be directly applied to China any longer and "a mere failure on the part of the producers under investigation to meet this 'clearly show'

[594] Appellate Body Report, *United States - Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, 4 February 2009, para.272; Appellate Body Report, *United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, 24 July 2001, paras.57-62.
[595] Jorge Miranda, "Interpreting Paragraph 15 of China's Protocol of Accession", supra note 501, p.103; Mark Wu, "The WTO and China's Unique Economic Structure", supra note 373, p.341.
[596] Ritwik Bhattacharya, "Three Viewpoints on China's Non-market Economy Status", supra note 503, p.194.
[597] Jorge Miranda, "Interpreting Paragraph 15 of China's Protocol of Accession", supra note 501, p.103.
[598] Ibid.

standard is not enough".[599] Importing countries have to actively justify their resort to surrogate benchmarks by proving that NME conditions still prevail in relevant industries. What they need to prove is not that China meets the international standard on NME conditions, the state trading monopoly and price fixing requirement in the second Ad Note to Article VI:1, but only national criteria freely set by themselves, the satisfaction of which is also decided by their own competent authorities. This is because China has conferred upon other WTO Members discretion in this regard in Section 15 of its accession protocol. Consequently, surrogate country benchmarks though are not directly applicable, they can still be relatively easily and arbitrarily resorted to. The shift of burden argument actually indicates China's acquisition of market economy status after 2016 since its domestic prices or costs, rather than surrogate country ones, are automatically applicable thereafter. This market economy status however is definitely different from the real nondiscriminatory one China expects to have.

Although the burden-shifting argument is able to give significance to all provisions at issue, its legal ground, however, is highly questionable. Firstly, there is no textual support for this argument since this shift is not mentioned in treaty text. Interpreting the expiry of subparagraph (a)(ii) as requiring importing countries to demonstrate the prevalence of NME conditions in specific industries or sectors for their resort of surrogate country benchmarks is reading something that is not written there, which goes far beyond what relevant treaty provisions plainly tell.[600] The starting point for treaty interpretation should be "the words actually used" in the treaty.[601] A treaty interpreter's duty "is to examine the words of the treaty to determine the intentions of the parties".[602] Secondly, the operation of the shifted burden of proof is pointed to result in a series of practical questions that are not clarified by treaty text, which include especially: what importing countries must show and what threshold of proof they need to meet when the burden shifts to them.[603] Since the burden-shifting argument is not written in treaty text, how can these operational details be clarified? To use the same standard imposed on Chinese producers in 15(a)(i) and the "clearly show" threshold again lacks textual basis. If these details are clarified by a WTO panel or the AB, the dispute settlement apparatus would then be engaging in impermissible legislative activity, prescribing rules that are not set forth and adding to or diminishing rights and obligations provided by the covered agreements.[604] This action is clearly prohibited by Articles 3.2 and 19.2 of the DSU. The burden-shifting argument though is not well-founded in law, it provides at least a theoretically reasonable solution for the continuation of NME treatment regarding China while giving effect to the expiry of subparagraph (a)(ii), a solution other WTO Members are highly likely to embrace in response to this expiry. Some governments have expressly conveyed their support of this point of view.[605] As what will

[599] Theodore R. Posner, "A Comment on Interpreting Paragraph 15 of China's Protocol of Accession by Jorge Miranda", supra note 503, p.151.
[600] Ibid, p.146; David Kleimann, "The Vulnerability of EU Anti-Dumping Measures against China after December 11, 2016", supra note 119, p.5.
[601] Appellate Body Report, *United States - Standards for reformulated and conventional gasoline*, supra note 538, p.17.
[602] Appellate Body Report, *India - Patent protection for pharmaceutical and agricultural chemical product*s, supra note 544, para.45.
[603] Theodore R. Posner, "A Comment on Interpreting Paragraph 15 of China's Protocol of Accession by Jorge Miranda", supra note 503, p.146.
[604] Ibid, p.151.
[605] First Written Submission by the European Union, *European Union - Measures Related to Price Comparison*

be analyzed below, the EU has adopted an approach reflecting precisely thought of this burden-shifting argument to react to the 2016 expiry.

2.4 WTO's "nature" and China's fulfillment of its accession commitments

The issue of terminating China's NME status has been frequently viewed through the lens of WTO's nature and China's fulfillment of its accession commitments. It is argued that WTO is an international trade organization established by market economies and running on market economy principles, which inherently requires the operation of a free market economy in the territory of its Members.[606] The characteristics of a market economy are enshrined in this organization and its rules. The deliberation of a new Member' accession is also based on the evaluation of whether its economy is sufficiently liberalized and its acceptance of commitments about further relaxing government control over trade related affairs. China also committed to undertake further market-oriented economic reform steps to transform its economic regime into a market-driven one in order to accede to the WTO. It in particular committed in Section 9 of its accession protocol to allow its domestic prices for traded goods and services to be determined by market forces.[607] It is now criticized that China has failed to implement completely its WTO commitments in this regard, the fulfillment of which would facilitate effective market-based operation of the Chinese economy.[608] China it is pointed out still applies price controls on commodities and services deemed to have a direct impact on the national economy and people's livelihoods.[609] Consequently, China is considered to have taken great advantage of the rights and benefits WTO granted, utilizing the WTO's non-discriminatory and free trade legal regime to boost its marvelous economic rise, while without implementing its corresponding international obligations.[610] The working party report of China's accession clearly documents the introduction of special price comparison methodologies for China as based on the account that "China was continuing the process of transition towards a full market economy", under the circumstances of which "special difficulties could exist in determining price comparability" and "a strict comparison with domestic costs and prices in China might not always be appropriate".[611] The termination of this special treatment due to the mere passage of 15 years is arguably unreasonable if the actual situation substantiating it does not substantially change. All these render other WTO Members' viewing of the conferral of market economy status to China, while it is still obviously not one in economic terms, as unfair and unacceptable.

Methodologies (DS516), Geneva, 14 November 2017, para.106-112; US - China Economic and Security Review Commission, *2014 Annual Report to Congress*, November 2014, p.110.

606 Third Party Submission of the United States of America, *European Union - Measures Related to Price Comparison Methodologies* (DS516), November 21, 2017, p.5-7.

607 Section 9 "Price Controls", Protocol on the Accession of the People's Republic of China.

608 Bernard O' Connor's presentation at the Workshop on "Market Economy Status for China after 2016?" organized by the European Parliament, Director-General for External Policies, Policy Department, for the Committee on International Trade, Brussels, 28 January 2018.

609 WTO Trade Policy Review Body, *Trade Policy Review: report by the secretariat - China*, WT/TPR/S/375, 6 June, 2018, para.23.

610 WTO, Communication from the United States, *2017 Report to Congress on China's WTO Compliance - Report of the United States Representative January 2018*, WT/GC/W/746, 16 July 2018, pp.7-11.

611 Para.150, Report of the Working Party on the Accession of China.

Conversely, China holds that it has faithfully and respectfully implemented the majority of its accession commitments and WTO obligations.[612] Its stance in this regard can be supported by previous WTO trade policy reviews, during which Members have well recognized and applauded China's efforts in honoring its commitments and obligations.[613] Some Members criticize that China has not fully respected its WTO obligations.[614] Yet, one should be aware that no country is above criticism when being reviewed. Individual WTO Members' evaluation of China's observation of the WTO discipline also bears limited significance, since such assessment can be rather subjective, being considerably influenced by their conflicting interests with China. The general view among WTO Members is that China has done really well in terms of implementing its extensive commitments; it has acted responsibly as an emerging leader in the organization and largely complied with WTO rulings.[615] Furthermore, if a WTO Member considers that China has violated its WTO obligation, it should resort to the DSB for a decision, rather than judging by itself.[616] If the DSB indeed rules that China has breached WTO rules, which actually can happen to any WTO Member, only under its authorization can the other disputing party take permitted retaliatory measures.[617] Judgment of China's unfulfillment of its WTO obligation cannot be unilaterally made by individual Members and then be utilized to justify their self-determined adoption of trade restrictive measures against China. This is obvious unilateralism and protectionism. Allegation of China's failure to implement all its accession commitments cannot justify other WTO Members' breach of their own international obligation to terminate China's NME status. These two matters cannot be subjectively linked and mixed up in the WTO legal regime. WTO is equipped with mechanism for dispute settlement, which is based on multilateralism and is available to all Members. WTO Members should resort to this mechanism to deal with suspected violation to ensure the effective operation of the rule-based international trading legal regime. To faithfully comply relevant rules and resort to the WTO DSM once dispute arises is a litmus test of just how committed a Member is to respect the multilateral trading system. If a WTO Member in itself despises rule of law in international trade, how can it confidently call for others to respect their WTO obligation.

The assertion of WTO's establishment on market economy principles is just too abstract and not well-grounded in law. Requirement for an acceding economy to be a market-oriented one is never mentioned in binding WTO rules, neither as a principle nor some specific norms, unlike the WTO's fundamental principle of non-discrimination. Requirement in this regard actually cannot be directly and clearly specified in law since hardly can WTO Members draw a clear definition and formulate precise standards for distinguishing market and non-market economies. Nonetheless, confronting requests for accession from transitional economies, WTO Members do deliberate their market conditions and make their admission decision based on the degree of marketization.

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[612] WTO Trade Policy Review Body, *Trade Policy Review: Report by China*, WT/TPR/G/375, 6 June 2018, para.4.15.
[613] Ibid.
[614] WTO, Communication from the United States, *2017 Report to Congress on China's WTO Compliance - Report of the United States Representative January 2018*, supra note 610.
[615] James Bacchus, "China's WTO membership can help the country achieve economic reforms and greater prosperity", *China business review*, October 1, 2011, available at: http://www.chinabusinessreview.com/chinas-continuing-need-for-the-wto/.
[616] Article 23.2(a), Understanding on rules and procedures governing the settlement of disputes.
[617] Article 23.2(c), Understanding on rules and procedures governing the settlement of disputes.

Yet, in legal terms, what the negotiating parties adopt is incorporating different WTO-plus obligations into transitional economies' accession commitments based on their respective specific market conditions so as to accommodate their accession to the operation of the WTO. As long as those commitments, which were freely negotiated and accepted, are faithfully respected, hardly can we say that any Member has intentionally cheated others or gamed the rule-based system. The claim of violation of some undefined and unspecified "principle" or "spirit", which is not manifested in legal rules, is subjective and arbitrary. Without any basis on legal rules, the assertion that China has flouted some of its commitments and utilized the gap of the system to officially stay inside the line is groundless.[618] This counterargument can not cover up the fact that some Members are now unwilling to respect international trade rules they agreed with China in the past according to the principle *pacta sunt servanda*. Nonetheless, a relatively more convincing argument is alternatively presented which claims that the WTO legal regime was never designed to deal with an NME of China's size, not well-equipped with sufficient rules regulating trade distortive policies and practices of NMEs.[619] This immaturity of the WTO is pointed to have been used by China to reap enormous benefits from its WTO membership through state-led mercantilism while to the detriment of interests of other Members and operation of the multilateral trading system.[620] It is based on these accounts, *inter alia*, WTO Members currently are keen on modernizing the WTO legal regime.

2.5 Concluding remarks

The current controversy concerning the effect of the expiry of Section 15, subparagraph (a)(ii) of China's accession protocol is caused by the ambiguity of the provisions of Section 15(a), the structure and text of which manifests clear systematic problems. Currently, it is difficult to figure out whether these problems were produced unconsciously due to poor draftsmanship or created intentionally for WTO Members to fight later. Regardless of the underlying root-cause, interpreting relevant provisions in accordance with customary rules of interpretation of public international law will leads to the conclusion that in the wake of the expiration, Chinese prices or costs should be automatically used for determining normal value, unless importing countries can justify their abandonment of these benchmarks based on general AD rules in the GATT 1994 or the WTO ADA. This indicates that China *de jure* acquires the status of a market economy. Even Members firmly viewing China as an NME according to their own economic criteria actually also realize that their continuation of directly applicable surrogate country methodologies regarding imports of Chinese origin is legally vulnerable. EU Trade Commissioner Cecilia Malmström stressed that whether to grant China the market economy status depends on the 15-year deadline in the protocol on the accession of the PRC, rather than whether China had achieved

[618] Jethro Mullen, "How did China end up posing as the defender of global trade?", *CNN business*, April 10, 2018, available at: https://money.cnn.com/2018/04/10/news/economy/china-us-global-trade-wto/index.html; Brady Opening Statement at Hearing on US - China Trade, February 27, 2019, available at: https://gop-waysandmeans.house.gov/brady-opening-statement-at-hearing-on-u-s-china-trade/.

[619] Testimony of Robert E. Lighthizer before the US House of Committee on Ways and Means, February 27, 2019, available at: https://waysandmeans.house.gov/sites/democrats.waysandmeans.house.gov/files/documents/Lighthizer%20testimony.pdf.

[620] United States Trade Representative, *2018 Report to Congress on China's WTO Compliance*, February 2019, pp.5-20.

the market economy standards or not.[621] She clearly pointed out that refusing to grant China the market economic status, in fact, is strictly a legal issue.[622] A study conducted by the Peterson Institute for International Economics stated on 11 April 2016 that the legal services division of the European Commission decided that, according to WTO rules, the European Union had the obligation to confer China the status of market economy.[623] Even the EU Parliament, which strongly and expressly rejected recognizing China as a market economy, in particular by issuing a non-binding resolution in this regard, also required simultaneously that any decision on how to deal with imports from China after 2016 must ensure compliance of EU law with WTO rules.[624] In general, WTO Members against viewing China as a market economy also suspect the legality of continuing their automatically applicable surrogate country methodologies regarding China and worry that China will highly likely make a cogent legal case in this respect.

It is noteworthy that international AD law does not explicitly require for the undertaking of a specific action of "granting" or "according" for China's acquisition of market economy status. It simply indicates that after 15 years from China's accession WTO Members can no longer rely on special rules in China's accession protocol to resort to surrogate country benchmarks for price comparison. They conversely have to treat China equally as other Members in establishing normal value. However, in order to implement this international obligation, individual WTO Members who treat China differently from other Members in this respect do have to actively adopt certain specific domestic measures, either legislative or administrative ones according to their legal procedures, to give effect to this change of China's legal status.

Lastly, treating China equally as other Members providing no special commitment on NME treatment and subjecting it merely to general international AD rules on price comparison does not naturally lead to the conclusion that from the 2016 deadline onwards, Chinese exports cannot be applied with surrogate country benchmarks on all occasions. It still needs to be analyzed whether general international AD rules also provide some margin for AD authorities' resort to surrogate country benchmarks within which China's market conditions fall. The justifiability of NME treatment based on general international AD rules will be analyzed in detail in next chapter.

3. Reaction of main trading Members to the expiry

As the 2016 deadline already passed, main trading Members of the WTO have reacted differently to the expiry of Section 15(a)(ii) of China's accession protocol confronting the considerably changed circumstances. A group of Members have recognized China as a market economy, even before the 2016 deadline. But not all of them have accordingly ended completely

[621] Joint press conference by Jyrki Katainen, Vice-President of the EC, and Cecilia Malmström, Member of the EC, on the treatment of China in anti-dumping investigations, available at: http://ec.europa.eu/avservices/video/player.cfm?sitelang=en&ref=I124948.
[622] Ibid.
[623] Gary Clyde Hufbauer, Cathleen Cimino-Isaacs, "The Outlook for Market Economy Status for China", Peterson Institute For International Economics, Trade & Investment Policy Watch, April 11, 2016, available at: https://piie.com/blogs/trade-investment-policy-watch/outlook-market-economy-status-china.
[624] European Parliament, European Parliament resolution of 12 May 2016 on China's market economy status, supra note 511.

their surrogate country methodologies to China. Some, especially Latin American countries including Argentina and Brazil, just politically made this recognition but did not confer it with any legal significance. Others like Australia though they generally stop automatic NME treatment regarding China, still reserve some possibility for their resort to surrogate country benchmarks for price comparison regarding China in certain circumstances. Members like the US strongly struggle against viewing China as a market economy. Their NME treatment legal rules and NME treatment practices regarding China have remained basically *status quo*. Other Members, mainly the EU, however, indeed amended relevant legislation and tried to give effect to the expiry. But it is still questionable if it has therefore faithfully implemented its international obligation or just converted to apply NME treatment in a superficially changed manner, since surrogate country methodologies are still not terminated regarding China but applied to it under a different name rather than that of a non-market economy. All practices continuing surrogate country methodologies to China are actually challengeable in international trade law, though currently China has initiated only two cases before the DSB against the US and the EU respectively. One thing worth mentioning is that while trying to accommodate China's call for market economy treatment, WTO Members, mainly EU, also pursue strategic stance from China as an exchange, including China's commitment of self-restriction of its exports, principally of iron and steel products, cutting industrial overcapacity, and establishing a more level playing field for foreign companies in China.[625] Their pursuit for measures in these regards is based primarily on policy considerations rather than legal parsing. This part, however, focuses only on some main trading Members' direct reaction in their trade defence legal regime, i.e. changes concerning price comparison methodologies applied to China.

3.1 Granting China market economy status

Before the advent of 11th December, 2016, more than 90 WTO Members had already admitted China as a market economy after China's vigorous campaign for this recognition.[626] While crafting China's specific accession terms, some Members, especially the US, conveyed their strong interests in arguing for China's automatic NME status.[627] China reluctantly accepted this categorization of it in law as it was eager to get WTO entry, even though it realized that this status involves unequal treatment and that, based on this status, AD measures can be rather arbitrarily applied to considerably impede its exports. Yet, the legally established NME status is a sore point

[625] European Commission, "Press release: college orientation debate on the treatment of China in anti-dumping investigations", Brussels, 20 July 2016, available at: http://europa.eu/rapid/press-release_IP-16-2567_en.htm; European Commission, "Announcement: 18th EU-China summit in Beijing", Brussels, 13 July 2016, available at: http://europa.eu/rapid/press-release_AC-16-3700_en.htm; European Commission, "Speech: China EU - A Partnership for Reform", given by Cecilia Malmström, Commissioner for Trade at a joint BUSINESSEUROPE, EUCCC and EUCBA event, Brussels, 28 January, 2016, available at: http://trade.ec.europa.eu/doclib/docs/2016/january/tradoc_154182.pdf.

[626] US - China Economic and Security Review Commission, *2014 Annual Report to Congress*, November 2016, p.109; Laura Puccio, "Granting market economy status to China: an analysis of WTO law and of selected WTO member's policy", European Parliamentary Research Service, November 2015, pp.8-12; Zhao Shuang, Scott Kennedy, "China's frustrating pursuit of market economy status: implications for China and the world", in Scott Kennedy, Shuaihua Cheng eds., *From Rule Takers to Rule Makers: The Growing Role of Chinese in Global Governance*, Research Center for Chinese Politics & Business, Indiana University, International Center for Trade & Sustainable Development, September 2012, pp.63-70.

[627] Esther Lam, *China and The WTO: a long march towards the rule of law*, supra note 579, pp.71-75.

with Chinese officials and is viewed by China as a largest compromise it made to get WTO entry.[628] Ever since its entry, the Chinese government has been actively pursuing worldwide for its economic partners' recognition of it as a market economy.[629] The NME issue has consistently ranked high on China's foreign economic policy priorities as it is keen to having changed its WTO status from NME to ME to eliminate the adverse effect this status has on its trade.[630]

Since joining the WTO, China has mounted a vigorous diplomatic campaign to strive for other WTO Members' granting of market economy status to it. It took initiatives outside the purview of the WTO, especially using its conclusion of FTAs with other Members to foster their earlier recognition of China as a market economy, setting revoking China's NME designation a necessary prerequisite for FTA negotiations with it.[631] Driven by divergent political motivation, countries including New Zealand, Australia, South Korea, Peru, Chile, Argentina, Brazil, South Africa, and ASEAN countries have agreed to recognize market economy status for China.[632] Agreement in this regard was made mainly via the conclusion of provisions within memoranda of understanding, with the first such agreement reached with New Zealand in April 16, 2004.[633] Countries have changed their classification of China based on the official claim that a strong and vibrate private sector is now prevailing in China.[634] Among these countries, Australia and New Zealand are traditional and principal users of AD measures. Such a recognition actually is not necessarily disadvantageous to countries providing it.[635] It should be recalled that a great deal of countries were not even equipped with AD laws while acceding to the WTO. The increase of cheaper Chinese imports moreover can not only contribute to the improvement of an importing country's social welfare but also the enhancement of its producers' international competitiveness due to their access to cheaper inputs from China.

Australia is the first large industrial country to treat China as a market economy in AD investigations. It recognized China formally as a market economy in the wake of the launch of negotiations on a free trade agreement with China.[636] China was added to Australia's list of

[628] Gary Clyde Hufbauer, "Statement on Market Economy Status for China", Testimony before the US-China Economic and Security Review Commission Hearing on "China' Shifting Economic Realities and Implications for the United States" Panel 4 "Evaluating China's Non-Market Economy Status", February 24, 2016, p.1.
[629] Ibid.
[630] Laura Puccio, "Granting market economy status to China: an analysis of WTO law and of selected WTO member's policy", supra note 626, p.8-12.
[631] Ibid, p.8.
[632] Ibid, Ka Zeng, "Multilateral versus Bilateral and Regional Trade Liberalization: explaining China's pursuit of free trade agreements (FTAs)", *Journal of Contemporary China*, Vol.19, Issue 66, September 2010, pp.644.
[633] "New Zealand Gives China Market Economy Status", *China Daily*, April 16, 2004 http://www.china.org.cn/english/BAT/93136.htm; "Singapore Recognizes China's Full Market Economy Status", *Xinhua News*, May 15, 2004, http://china.org.cn/english/MATERIAL/95470.htm; "Malaysia recognizes China's full market status", Embassy of People's Republic of China, May 29, 2004, http://in.chineseembassy.org/eng/jjmy/t122928.htm; "Australia grants full market economy status to China", Asian Tribune, April 20, 2005, http://www.asiantribune.com/news/2005/04/20/australia-grants-full-market-economy-status-china.
[634] Ibid.
[635] Concerning effect of Australia's recognition of China as a market economy on its trade, see for example James Meszaros, Berdine Oosterhout, Marc Pervès, "Towards China's Market Economy Status - A Powell Tate Report", Powell Tate, April 2016, p.3, available at: http://powelltate.com.au/wp-content/uploads/2016/04/China-MES-Report.pdf.
[636] Memorandum of Understanding between the Department of Foreign Affairs and Trade of Australia and the Ministry of Commerce of the People's Republic of China on the Recognition of China's Full Market Economy Status and the Commencement of Negotiation of a Free Trade Agreement between Australia and the People's Republic

economies to which its non-standard price comparison methodologies for economies in transition do not apply.[637] However, it must be noted that the removal of China from an importing country's list of NMEs or the revocation by a country of China's NME designation does not indicate that country's complete termination of the applicability of surrogate country methodologies regarding China. In Australia's case, China is still subject to its cost adjustment methodology, which provides for the rejection of domestic sales prices and costs to establish normal value and may generate effect equal to that of explicit NME treatment.[638] According to the broad definition given to NME treatment in this thesis, this practice is also categorized as a kind of NME treatment since surrogate country values are resorted to for price comparison due to the unreliability of domestic values caused by government intervention in the market. China is actually a principal target of the cost adjustment methodology in Australian AD investigations, even though this methodology is allegedly country-neutral and applied on the merits of each specific case. A WTO lawsuit has already been initiated against Australia's practices of this methodology by Indonesia, but no ruling has been rendered yet.[639]

Furthermore, some Latin American countries, such as Argentina and Brazil, which are emerging active users of AD measures, though recognized China as a market economy in diplomatic statements, they do not legally implement this political decision and still treat China as an NME for AD purposes.[640] That is to say, they have never accorded this recognition any legal significance in their AD laws. Their NME treatment regarding China has remained business as usual regardless of the recognition officially made. They have rhetorically made the statement simply for political purposes, but do not mean to give it any actual effect. In general, the current situation of countries' acknowledgement of China as a market economy is still far from according China real and full market economy status. Further diplomatic or even legal steps may be needed to secure achievement of this aim.

3.2 Applying NME treatment continuously without changing domestic legislation and practices

The US, Japan, Canada, India, among others, have completely ignored the specified expiry in China's accession protocol and are continuing their discriminatory methodologies regarding China without making any change to their domestic legislation and practices. Confronting China's previous vigorous diplomatic campaign, they had rejected persistently to admit China as a market economy.[641] After the 2016 deadline, they still refuse to make any change to their NME

of China, signed 18 April 2005.

[637] "Schedule 2 - Countries to which subsection 269TAC(5D) of the Act does not apply", Customs (International Obligations) Regulation 2015, Select Legislative Instrument No.32, 2015, made under Customs Act 1901.

[638] "Market economy status for China: implications for antidumping protection in Australia", speech by Andrew L. Stoler at the Australia-China Business Council of South Australia, Adelaide, 28 September 2004, pp.7-10, available at: https://iit.adelaide.edu.au/research/conferences/docs/ACBCSA2809042.pdf.

[639] DS529: *Australia - Anti-dumping measures on A4 copy paper*, panel composed on 12 July 2018, WT/DS529/7, 13 July 2018.

[640] Laura Puccio, "Granting market economy status to China: an analysis of WTO law and of selected WTO member's policy", supra note 626, p.11.

[641] Ibid, pp.12-24.

treatment legislation and practices, but choose to treat China in AD proceedings as before the expiry of the deadline.

Regarding the US, it is necessary to point to a long standing practice of ignoring WTO condemnation of its illegal trade remedy practices, and the most notable example of US defiance is the decades-long saga over "zeroing", which has been determined as illegal by the WTO over and over again.[642] Relating to NME treatment, the US practices of single AD duty rate for an NME's all exporters and concurrent AD and CVD on NME exports, both already confirmed to exceed the bounds of WTO discipline.[643] There is moreover a history of lawless administration of NME treatment by US investigating authorities.[644] Currently, the US is pointed to be entangled in a tit-for-tat litigation war with China over mutual AD abuses.[645] All these facts, in conjunction with the changed political-economic context, already strongly suggested that the US would not in good faith respect the 2016 deadline. The US' unwillingness or objection is actually clear and firm. As the deadline approached, the Obama administration made its decision that the US would not confer China market economy status.[646] The US even warned the EU not to grant China such status and not to be tempted by short-term interests offered by China.[647] The current Trump administration's objection stance is even steadier and more official and unambiguous.[648] Its interference in other countries' decision making on this matter is much stronger. In the ongoing EU-China DSB case concerning this matter, it stated that the US would stand with the EU in any future litigation of this dispute and encouraged other Members to do so as well.[649] In the newly negotiated Unites States-Mexico-Canada Agreement (USMCA), a "poisonous" article concerning NME is even introduced, which sets that "[e]ntry by a Party into a free trade agreement with a non-market economy country will allow the other Parties to terminate this Agreement on six months' notice and replace this Agreement with an agreement as between them (bilateral agreement)".[650] A non-market country is defined as "a country (a) that on the date of signature of this Agreement, a Party has determined to be a non-market economy for purposes of its trade remedy laws; and (b) with which no Party has signed a free trade agreement".[651] This provision

[642] K. William Watson, "Will Nonmarket Economy Methodology Go Quietly into the Night? US Antidumping Policy toward China after 2016", supra note 392, p.2; Daniel Ikenson, "Zeroing In: Antidumping's Flawed Methodology under Fire", Cato Institute Free Trade Bulletin, No.11, April 27, 2004.

[643] Concerning the illegality of the US practices of single duty rate presumption, see: *United States - Anti-dumping measures on certain shrimp from Vietnam*, WT/DS429/R, 17 November 2014, para.7.193, para.7.208; *United States - Certain methodologies and their application to anti-dumping proceedings involving China*, WT/DS471/R, 19 October 2016, para.7.388. Concerning the illegality of the US concurrent application of AD and CVD regarding NME exports, see: *United States - Definitive anti-dumping and countervailing duties on certain products from China*, WT/DS379/AB/R, 11 March 2011, para.592.

[644] For details, see section 2.2 Chapter 3 of this thesis.

[645] Chad P. Bown, "Should the United States Recognize China as a Market Economy?", Peterson Institute for International Economics, Policy Brief, Number PB16-24, December 2016, p.8.

[646] Ian Talley, "US won't grant China market economy status, senior administration official says", *The Wall Street Journal*, December 9, 2016, available at: https://www.wsj.com/articles/u-s-wont-grant-china-market-economy-status-u-s-senior-official-says-1481318577.

[647] Christian Olive, Shawn Donnan, Tom Mitchell, "US warns EU over granting market economy status to China", *Financial Times*, December 28, 2015, available at: https://www.ft.com/content/a7d12aea-a715-11e5-955c-1e1d6de94879.

[648] Third Party Submission of the United States of America, European Unions - Measures related to price comparison methodologies (DS516), November 21, 2017.

[649] WTO news, Panels established to review EU dumping methodologies, India steel safeguard, 3 April 2017, available at: https://www.wto.org/english/news_e/news17_e/dsb_03apr17_e.htm.

[650] Article 32.10, paragraph 5, United States-Mexico-Canada Agreement.

[651] Article 32.10 paragraph 2, United States-Mexico-Canada Agreement.

obviously targets principally China. It broadens the legal implication of the term non-market economy. It is utilized here to interfere the other two Parties' reach of any free trade agreement with China.

Concerning Canada, provisions on explicit NME treatment are prescribed in Section 20 of its Special Imports Measures Act (SIMA). Section 20(1)(a) specifies a circumstance under which surrogate country methodologies for determining normal value apply, i.e. imports from "a prescribed country where, in the opinion of the President, domestic prices are substantially determined by the government of that country and there is sufficient reason to believe that they are not substantially the same as they would be if they were determined in a competitive market".[652] According to Section 17.1 of its Special Import Measures Regulations (SIMR), China is a prescribed country, together with Vietnam (added in 2007) and Tajikistan (added in 2015).[653] Concerning these three countries, the Canadian administering authority is justified to use surrogate country benchmarks to determine normal value if it is satisfied that the prescribed NME situation is met in a specific case. The burden of proof here is reversed since prescribed countries are not directly treated as NMEs, but are presumed to be normal market economies, the presumption of which yet can be overturned. However, being directly designated as prescribed countries, China, Vietnam and Tajikistan are still discriminatorily treated in Canadian AD law since they are explicitly subject to different rules. Section 17 of the SIMR used to specify expiry provisions which provided for the cease of treating China and Vietnam as prescribed countries on December 11, 2016 and December 31, 2018 respectively.[654] Both were subsequently repealed in 2013.[655] Since the list of prescribed countries is stipulated in regulatory rules, any change to Canada's law in this regard does not require approval from the Parliament.

The Japanese AD law sets a presumed NME status for China and specifies also certain criteria to evaluate the prevalence of market economy conditions in Chinese industries.[656] In 2007, Japan introduced an amendment to The Guidelines for Procedures Relating to Countervailing and Antidumping Duties, setting 10 November 2016 and 31 December 2018 as the deadline for automatic NME status regarding China and Vietnam respectively.[657] This non-binding deadline, however, is not legally enforceable. Japan made no official statement saying that it will follow this guideline, granting unconditionally China market economy status. Conversely, on December 8, 2016, its Minister for Economy, Trade and Industry said that considering China's position in the WTO, they continued to insist China as an NME country because China had not yet solved the problem of excess capacity in state-owned enterprises.[658] Japan reiterated that it supported the EU's and the United States' respective positions in this

[652] Section 20(1)(a), Special Import Measures Act.
[653] Section 17.1, Special Import Measures Regulations, SOR/2015-33, s.1.
[654] Concerning China, Article 17.1(2), Special Import Measures Regulations, SOR/2002-349, s.1; Concerning Vietnam, Article 17.2(2), Special Import Measures Regulations, SOR/2007-175, s.1.
[655] Special Import Measures Regulations, SOR/2013-81, s.1, s.2.
[656] Article 2, paragraph 2, Article 10bis, Cabinet Order Relating to Anti-Dumping Duty, Cabinet Order No.416, December 1994, as amended; Paragraph 3, The Guidelines for Procedures Relating to Countervailing and Antidumping Duties.
[657] The 2007 amendment of paragraph 3 of The Guidelines for Procedures Relating to Countervailing and Antidumping Duties.
[658] Sun Wenyu, "Japan denies China's market economy status, expert says: none sense", *People's Daily Online*, December 09, 2016, available at: http://en.people.cn/n3/2016/1209/c90000-9153037.html.

dispute and shared their concerns.[659] As to the legal merits of this proposition, Japan was of the view that the WTO Agreement, including China's accession protocol, continued to allow Members to use a methodology not based on a strict comparison with domestic prices or costs in China.[660] After all, Japan is an inactive user of AD measures, contrary to India, who is one of the most frequent users and whose legislation is silent to the 2016 deadline indicating its continuation of NME treatment regarding China.

These countries' great reluctance in according China market economy status and willful ignorance of the expiry concerned is understandable, not only given the currently greatly changed political-economic context, but also based on the commonly prolonged judicial procedures of the DSB. These countries have made their policy choice confronting the high risk of being sued by China in the WTO for not respecting their international obligation on time. Nonetheless, they are also clearly aware that such a lawsuit can take a long time and their unfulfillment of this obligation before the DSB's making of any binding ruling, rather than the specified 2016 deadline, will not inflict any loss upon them. According to a study, the average overall time needed for the WTO dispute settlement machinery to deliver a panel and/or AB report is around 800 days and this timespan can easily reach 980 days, almost three years, in the case of complicated disputes.[661] This is the average, and when the losing Member refuses to comply, the retaliatory process will take another two years.[662] Given the importance of the NME treatment issue to relevant countries and their persistent wrestling concerning this matter, it is nearly undoubted that disputing parties will definitely appeal a panel's ruling no matter what decision it makes once this issue is submitted to the DSB for a resolution and the implementation of a final DSB report will not be smooth. Moreover, as the DSB is currently under considerable pressure, both facing a heavy caseload and a serious shortage of AB members, it highly likely needs three or more years to make a dispositive ruling to clarify relevant rules and clear up pertinent disputes, in particular given the novelty and complexity of the NME treatment issue. Furthermore, even if the AB decision rules against Members maintaining NME treatment regarding China, they will not receive requirement for retroactive refunds of AD duties collected during the ruling, i.e. they will not suffer any loss for delayed implementation of their obligation. In general, speculating on the timeline of prospective WTO litigation and the implementation mechanism of DSB reports, Members can reasonably delay their faithful taking of any reacting measures to the expiry. In this delayed period, they can extend the protection offered by NME treatment and deliberate and complete the enhancement of their trade defence mechanism against Chinese imports.

Right after the expiry of the 15-year's transitional period, China immediately initiated a lawsuit in the WTO against the US, its second largest trading partner and a firm and leading opponent of its market economy status.[663] During the consultations, the US rejected China's automatic acquisition of market economy status, and reviewed again China's status according to

[659] WTO news, DS516: European Union - Measures related to price comparison methodologies, 3 April 2017, available at: https://www.wto.org/english/news_e/news17_e/dsb_03apr17_e.htm.
[660] Ibid.
[661] Gary Hufbauer, Jeffrey Schott, "Payoff from the World Trade Agenda 2013", Peterson Institute for International Economics, Report to the ICC Research Foundation, April 2013, pp.52-53.
[662] Ibid.
[663] WT/DS515, United States - Measures Related to Price Comparison Methodologies.

its domestic law.[664] The US conducted this review as a part of an AD investigation into imports of Chinese aluminium foil.[665] It evaluated China's overall economy against the six statutory factors prescribed in Section 771(18)(B) of its Tariff Act of 1930, namely: convertibility of currency, the extent wages are determined by free bargaining, permissibility of foreign investments and joint ventures, government ownership or control of the means of production, government control over allocation of resources and over price and output decisions of enterprises, as well as other factors the DOC considers appropriate.[666] The final outcome of this domestic procedure is that China still could not pass the test, satisfying none of the six criteria, to graduate from NME status and it remains an NME in US law.[667] The USDOC has made such a decision regardless of what international AD rules require. The US moreover asserts that overwhelming evidence demonstrates that China is still not a market economy in the communication it submitted to the WTO and the third party submission it presented to the panel of the case DS516 concerning China and the EU's dispute of this issue.[668] According to Section 771(18)(D) of the US Tariff Act of 1930, the USDOC's decision of a country's market or non-market economy status is not subject to judicial review.[669] The US executive branch possesses great flexibility and authority in making decisions in this regard. In order to constrain its administrative discretion, especially its possible grant of ME status to China for diplomatic or political sake, the US - China Economic and Security Review Commission even recommended the US Congress to enact legislation requiring its approval before such a decision is taken.[670] Against the current bilateral trade friction, or trade war, between China and the US, it is nearly impossible for China to prove its ME status following the US domestic legal criteria.

China has long expected to obtain normal ME status. It is moreover confident about its successful acquisition of this status according to treaty interpretation. Therefore, China definitely will not give up its effort of winning this status approaching it through legal means. Conversely, the US has great concern about its loss of the current case. Due to this reason, *inter alia*, it endeavors to impede the operation of the WTO dispute settlement mechanism, especially by repeatedly blocking the nominations of new AB members, which can substantially paralyze the mechanism.[671] With the Mauritian member, Shree Baboo Chekitan Servansing, leaving office, the AB currently is equipped with only three members.[672] Any member's avoidance, or absence

[664] Request for consultations by China (addendum), United States - Measures related to price comparison methodologies, 8 November 2017, WT/DS515/1/Add.1, G/L/1169/Add.1, A/ADP/D115/1/Add.1.
[665] U.S. Department of Commerce, Certain Aluminum Foil from the People's Republic of China: Notice of Initiation of Inquiry into the Status of the People's Republic of China as a Nonmarket Economy Country under the Antidumping and Countervailing Duty Laws, March 29, 2017, Federal Register, Vol.82, No.62, p.16162, available at: https://www.gpo.gov/fdsys/pkg/FR-2017-04-03/pdf/2017-06535.pdf.
[666] Ibid.
[667] United States Department of Commerce, International Trade Administration, *Memorandum concerning China's Status as a Non-Market Economy*, October 26, 2017, available at: https://enforcement.trade.gov/download/prc-nme-status/prc-nme-review-final-103017.pdf.
[668] Communication from the United States, China's Trade-Disruptive Economic Model, WT/GC/W/745, 16 July 2018; Third Party Submission of the United States of America, European Union - Measures related to price comparison methodologies (DS516), November 21, 2017, pp.15-46.
[669] Section 771(18)(D), Tariff Act of 1930, title 19 U.S.C section 1677(18)(D).
[670] US - China Economic and Security Review Commission, Chapter 1 Section 2, "State-owned enterprises, overcapacity, and China's market economy status", in *2016 Annual Report to Congress*, November 2016, p.126.
[671] For example, statement by the US at the meeting of the WTO Dispute Settlement Body on 27 March 2018, 28 May 2018, 22 June 2018, 27 August 2018, 29 October 2018, 21 November 2018, and 18 December 2018.
[672] For the specific expiry date of each AB member's term in office, see:

based on some other account, in an appellate case will render a substantial paralysis of the WTO DSB. The WTO dispute settlement mechanism moreover will fall into a real deadlock at the latest by December 2019, since at that point of time, there will be less than 3 AB members left if the US continues its blockage, less than the minimum number required for the AB to hear an appeal.[673] This will impair the enforcement, trust and credibility of the whole WTO rules system.[674] Once the AB stops working, the current cases on China's ME status will naturally reach deadlock. This is a more fatal action the US adopted. During the intentionally made stalemate, the US will be able to pursue broader approaches beyond AD to restrict competition from China. Actually, the US is currently calling for reform of the whole DSM with respect to a broad range of issues.[675] It even criticized the WTO as unfair to the US since it ruled against the US in almost all trade disputes.[676] It tries to considerably weaken the robustness and effectiveness of the DSM, which earned it a reputation as "the Crown Jewel of the WTO" for its impartiality and efficiency in international economic governance. This is also part of the US overall trade protectionism and unilateralism under the current circumstances.

Among all options, this group of countries have adopted the worst in terms of compliance with WTO rules. By doing so, they have willfully ignored the changed international legal basis caused by the 2016 expiry as well as the considerably varied Chinese economic regime. China's economy currently is still controlled by government in many aspects. However, as early as 2006 the US evaluation of China's market conditions in response to China's request of being graduated from NME status already confirmed that "the era of China's command economy has receded and the majority of prices are liberalized".[677] Only price fixing together with trade monopolization genuinely influences comparability of domestic prices and costs in AD proceedings.[678] Not all government economic regulation and administrative discrepancies in economic affairs among countries can justify the rejection of domestic prices and costs for price comparison. The fact that China's economy is significantly reformed and sufficiently liberalized proves that its domestic prices and costs generally provide adequate evidence of normal value.[679] The greatly and arbitrarily broadened list of factors for evaluating NMEs is actually unreasonable in determining price comparability. Moreover, the application of the NME test is frequently driven by political motives. China's economic regime in fact can barely be regarded as less market-oriented than that of Russia, India, Brazil, some other developing countries, and gulf oil countries, which are treated as market economies in AD.[680]

https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm.

[673] European Commission, "Concept paper: WTO Modernisation", supra note 543, p.13.

[674] Ujal Singh Bhatia, Chair of Appellate Body, 11th Annual Update on WTO Dispute Settlement Graduate Institute, Geneva, 3 May 2018, available at: https://www.wto.org/english/news_e/news18_e/ab_07may18_e.htm.

[675] US Trade Representative, The President's 2018 Trade Policy Agenda, supra note 593, pp.22-28.

[676] "Trump threatens to pull US out of World Trade Organization", 31 August 2018, *BBC News,* https://www.bbc.com/news/world-us-canada-45364150.

[677] Memorandum, Antidumping duty investigation of certain lined paper products from the People's Republic of China ("China") - China's status as a non-market economy ("NME"), supra note 513, p.3.

[678] K. William Watson, "Will Nonmarket Economy Methodology Go Quietly into the Night? US Antidumping Policy toward China after 2016", supra note 392, p.8.

[679] Ibid.

[680] Concerning the degree of marketization of different economies, see for example data from two institutions: Fraser Institute, Economic Freedom of the World, available at: https://www.fraserinstitute.org/economic-freedom/map?geozone=world&page=map&year=2015; Heritage Foundation, 2018 Index of Economic Freedom, available at: https://www.heritage.org/index.

It is noteworthy that NME treatment actually is not that significant for countries like the US. The US AD duties are typically high even without the use of surrogate country benchmarks, especially due to its non-incorporation of the lesser duty rule, use of adverse inferences to determine normal value, and practices of "zeroing".[681] Adding an extra 20 per cent penalty through the use of surrogate country benchmarks will not do a great deal more to restrict injurious imports.[682] However, in some cases, the difference of AD duties calculated through standard methodologies and surrogate country methodologies can go beyond 20%. Under the current economic circumstances, even a moderate increase of AD duties on some products can still be rather significant to relevant producers. Some Members are imposing full-range AD duties apparently not only to remove injurious imports, but also to provide anti-competitive protection to their domestic producers, though the plausibility of such practice is highly questionable. Furthermore, from a symbolic point of view, the designation of China as an NME also carries considerable political significance, since such a label of China can act as an abstract and open attacking point for other countries' vigorous criticism of its rise, which can lead to counteracting measures not limited to the realm of AD.

3.3 The EU approach

Different from the US, who expressly and firmly objects to confer China market economy status, the EU has conveyed its standpoint regarding this matter ambiguously, mainly because its political, economic and legal concerns regarding this matter diverge considerably from those of the US. The EU in general does not share America's worries about China's growing economic dominance and political influence in Asia, nor its military forces.[683] It moreover cherishes its reputation as a strong and staunch supporter of free trade, multilateralism and international rule of law.[684] Therefore, though the EU holds some common interests on this matter with the US under the current circumstances and there is no serious transatlantic difference of opinion concerning restricting China's rise as a state capitalist economy, the EU has acted in a clearly different manner from the US in dealing with the 2016 expiry issue.

The EU had carried out a considerable amount of research on this matter for its decision making, including public surveys, impact assessment and legal study.[685] While deliberating this matter, on the one hand, it firmly denied China's market economy status in economic terms. On

[681] Cecilia Bellora & Sébasttien Jean, "Granting Market Economy Status to China in the EU: An Economic Impact Assessment", supra note 460, p.4.
[682] Gary Clyde Hufbauer, "Statement on Market Economy Status for China", supra note 628, p.4.
[683] Stephen Green, "China's quest for market economy status", supra note 468, p.6.
[684] European Commission, "Concept paper: WTO Modernisation", supra note 543, p.1.
[685] European Commission, "Open public consultation regarding the possible change in the methodology to establish dumping/subsidisation in trade defence investigations concerning the Peoples' Republic of China", available at: http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154258.pdf; European Commission, "Commission Staff Working Document: impact assessment - possible change in the calculation methodology of dumping regarding the People's Republic of China (and other non-market economies)", SWD (2016) 370 final, Brussels, 9.11.2016; European Commission, "Commission Staff Working Document: executive summary of the impact assessment", SWD (2016) 371 final, Brussels, 9.11.2016; European Commission, "Commission Staff Working Document: assessment of the economic impact of changing the methodology for calculating normal value in trade defense investigations against China", SWD (2016) 372 final, Brussels, 9.11.2016.

the other, it strongly suspected legality of its existing NME treatment practices regarding China and seriously investigated amending its basic AD regulation to conform to its international obligation. Yet, during this course, it still tried hard to maintain the possibility for its AD authority' to use surrogate country benchmarks for price comparison in China's case to satisfy its domestic interested parties' needs. It also paid considerable attention to the standpoints and reaction of its peers, principally the US, regarding this matter, to keep basically in accord with them.[686] Based on comprehensive consideration of all these matters, the EU indeed amended its basic AD regulation after the specified deadline for expiry, trying to give significance to the 2016 expiry, but also remain the availability of surrogate country methodologies. Its practice apparently diverges from the US' overt and direct ignorance of the legally specified expiry. It also differs from the Australia's clear recognition of China as a market economy country. The newly introduced EU rules provide a new approach for investigating authorities' recourse to surrogate country methodologies. This approach fundamentally differs from the cost adjustment methodology, which is also embodied in EU AD law. Moreover, the EU's new approach *prima facie* is compatible with WTO law, since the NME tag is removed from China. However, slightly further reflection may reveal that its new approach is merely "wearing new shoes to walk on the old path" or "putting new wine in old bottles".

3.3.1 Amended domestic legislation: a formal grant of market economy status to China or a new form of NME treatment application?

In November 2016, the EU Commission published its long-awaited proposal for reworking its basic AD regulation to change its previous NME treatment and to introduce a new approach in dealing with potentially dumped imports from China after the conduction of internal discussions, public consultations and several benchmark tests.[687] The legislative organs of the EU, the European Parliament and the Council, agreed on a final text by the end of 2017 after intensive discussion among their representatives, which then entered into force on 20 December 2017 as the Regulation (EU) 2017/2321.[688]

The Regulation (EU) 2017/2321 did not wipe off the previous explicit EU NME treatment rule in Article 2(7), from its basic AD regulation. It however replaced this paragraph with new

[686] European Commission, "Fact sheet: College orientation debate on the treatment of China in anti-dumping investigations", Brussels, 13 January 2016; European Parliament, "European Parliament resolution of 12 May 2016 on China's market economy status (2016/2667(RSP))", supra note 511.

[687] European Commission, *Proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union and Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union*, COM(2016) 721 final, 2016/0351 (COD), 9.11.2016, Brussels.

[688] Regulation (EU) 2017/2321 of the European Parliament and of the Council of 12 December 2017 amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union and Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union, OJ L 338/1, 19.12.2017. For the specific legislative process of this regulation, see: https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2016/0351(COD)&l=en#tab-0.

provisions, which considerably changed the former EU discipline of explicit NME treatment. Firstly, the newly drafted Article 2(7) specifies its applicable scope as "the case of imports from countries which are, at the date of initiation of the investigation, not members of the WTO and listed in Annex I to Regulation (EU) 2015/755 of the EU Parliament and of the Council".[689] It does not specify that it applies to cases of imports from NME countries, the scope of which is clarified further by either listing such countries in a footnote or cross-referring to countries numerated in some other regulation's annex. New provisions avoid using the wording "non-market-economy country" or "market economy country". To be specific, countries listed in Annex I to Regulation (EU) 2015/755 are Azerbaijan, Belarus, North Korean, Turkmenistan and Uzbekistan.[690] All of them currently are not WTO Members, with Azerbaijan, Belarus and Uzbekistan being observers of the WTO.[691] Subparagraphs (b), (c) and (d) of the previous Article 2(7) are all deleted. These subparagraphs provided specific provisions concerning the application of market economy treatment to imports from China, Vietnam, Kazakhstan, and any NME country which was a Member of the WTO on the basis that market economy conditions were proved to prevail by their individual producers. They specified relevant procedures and the famous EU five criteria for evaluating market economy conditions. Since all these subparagraphs were deleted, the applicable scope of the new Article 2(7) is quite clear, merely the five countries stated before. It removes all WTO Members, including China and Vietnam, from the applicable scope of Article 2(7), therefore resolves completely the issue of compatibility of this article with WTO law. Moreover, the NME designation is stopped being used. This avoids disputes concerning the classification of a country into a market or non-market economy one, especially circumventing the dilemma of whether to admit China as a market economy. Superficially, China is no longer labeled as an NME country in EU AD law and is removed from the applicable scope of Article 2(7), which seems to indicate its graduation from being viewed as an NME. However, since no such terminology is employed, we cannot say that the EU has tacitly recognized China as a market economy. In practice, it can still freely call China an NME country. But as Article 2(7) is not applicable to China any longer, it looses its significance regarding China. China, among all other WTO Members, cannot challenge this EU legislation in the WTO now, which though used to be very problematic in terms of WTO compliance. Secondly, regarding the establishment of the normal value of imports from these countries, what should be utilized is still surrogate country methodologies. The eligible surrogate benchmarks and the sequence of their application are not changed.[692] Yet, currently no possibility is provided for these countries to have normal market economy treatment being applied to their exports in exceptional circumstances. While describing eligible surrogate benchmarks, new Article 2(7) specifies those benchmarks to be from an appropriate representative country, rather than an appropriate market economy third country, completely refraining from using the market and non-market economy dichotomy.[693] Regarding the selection of an appropriate representative country, it puts forward an additional requirement

[689] Subparagraph 1, Article 2(7) of the Regulation (EU) 2016/1036 as amended by Article 1(2), Regulation (EU) 2017/2321, ibid.
[690] Annex I "list of third countries', Regulation (EU) 2015/755 of the European Parliament and of the Council of 29 April 2015 on common rules for imports from certain third countries (recast), OJ L 123/33, 15.5.2015.
[691] List of WTO Members and Observers, see: https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm, latest visit on 17 November 27, 2018.
[692] Subparagraph 1, Article 2(7) of the Regulation (EU) 2016/1036 as amended by Article 1(2), Regulation (EU) 2017/2321, supra note 454.
[693] Ibid.

- "[w]here there is more than one such country, preference shall be given, where appropriate, to countries with an adequate level of social and environmental protection".[694]

As Article 2(7) is applicable only to non-WTO Members and all WTO Members are subject to the rest provisions of Article 2, provisions which really concern China and other transitional economies alike are those of Article 2(6a), a new paragraph inserted by the amendment which introduces a new discipline for establishing normal value. This paragraph is applicable to the circumstance of the existence of "significant distortions" in the respective country which prevent the appropriateness of using its domestic prices and costs.[695] Under this circumstance, the normal value "shall be constructed exclusively on the basis of costs of production and sale reflecting undistorted prices or benchmarks".[696] While constructing normal value, the sources of information the Commission may use include: (1) corresponding costs of production and sale in an appropriate representative country with a similar level of economic development as the exporting country, provided the relevant data are readily available; where there is more than one such country, preference shall be given, where appropriate, to countries with an adequate level of social and environmental protection; (2) if it considers appropriate, undistorted international prices, costs, or benchmarks; or (3) domestic costs, but only to the extent that they are positively established not to be distorted, on the basis of accurate and appropriate evidence, including in the framework of the provisions on interested parties in point (c).[697]

It can be seen that what is applied under this situation, in the name of normal value construction, is still surrogate country methodologies. Domestic costs are applicable only if they are appropriately and sufficiently established to be undistorted. Or the investigating authority is legally justified to use surrogate benchmarks. Surrogate benchmarks firstly include corresponding costs of production and sale in an appropriate representative country. Here, the requirement for the surrogate country to be a market economy one again is not explicitly mentioned. Yet, it has to be one at the similar level of economic development as the exporting country. The EU introduces this US requirement for selecting surrogate countries into its own AD legal regime. Furthermore, it also requires the investigating authority to give certain consideration to social and environmental protection while making its choice. In practice, the EU investigating authority will apply five criteria for the selection of an appropriate representative country - significant production, similar level of economic development, readily available, not subject to distortions, and adequate level of social and environmental protection.[698] Secondly, besides costs of production and sale in an appropriate representative country, the list also provides for undistorted international reference prices, costs, or benchmarks as a possible source for constructing normal value in the case of significant distortions. Apart from costs of production, the constructed normal value shall also include an undistorted and reasonable amount for

[694] Subparagraph 2, Article 2(7) of the Regulation (EU) 2016/1036 as amended by Article 1(2), Regulation (EU) 2017/2321, ibid.
[695] Subparagraph (a), Article 2(6a) of Regulation (EU) 2016/1036 inserted by Article 1(1), Regulation (EU) 2017/2321, ibid.
[696] Ibid.
[697] Ibid.
[698] European Commission, *How to make an anti-dumping complaint: a guide*, p.17, available at: http://trade.ec.europa.eu/doclib/docs/2017/december/tradoc_156473.12.12.17_final.pdf.

administrative, selling and general costs and for profits.[699] In general, though difference is made, the methodologies specified in the newly introduced Article 2(6a) are substantially still a kind of analogue country methodology, which authorizes the investigating authority's determination of the normal value of a country's exports not based on its own domestic prices and costs. The requirement for the surrogate benchmarks to be from an appropriate representative country and to be undistorted is actually quite subjective and not substantially different from that requiring the benchmarks to be from a market economy country. But compared with the EU's previous mode, its new analogue country methodology is obviously much more flexible. The investigating authority does not need to substitute an exporting country's domestic costs as a whole. While constructing normal value, it can mix the use of surrogate benchmarks with domestic costs as long as it determines that the later ones are conversely reasonably proved to be not distorted.[700] The greater flexibility, however, introduces simultaneously more discretionary power, which enables the investigating authority's adoption of advantageous data. Moreover, the investigating authority is required to make its assessment in this regard for each exporter and producer separately, basing its decision on an exporter/producer-specific basis.[701] This for one thing ensures its making of more accurate decision, for another enables its differentiation treatment of different types of enterprises.

Overall, the EU basis AD regulation currently is equipped with three rules, Article 2(5), Article 2(6a) and Article 2(7), providing for its investigating authority's resort to surrogate country benchmarks. The new Article 2(6a) especially applies in parallel with Article 2(5), which in conjunction with Article 2(3) provides for the EU cost adjustment methodology, with respect to WTO Members irrespective of whether the applicable condition of the latter is fulfilled. Though these provisions have specified the approach to surrogate country benchmarks and the eligible surrogate information differently, their essence is the same. And due to the considerable discretion embodied in applying surrogate country methodologies, the establishment of normal value based on these three different legal bases can actually reach substantially the same result.

The newly introduced Article 2(6a) provides for the use of surrogate benchmarks when "significant distortions" exist in the exporting country concerned. It defines "significant distortions" as "those distortions which occur when reported prices or costs, including the costs of raw materials and energy, are not the result of free market forces because they are affected by substantial government intervention".[702] Clearly, the distortions here relate still to the interaction between market force and government intervention, i.e. concerning whether market economy conditions prevail, though the dichotomy of market and non-market economies is not employed. Since the distortions influencing the costs of a product are also incorporated, Article 2(6a) actually provides also the possibility of applying surrogate country methodologies in the case of the so-called "input-dumping", a constellation where the state has a strong influence on the inputs market, based on which domestic producers are able to produce at much more

[699] Article 2(6a)(a) of Regulation (EU) 2016/1036 inserted by Regulation (EU) 2017/2321, supra note 454.
[700] European Commission, *How to make an anti-dumping complaint: a guide*, supra note 698, pp.16-18.
[701] Article 2(6a)(a) of Regulation (EU) 2016/1036 inserted by Article 1(1), Regulation (EU) 2017/2321, supra note 454.
[702] Subparagraph (b), Article 2(6a) of Regulation (EU) 2016/1036 inserted by Article 1(1), Regulation (EU) 2017/2321, supra note. 454

competitive prices.[703] The production factors clearly given and emphasized in law are raw materials and energy. But actually broader ones, such as land, labor force and capital, all can be included in an investigating authority's decision. Article 2(6a) further sets up an illustrative list of criteria in subparagraph (b) for assessing the existence of significant distortions. This non-exhaustive list specifies the following points: (1) the market in question being served to a significant extent 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, discriminatory application or inadequate enforcement of bankruptcy, corporate or property laws; (5) wage costs being distorted; (6) access to finance granted by institutions which implement public policy objectives or otherwise not acting independently of the state.[704] This list shares one point with the EU's previous test for evaluating the prevalence of market economy conditions, i.e. the one concerning the equipment and enforcement of bankruptcy, corporate and property laws. The rest points, however, are different, and are principally and clearly China-oriented, since they concern with matters that are the focus of other countries' criticism of China's rising as a state capitalism economy. Furthermore, the list is not exhaustive and the investigating authority can give regard to some other elements of government intervention as it deems as appropriate while making its assessment in this regard. Like the previous EU market economy test, criteria for the assessment of the existence of significant distortions also cover broad matters that go beyond the original justification for disregarding domestic prices and costs - price fixing and trade monopoly. Some issues are actually subject matters of other regulatory domains. The assessment of circumstances qualifying for significant distortions can also be arbitrarily and discriminatorily made in light of the definition and criteria established by the new provisions.

No specific country's economy is legally specified to be one with significant distortions. The complainants have to sufficiently establish the existence of significant distortions in a specific country in individual cases for the Commission's resort to surrogate benchmarks relying on Article 2(6a). However, subparagraph (c) of this Article imposes on the Commission an obligation to produce, publish, and regularly update reports describing significant distortions in a country or a specific sector of it once it has well-founded indications of the possible existence of significant distortions in that country or sector.[705] Such reports, together with the evidence substantiating them, shall be placed on the file of any investigation relating to that country or sector, and interested parties shall be given ample opportunity to rebut, supplement, comment or rely on them in each investigation in which they are used.[706] That is to say, they actually act as evidence of a complainant proving the existence of significant distortions, though they are provided by the Commission. While making the final determination, the Commission still has to take into account

[703] Christian Tietje, Vinzenz Sacher, "The new Anti-dumping Methodology of the European Union - A Breach of WTO-law?", May, 2018, p.10, available at: http://tietje.jura.uni-halle.de/sites/default/files/BeitraegeTWR/Heft%20153.pdf.

[704] Subparagraph (b), Article 2(6a) of Regulation (EU) 2016/1036 inserted by Article 1(1), Regulation (EU) 2017/2321, supra note 454.

[705] Subparagraph (c), Article 2(6a) of Regulation (EU) 2016/1036 inserted by Article 1(1), Regulation (EU) 2017/2321, supra note 454.

[706] Ibid.

all relevant evidence that is on the investigation file. But the reports prepared by itself undeniably carry great weight in its decision making. The imposition of this obligation on the Commission is to relieve the burden of proof of AD complainants, i.e. domestic producers of the EU, especially for SME complainants, for the effective application of this regulation and maintenance of strong trade defence in the EU.[707] Without such help from the Commission, individual producers' proof of the existence of significant distortions in a country or a specific sector of it can be very difficult, both time and money consuming. According to Subparagraph (d) of Article 2(6a), AD complainants may rely on the contents of these reports when making complaints.[708] This subparagraph seeks to clarify how a complainant can make a preliminary measurement of dumping, since in order to successfully initiate an AD complaint, it must firstly show *prima facie* evidence of dumping.

Different from the legally specified designation of a country as an NME country, the EU Commission's reports of significant distortions by themselves are not decisive regarding the legal status of a country or a specific sector of it in AD proceedings. These reports are just a kind of evidence, which though are highly credible since they are officially issued by the Commission, still can be rebutted by adequately substantiated and evidenced counterargument. Moreover, such reports will not draw any conclusion as to the impact the distortions will have on the establishment of normal value of a specific product in an investigation. It is pointed out that decisions on the consequences of the distortions will only be made in the context of a specific investigation.[709] Parties to the investigation will have to argue the weight and the consequences of the distortions for the establishment of the normal value of the product concerned.[710] The Commission in turn would only make conclusions on the distortions in relation to the specific investigation of the specific product.[711] In overall, there is still considerable space for argument between disputing parties. It is clear that the Commission's drawing up of reports on significant distortions would greatly alleviate the burden of proof on EU complainants, which do not have equivalent resources in finding and proving distortions in other markets. Nonetheless, it is still undeniable that the new approach is more complicated than the one specified in the previous Article 2(7) and it requires more work from EU complainants, who bear the burden of proof.

Currently, the EU has already published a report as such concerning China, which judges China's whole economy as significantly distorted.[712] This report is divided into three main parts. Part I "cross-cutting distortions" analyzes distortions existed in China's macro economic regime, including aspects concerning socialist market economy, Chinese Communist Party, the system of plans, state owned enterprises, financial system, public procurement market in China, investment

[707] Recital (7), Regulation (EU) 2017/2321, ibid.
[708] Subparagraph (d), Article 2(6a) of Regulation (EU) 2016/1036 inserted by Article 1(1), Regulation (EU) 2017/2321, ibid.
[709] Bernard O' Connor, "A short primer on China, anti-dumping and the Commission's proposal on significant Distortions", Il Sole 24 Ore Digital Edition, April 13, 2017, available at: http://www.italy24.ilsole24ore.com/art/laws-and-taxes/2017-04-10/a-short-primer-on-china-anti-dumping-and-the-commission-s-proposal-on-significant-distortions--184706.php?uuid=AEGnKy2.
[710] Ibid.
[711] Ibid.
[712] European Commission, "Commission staff working document on significant distortions in the economy of the People's Republic of China for the purpose of trade defence investigations", SWD (2017) 483 final/2, 20.12.2017, Brussels.

restrictions for Chinese and foreign companies.[713] Part II "distortions in the factors of production" describes distortions in five main categorizes of production factors used in all manufacturing processes, including land, energy, capital, raw materials and other material inputs, and labour.[714] Part III "distortions in selected sectors" focuses on distortions in four specific Chinese industries, which are the main targets of the EU's AD measures, i.e. steel sector, aluminium sector, chemical sector, and ceramic sector.[715] The comprehensive defense against identifying China's whole market as significantly distorted will be tough. It moreover will be extremely difficult for producers in those four industries specifically analyzed in the report to argue for the use of their own costs. For imports from other Chinese industries, the reported distortions in factors of production used in all manufacturing processes greatly and effectively support EU claimants' argument for substituting distorted Chinese costs by surrogate undistorted ones in constructing normal value. The EU's first three-dimension report concerning China therefore is arguably quite comprehensive and user-friendly. This report and the evidence substantiating it will be placed in every AD case concerning China and be used as an EU complainant's evidence. Chinese producers and exporters will also make their defence in each individual investigation. Since this report has to be used in conjunction with the specificities of each case, and the new EU approach requires for producer/exporter-specific assessment and allows for the use, even partial, of undistorted domestic costs, a Chinese defendant therefore should concentrate on arguing and proving that it individually does not have access to a specific distorted input or it does not use or only partially uses a distorted input. For the rest part, it should argue for the EU investigating authority's use of its own costs. From this point, the new EU approach provides more lenience for foreign producers compared with its previous individual market economy treatment, which requires for an individual producer's proof of the prevalence of market economy conditions regarding its manufacture and sale of the like product concerned.

The European Commission alleged that it issued its first report in this regard concerning China based on the bulk of its AD activity, both investigations and measures, concerning China.[716] It declared that its issuance of a report as such is in accordance with an economy's relative importance in EU AD activity and indications of the existence of distortion in the economy.[717] According to this principle, the next report will be issued regarding Russia.[718] The EU continuously emphasizes the non-discriminatory nature of its new AD rules and especially the neutrality of its first report concerning China. Nonetheless, the new approach's specific target of China is obvious, especially given the drafting process of this report. In the committee report tabled for the European Parliament's plenary, a requirement was inserted which demanded for the Commission's adoption of a significant distortions report before the entry into force of this regulation +15 days concerning a country for which a substantial number of anti-dumping cases

[713] Ibid, pp.4-201.
[714] Ibid, pp.202-344.
[715] Ibid, pp.345-463.
[716] European Commission, "Fact sheet: the EU's new trade defence rules and first country report", 20 December 2017, Brussels, available at: http://europa.eu/rapid/press-release_MEMO-17-5377_en.htm; European Commission, "Press release: EU puts in place new trade defence rules", 20 December 2017, Brussels, available at: http://europa.eu/rapid/press-release_IP-17-5346_en.htm.
[717] Ibid.
[718] Ibid.

had been opened.[719] And the European Parliament and a Member State should be conferred the right to instruct the Commission's initiation and update of such a report.[720] These requirements reveal that the European Parliament wanted to have the initiative to prevent the Commission from nonfeasance, pushing its issuance of a report concerning China to ensure that the EU's trade defence against China will not be crippled once the old methodology is substituted. Put differently, the new approach can be smoothly applied to Chinese imports. The alleged neutrality of this new approach is clouded. To date no second report as such has been produced and published. Though the existence of an officially issued report is not compulsory for normal value construction relying on Article 2(6a), the absence of such a report in a complainant's hand concerning a specific country undeniably poses substantial difficulty for an actual EU complaint. The equipment of a report regarding only China *de facto* discriminates it even more than the EU's previous Article 2(7) approach.

What's more, a notable breakthrough the amending regulation has made to the AD legal regime is its introduction of social and environmental protection considerations into the selection of surrogate countries in both Article 2(6a) and Article 2(7). It is the European Economic and Social Committee that firstly called for considering matters of social and environmental protection in AD determinations during the course of amending the EU basic AD regulation.[721] It originally proposed not to limit the distortion-analysis to economic factors, but rather to extend it by also considering the exporting country's compliance with international labor standards and multilateral environmental agreements.[722] This point of view was further supported by the EU Parliament, especially its Committee on International Trade, in the legislative process. And after amendment, it put forward a proposal which stipulated that in determining whether a market is significantly distorted, a distinguishing factor shall be whether the country in question complies with core ILO conventions, multilateral environmental agreements to which the Union is a party and even relevant OECD conventions pertaining to the field of taxation.[723] This proposal is pointed out to be the first legal text directly counteracting the so-called social- or eco-dumping.[724] Such an approach obviously is too strict and impracticable, and it can drag a considerable amount of countries into an affirmative determination of conducting dumping practices. This proposal did not gain the acceptance of the Commission and the Council, but a

[719] European Parliament, Committee on International Trade, "Report on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union and Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union", Committee report tabled for plenary, 1st reading/single reading, A8-0236/2017, 27.06.2017, p.8, p.15.

[720] Ibid.

[721] European Economic and Social Committee, "Opinion: proposal for a Regulation amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union and Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union", CES0077/2017, 29.03.2017.

[722] Ibid.

[723] European Parliament, Committee on International Trade, "Amendments: draft report - Protection against dumped imports from countries not members of the EU", PE604.811, 30.05.2017; European Parliament, Committee on International Trade, "Report on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union and Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union",supra note 719.

[724] Christian Tietje, Vinzenz Sacher, "The new Anti-dumping Methodology of the European Union - A Breach of WTO-law?", supra note 703, p.9.

compromise was reached after a complicated trilogue between the three organs, which led to the present provisions.[725] Whiling choosing surrogate countries for determining normal value based on Article 2(6a) or Article 2(7), the Commission should give preference to countries with an adequate level of social and environmental protection, where appropriate, if there is more than one qualified countries. The call for taking account of relevant international labor and environmental standards, where appropriate, when assessing the existence of significant distortions, is stipulated only in the recital part of the Regulation, which is not legally binding.[726] Such a modified requirement gives some weight to the EU Parliament's viewpoint. It is less strict compared with the Parliament's previous proposal. More importantly, the modified version targets only a small range of countries since both Articles 2(7) and 2(6a) are applicable only to certain specific countries, the former the five countries listed in Annex I to Regulation (EU) 2015/755 and the latter the countries whose economy, in its entirety or a part of it, is determined to be significantly distorted. That is to say, the Commission will only consider so-called social- and eco-dumping while dealing with complaints concerning these particular countries. This is actually also a kind of discrimination since higher requirements are proposed for them. Furthermore, pertinent phrasing such as "an adequate level", "where appropriate", "where there is more than one such country" still leaves considerable margin for discretionary application in practice.

In fact, for the application of the new EU approach specified by Article 2(6a), it is foreseeable that a series of questions will have to be clarified in the Commission's actual practices. To name a few, such questions include: how could a complainant initiate an AD investigation if there is no report on significant distortions issued by the Commission regarding the exporting country?[727] To what extent do complainants bear the burden of proving that there are significant distortions in a particular economy? What weight is to be given to the different distortions in a given economy whiling determining price comparability? How should surrogate benchmarks be used for establishing normal value? All these issues are not clearly clarified in Article 2(6a). We have to see how the Commission will answer these questions while handling real specific cases in the coming years. Moreover, it is also questionable whether the new approach will be equally effective in maintaining a strong EU trade defence compared to the old approach stipulated in Article 2(7) as the EU Commission promised before.[728] Yet, what has to be and will be investigated here is the critical question whether the EU's new approach is truly WTO-consistent as publicly claimed by the EU. This question will probably be legally decided in the WTO case initiated by China against the EU price comparison methodologies.[729] Or, China will initiate another case complaining this EU new approach since it actually was introduced primarily to deal with alleged dumping of Chinese producers.

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[725] European Parliament, Committee on International Trade, "Provision agreement resulting from institutional negotiations", PE612.094, 12.10.2017.

[726] Recital (4), Regulation (EU) 2017/2321, supra note 454.

[727] According to the European Commission's guide on how to make an anti-dumping complaint, if no report exists or in addition to it, other distortions can also be alleged in the complaint, based on market knowledge and/or publicly available reports. Any allegations concerning distorted inputs must be structural and supported by evidence. This clarification however is still quite ambiguous, providing rather limited instruction. European Commission, *How to make an anti-dumping complaint: a guide*, supra note 698, p.16.

[728] Joint press conference by Jyrki Katainen, Vice-President of the EC, and Cecilia Malmström, Member of the EC, on the treatment of China in anti-dumping investigations, 20 July, 2016, supra note 621.

[729] *European Union - Price comparison methodologies*, Request for consultation by China, WT/DS516/1, G/L/1170, G/ADP/D116/1, 15 December 2016.

The amending regulation does not directly mention China. But as correctly pointed out, "there is nothing to do with China, but actually all is about China".[730] Firstly, this regulation was proposed and enacted in response to the expiry of certain provisions in China's accession protocol.[731] The last sentence of recital (2) of the Regulation stipulates "[t]his Regulation is without prejudice to establishing whether or not any WTO Member is a market economy or to the terms and conditions set out in protocols and other instruments in accordance with which countries have acceded to the Marrakesh Agreement Establishing the World Trade Organization done on 15 April 1994".[732] By making this statement, the EU clearly tried to avoid clarifying its stance on China's market economy status and the effect of the 2016 expiry stipulated in China's accession protocol, both of which are highly sensitive and controversy. But, this does not mean that the EU therefore has not expressed its attitudes concerning these matters by directly making its policy choice. Secondly, the formulation of the new provisions in Article 2(6a) is based principally on reflections of market distortions evident in China. The criteria for assessing the existence of significant distortions clearly reflect criticism of China's economic mode. And more obvious, currently the Commission has published only one report concerning significant distortions regarding only China. Though the new methodology is frequently emphasized by the EU as country neutral, applicable to imports from all countries, it obviously disadvantages principally China.[733] This new approach apparently does not categorize countries and can be relied for addressing significant distortions wherever they are found. Yet it is China principally targeted by this approach and Chinese imports most easily subject to surrogate benchmarks in AD investigations by invoking Article 2(6a) and relying on the market distortion report issued by the Commission.

In comparison with the previous approach of applying surrogate country methodologies regarding China based on Article 2(7), the new approach specified in Article 2(6a) though has made some important modifications, does not substantially change the treatment Chinese imports have in EU AD proceedings. The most notable difference is that China is no longer legally designated as an NME country and is removed from the applicable scope of Article 2(7). To be more precise, actually the whole classification of market and non-market economies is deleted from EU AD law and all WTO Members are removed from the applicable scope of Article 2(7). Specific to China, this means the name of it as an NME, or not, is no longer relevant for determining Chinese exports' normal value. However, based on Article 2(6a) and the pertinent report of significant distortions in China, Chinese exports are still highly probably subject to surrogate country methodologies. Significant distortions and the classification of China as an NME essentially concern the same issue, the lack of free market practice and the existence of substantial government intervention. The new approach has shifted the burden of proving the existence of significant distortions to the EU complainants. However, the report issued by the

[730] Bernard O' Connor, "A short primer on China, anti-dumping and the Commission's proposal on significant Distortions", supra note 709.
[731] European Parliament, "Briefing: EU legislation in progress - Protection from dumped and subsidised imports", available at: http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/595905/EPRS_BRI(2017)595905_EN.pdf.
[732] Recital (4), Regulation (EU) 2017/2321, supra note 454.
[733] Joint press conference by Jyrki Katainen of the EC, and Cecilia Malmström, Member of the EC, supra note 621; European Commission, "Fact sheet: the EU's new trade defence rules and first country report", supra note 716.

Commission regarding China largely ensures that EU producers will not be significantly impeded by this burden while complaining of Chinese imports. This report in effect equals to directly labeling China as an NME, though it in legal sense is just a kind of evidence, which is rebuttable in individual cases and has to be decided by the investigating authority. Furthermore, the Commission can issue reports of this kind concerning a country's economy in its entirety or only specific sectors of it. It can also update such reports according to changed circumstances. The new approach is therefore more flexible, which can be actively used for the EU's swift formulation of its AD policies to meet its specific protection needs. In conclusion, though the EU does not formally label China as an NME country any longer, it still continues applying a modified analogue country methodology regarding China on account of the existence of significant distortions in its economy, which is already officially confirmed by the Commission's report. That is to say, China is actually still subject principally to NME treatment in EU AD investigations. Its basic NME status in EU AD law is not substantially changed. That is why some scholars have called the EU's new approach as "wearing new shoes to walk on the old path" or "putting new wine in old bottles".[734] As the real treatment conferred to China in AD determinations is not changed compared with the past, China will definitely challenge this new EU approach.

The idea of significant distortions is not provided for in WTO law, nor national AD laws of any other country. It moreover is different from the cost adjustment methodology, which is stipulated in parallel in EU AD law. It is a new concept, which though actually does not differ from the NME concept in any substantial sense based on its definition and criteria given in EU AD law. Concerning this new EU approach's international legal basis, it is pointed out that this new approach is definitely not based on China's special commitments since it is established as a country-neutral and non-discriminatory mechanism applicable to all countries and available in all cases.[735] This new approach is specified in Article 2(6a), a generally applicable rule different from Article 2(7), which is applicable only to limited countries. All WTO economies are now considered equal in law and subject to general AD rules in Articles 2(1) to 2(6). By doing so, the EU has actually abandoned the idea that China's special commitments in Section 15 of its accession protocol can be the legal basis for treating China differently from other WTO Members.[736] Then, the EU's new approach should be considered in WTO law as being based on its general AD rules. But it is highly questionable that this new approach can be justified under general WTO AD rules. This issue will be analyzed in detail in the next section of this chapter.

In general, in reacting to the disputable expiry in China's accession protocol, the EU has stepped into a dilemma. On the one hand, it admits that China's special commitments concerning NME treatment cease to be effective since it does not legally treat China differently any more. The new approach introduced by it at least *de jure* is equally applicable to all economies, including all WTO Members. On the other, the EU does not end its NME treatment of China. It tried to sidestep the issue of market and non-market economy status and avoid the classification

[734] Andrei Suse, "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", Working Paper No.186, May 2017, available at: https://ghum.kuleuven.be/ggs/publications/working_papers/2017/186suse.
[735] Bernard O' Connor, "A short primer on China, anti-dumping and the Commission's proposal on significant Distortions", supra note 709.
[736] Ibid.

in this regard. However, its use of the "significant distortions" test and issuance of a report on China still exposes China to NME treatment. NME treatment based on this approach though is not automatically applicable, is still easily accessible especially relying on the report equipped by the Commission. It seems that the EU is abandoning the business-as-usual viewpoint, but simultaneously refusing granting China market economy status. Actually, its approach can be best explained by the burden-shifting point of view introduced above regarding the effect of the expiry concerned. According to this viewpoint, the expiry of Section 15(a)(ii) does not mean China's acquisition of market economy status in AD law. It only results in the shift of burden for the complainants to prove the lack of free mark force in China for the investigating authority's resort to surrogate benchmarks. And the criteria in this regard can be discretionary determined by national AD laws. This burden-shifting viewpoint still bases its legality on China's special commitments. The EU's significant distortions approach, however, does not, as it is already pointed out above. This reveals that actually the EU is clearly aware that surrogate country methodologies can no longer be based on China's accession protocol. Its new approach is seeking to create an additional basis for deviation from normal methodologies, which is not contemplated under WTO rules.[737] The only possibility is to see if the basis of significant distortions can be embraced into "not in the ordinary course of trade" or "particular market situation", regarding which two circumstances the EU basic AD regulation already provides separate rules.[738] In overall, compared with the US, the EU has acted in a vague but more cautious manner in finding a similar way to essentially continue its previous practices under the analogue country methodology.

China has already initiated WTO dispute settlement proceeding against the EU's price comparison methodologies immediately after the passage of the 2016 deadline. At the time of initiation, the EU had not amended its basic AD regulation yet. China held that the treatment afforded to China under Article 2(7) ceased to be justified when section 15(a)(ii) expired and was inconsistent with general WTO AD rules thereafter, specifically Article VI:1 of the GATT 1994, Articles 2.1, 2.2 of the WTO AD Agreement, and the second Ad Note to Article VI:1 of the GATT 1994.[739] The EU's rules on establishing normal value accordingly violated the most-favored-nation treatment set forth in Article 1:1 of the GATT 1994.[740] China further clarified that its complaint concerned also any modification, replacement and amendment to the EU's established price comparison methodologies and any closely connected subsequent measures.[741] It was clearly aware that two amending procedures were under way at the time of initiation, including the one that later led to the regulation modifying Article 2(7) and introducing Article 2(6a).[742] Since the new regulation has removed China from the applicable scope of Article 2(7) and subjected China to Article 2(6a), the DSB will have to clarify the conformity of this new methodology with WTO rules.

[737] Ritwik Bhattacharya, "Three viewpoints on China's non-market economy status", supra note 503, p.196.
[738] Concerning circumstances of "not in the ordinary course of trade", Articles 2(1) and (4), concerning "particular market situation", Article 2(3), Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union, OJ L 176/21, 30.6.2016.
[739] European Union - Price comparison methodologies, Request for the establishment of a pane by China, WT/DS516/9, 10 March 2017, paragraph 7.
[740] Ibid.
[741] Ibid, paragraph 12.
[742] Ibid.

3.3.2 Discipline concerning transition from the old approach to the new one

One thing worth mentioning is that the amending regulation sets forth some specific transitional provisions clarifying the replacement of the former Article 2(7) methodology by the methodologies specified in Articles 2(1) to 2(6a) for normal value calculation regarding AD measures existed before the entry into force of the regulation. It notably requires such replacement to happen "only from the date on which the first expiry review of those measures, after 19 December 2017, is initiated".[743] The former Article 2(7) methodology will not change in interim and new exporter review investigations concerning existing measures.[744] The transition of methodologies provided for in this amendment in itself cannot be taken as an account for the initiation of interim review in the absence of other changes in circumstances.[745] The original Article 2(7) methodology should continue to apply concerning existing measures until the initiation of their first expiry review after 19 December 2017. That is to say, pre-existing measures enacted under the old Article 2(7) will basically stay in force, irrespective of the change of law, until at least those dates. Such transition concerns principally pre-existing EU AD measures imposed on Chinese imports. Let alone whether the EU's new methodology is WTO-compatible and set aside the EU's delayed enactment of new methodology, this transitional requirement in itself is not legally tenable. The second sentence of Section 15(d) of China's accession protocol sets "in any event...shall expire 15 years after the date of accession". This language actually indicates that after the deadline surrogate country methodologies can no longer be used regarding China in all circumstances involving the determination of normal value unless this use can be justified on some other international legal basis. These circumstances include all decisions on the initiation of proceedings, all original and review, both interim and expiry review, investigations that involve the determination of normal value conducted after 11 December 2016. There is no justification for WTO Members to exempt their obligation in this regard in the cases of interim and new exporter review investigations concerning existing measures. The wait until the first expiry review of existing measures for the abandonment of conventional approach in individual cases is termed by the EU as a kind of "grandfathering", which was introduced by it to ensure that existing AD measures would not be affected so as to extend their effectiveness.[746] The international illegality of this practice however is obvious. In addition, some even take the view that the EU is not legally justified denying interim review requests based on the ground that a change in the applicable WTO legal regime does not constitute a change in factual circumstances.[747] This is because Article 11.2 of the WTO ADA conditions an interested party's right to request for interim review on 1) the passage of a reasonable period of time since imposition of the definitive duty; and 2) the submission by the interested party of "positive

[743] Articles 1(3), 1(4) , Regulation (EU) 2017/2321, supra note 454.
[744] Ibid.
[745] Recital (9), Regulation (EU) 2017/2321,supra note 454.
[746] European Commission, "Inception Impact Assessment on possible change in the methodology to establish dumping in trade defence investigations concerning the People's Republic of China", p.3, available at: http://ec.europa.eu/smart-regulation/roadmaps/docs/2016_trade_002_dumping_investigations_china_en.pdf.
[747] David Kleimann, "The Vulnerability of EU Anti-Dumping Measures against China after December 11, 2016", supra note 119, p.6-8.

information" substantiating the need for a review.[748] It is observed that a "need for a review" can be warranted if the applicant provides positive information to the claim that the continued imposition of the duty will not be necessary to offset dumping after the review is concluded.[749] WTO rules do not give any textual indications to the end that a change of dumping calculation methodologies, in contrast to changes in factual circumstances, precludes the need for a review. After 11 December, 2016, an interested party furthermore is legally justified to rely on standard methodologies to calculate dumping in initiating interim review investigation. Once the two prescribed conditions are fulfilled, "the plain words of the provision make it clear that the agency has no discretion to refuse to complete a review".[750] Interim review requests on account of discontinuation of dumping calculated through standard methodologies thus should be accepted and standard methodologies have to be used in the following investigations. The EU's denial of interim review requests in this regard constitutes further application of the expired rights and can be challenged by China in the WTO.[751]

Furthermore, the EU's new amending regulation has stipulated its temporal applicable scope as "[t]his Regulation shall apply to all decisions on the initiation of proceedings, and all proceedings, including original investigations and review investigations, initiated on or after the date on which this Regulation enters into force", i.e. non-retroactive to investigations initiated before the entry into force of this regulation.[752] The EU has already delayed its enactment of new legislation giving effect to the specified unconditional expiry of Section 15(a)(ii) of China's accession protocol. Even it had enacted its legislation in time, its proposition of non-retroactive application is still unjustifiable in international law.[753] Non-retroactivity is an established principle in customary international law, concerning which Article 28 of the VCLT explicitly stipulates: "[u]nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to the party".[754] Yet, the AB of the *EC and certain Member States - Large Civil Aircraft* has further clarified that "[i]n order to determine the temporal scope of a particular treaty provision, regard must be had to the text of the treaty at issue, the subject matter of the treaty in question, and to the nature of the treaty obligations undertaken".[755] As stated above, the second sentence of Section 15(d) requires for the unconditional and definitive expiry of Section 15(a)(ii) after 11 December 2016 in all circumstances. What Section 15(a)(ii) provides is China's authorization of other WTO Member's direct use of surrogate country benchmarks for establishing Chinese exports' normal value. The subject matter of this provision is the price comparison methodology used by investigating authorities, concerning an investigating authority's act of establishing

[748] AB report, *Mexico - Definitive anti-dumping measures on beef and rice*, complained with respect to rice, WT/DS295/AB/R, 29 November 2005, para.314.
[749] Ibid.
[750] Ibid.
[751] David Kleimann, "The Vulnerability of EU Anti-Dumping Measures against China after December 11, 2016", supra note 119.
[752] Article 4, Regulation (EU) 2017/2321,supra note 454.
[753] *EU- Price comparison methodologies* (DS516), First written submission by the European Union, para.390, 14 November 2017, Geneva.
[754] Article 28, Vienna Convention on the law of treaties, UNTS Vol. 1155, No. 18232.
[755] Appellate Body Report, *EC and certain Member States - Large Civil Aircraft*, WT/DS316/AB/R, 18 May 2011, para.656.

normal value, rather than its decision of initiating an investigation. The evaluation of retroactivity therefore should also be based on the act of establishing normal value, rather than initiating a specific investigation. The agreement reached between China and other WTO Members cannot be retroactively applied to the act of determining normal value that took place before the specified expiry date. But those made after that date have to be bound by this agreement. The date of initiation of a specific investigation is not the time point determining the applicability of this international obligation. A WTO Member cannot circumvent its international obligation in this regard by initiating massively and intensively AD investigations regarding China just before the specified expiry date.[756] The non-retroactive application rule stipulated in its domestic AD law cannot be relied upon to justify its unfulfillment of this international obligation.[757] The AB also confirmed that "a WTO Member's domestic law does not excuse that Member from fulfilling its international obligations".[758] As long as a determination of normal value has not been made before the date of expiry, 11 December 2016, an investigating authority is obliged to use standard methodologies after that date, regardless of if relevant proceedings are initiated before or after the expiry.

The EU holds that it has formulated non-retroactive application rules and specific transitional provisions as described above to ensure legal certainty for on-going cases and existing measures.[759] However, the expiry of China's authorization of automatically applicable NME treatment regarding it after 15 years is specified in its accession protocol, which entered into force on 11 December 2001. A WTO Member's faithful implementation of this international obligation therefore requires for its undertaking of certain measures in this 15-year's transitional period to ensure the complete end or phase-out of illegal legislation and practices before the expiry date. Set aside if the substantive content of a WTO Member's new legislation giving effect to this expiry is fully WTO-consistent, this Member will also be held liable for 1) delayed enforcement of such legislation; 2) non-retroactive application of this legislation to investigations initiated before the expiry but concerning which no determination of normal value has been made before the expiry; and 3) the exemption of interim and new exporter review investigations concerning existing measures from the applicable of new methodology. Currently, a panel was already established and composed at China's request to deal with the dispute.[760] The panel expected to issue its final report during the second quarter of 2019.[761] Yet, it has currently suspended its work in the proceedings based on its decision made on 14 June 2019 in response

[756] During the period 1 January - 31 December 2016, the EU initiated 5 new AD investigations against imports from China, all of which concern iron or steel products. Moreover, 11 expiry review investigations were initiated during this period concerning Chinese imports. European Commission, *Commission Staff Working Document accompanying the document report of the Commission to the Council and the European Parliament, 35th annual report from the Commission to the Council and the European Parliament on the EU's anti-dumping, anti-subsidy and safeguard activities (2016)*, SWD(2017) 342 final, Brussels, 17.10.2017, Annex A and Annex F.

[757] Article XVI:4, Marrakesh Agreement Establishing the World Trade Agreement; Article 18.4, Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994; Article 27, Vienna Convention on the Law of Treaties.

[758] Appellate Body Report, *Brazil - Aircraft (Article 21.5 - Canada)*, WT/DS46/AB/RW, 21 July 2000, para.46.

[759] EU Commission, proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union and Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union, supra note 687, p.3

[760] *EU - Price comparison methodologies*, Constitution of the Panel established at the request of China, WT/DS516/10, 11 July 2017.

[761] *EU - Price comparison methodologies*, Communication from the panel, WT/DS516/12, 27 November, 2018.

to China's request to do so.[762] 19 Members requested for join in this case as a third party, since they deemed this issue as of substantial trade interests to them and of a systematic interest in interpreting relevant treaty provisions.[763] Apart from the substantive issue, the panel and future AB will also need to clarify the issue of the temporal applicable scope of China's special commitment.

[762] *EU - Price comparison methodologies*, Communication from the panel, WT/DS516/13, 17 June, 2019.
[763] Concerning specific third parties of this case, see: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds516_e.htm.

Chapter 6 Prospects of Non-market Economy Treatment

1. Conformity of NME treatment with general international AD rules

WTO Members' special commitments on NME treatment provide for explicit and robust legal basis for NME treatment to be applied in relations to them. The employment of surrogate country methodologies based on these special commitments is not challengeable.[764] It in particular cannot be challenged based on Article 2.4 of the WTO AD Agreement, which requires for due allowance to be made to induce fair comparison between normal value and export price.[765] It is because this provision dose not concern the methodological approach establishing normal value.[766] And permitting adjustment made to normal value to give account to differences, principally regarding costs, between NME producers and their surrogate country ones would lead to fallback to distorted circumstances in NME exporting countries.[767] An investigating authority's right to have recourse to surrogate country benchmarks will be materially impaired. However, special rules providing for these commitments are transitional. They are destined to expire as the specified time passes, the effect of which though is still controversial and up to the DSB's judgment. The first case in this regard concerns China, whose special commitments on NME treatment expired on 11 December 2016. Yet, apart from clarifying the interpretation of relevant special rules in individual Members' accession legal documents, a further question that needs to be investigated is whether NME treatment can be legally justified based on general international AD rules. If these rules can justify the application of NME treatment, this would mean that NME treatment can be continued regarding countries whose special commitments in this regard already expired and even countries providing no such special commitments.

General international rules concerning the determination of normal value are Article VI:1 of the GATT 1994, the second Ad Note to Article VI:1 of the GATT 1994, and Articles 2.1 and 2.2 of the WTO AD Agreement. These general principles under the GATT and the WTO AD Agreement are applicable to all WTO Members. Though the term NME is not employed in these rules, they provide the possibility to disregard domestic prices for comparison in certain circumstances. It is necessary to clarify if these rules allow for NME treatment - the use of surrogate country

[764] Appellate Body Report, *European Communities - Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, supra note 344, para.287.
[765] Article 2.4, WTO AD Agreement.
[766] Appellate Body Report, *EU Communities - Definitive Anti-dumping Measures on Certain Iron or Steel Fasteners from China* (Recourse to Article 21.5 of the DSU by China), WT/DS397/AB/RW, 18 January 2016, paras.5.207, 5.215, 5.231.
[767] Ibid.

benchmarks for price comparison in case that domestic ones of the exporting country are unreliable due to considerable government intervention in its market. The NME treatment here embraces not only the explicit NME treatment existing in domestic AD laws, but also the EU's new "significant distortions" approach, and the cost adjustment methodology. The latter two are also criticized by certain WTO Members and are subject to heated discussion. For identifying NME treatment, whether a country is expressly designated an NME does not carry substantial significance. What really matters is if surrogate country benchmarks are resorted to on account of the existence of government intervention in the exporting country's market. What transitional countries are genuinely concerned about is not whether they are called NMEs or not, but whether their domestic values are used for establishing normal value of their exports in AD proceedings.

Concerning the second Ad Note to Article VI:1 GATT 1994, it is considered by some to be the only general international legal basis for NME treatment.[768] As analyzed in Chapter 3 of this thesis, provisions of this Ad Note were firstly introduced into the multilateral trade legal regime by the 1955 Interpretative Note based on the then economic circumstances, and the reading of it as allowing for the use of surrogate country benchmarks is actually problematic. However, currently the most critical problem concerning the application of this article is that its premise set in accordance with the trade situation of the 1950s does not now represent the modern trade reality. As the AB in *EC - Fasteners* pointed out, the premise for this Ad Note's application "appears to describe a certain type of NME, where the State monopolizes trade and sets all domestic prices" and this Ad Note "would thus not on its face be applicable to lesser forms of NMEs that do not fulfill both conditions".[769] This threshold is so high that presently not a single WTO Member qualifies anymore and it is also unlikely to be proved with regard to any future WTO Members.[770] The AB mentioned its reading of this Ad Note merely in a footnote as an *obiter dictum*. It nonetheless manifests the DSB's basic attitude towards the application of this standard in reality. Moreover, this high evidentiary bar is a country-specific standard, which requires an assessment of a country's condition as a whole.[771] And the burden of proof is rested upon the importing country, which means it should prove an exporting country's whole economy' satisfaction of this impossibly high threshold for its derogation from the standard methodologies. Or it cannot invoke this rule for its resort to surrogate country methodologies.

Specific to China, given its great economic reforms, it is unlikely that China would be found to meet the Ad Note's requirements. In addition, China's accession protocol includes explicit commitments not to have a government trade monopoly and to allow trading rights to anyone for any product except for a few listed exceptions, as well as commitments not to have any price controls except for those on another short list of products.[772] There is no evidence showing that

[768] Rao Weijia, "China's market economy status under WTO anti-dumping law after 2016", supra note 502, p.167; Request for the establishment of a panel by China, *European Union - Measures related to price comparison methodologies*, WT/DS516/9, 10 March 2017, para.10.

[769] Appellate Body Report, *European Communities - Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, supra note 344, para.285 and fn.460.

[770] Tietje Christian, Nowrot Karsten, "Myth or reality? China's market economy status under the WTO antidumping law after 2016", supra note 502, p.10.

[771] Mark Wu, "The WTO and China's Unique Economic Structure", supra note 373, p.341.

[772] Section 5 "Right to trade", and Section 9 "Price controls", Protocol on the Accession of the People's Republic of

China is not respecting these commitments. The WTO trade policy review report conversely confirms that China is now maintaining state trading only for a limited range of products and currently less than 3% of its economy is covered by price controls.[773] The factual premise for applying the second Ad Note does not exist in China's case. It is noteworthy that Section 15 was included in China's accession protocol precisely because China was an economy in transition and did not fit within the contours depicted in the second Ad Note.[774] Even before China's accession to the WTO, the EC basic AD regulation already authorized individual market economy treatment to Chinese producers to give account to China's considerable progress in economic reform.[775] The shift in the policy of initiating anti-subsidy cases against China also substantiates the unfulfillment of China's economy regime with the strict criterion in the second Ad Note since subsidies would not make any sense in a fully state-controlled economy as contemplated by the second Ad Note. The importing country, which bears the burden of proof, will not be able to prove that the requirements concerned are fulfilled with regard to market conditions prevailing in China. In overall, the second Ad Note to GATT Article VI:1 as well as Article 2.7 of the AD Agreement are not an option for justifying NME treatment anymore.

Different from the second Ad Note to Article VI:1, the rest general international rules do not clearly describe any specific NME circumstances for the establishment of normal value. Actually, even WTO Members' special commitments do not specify any criteria for the evaluation of NME circumstances. The impossibly high threshold of the second Ad Note is the only international standard in this regard. However, both Article VI:1 of the GATT 1994 and Article 2.2 of the WTO AD Agreement provide for the possibility of constructing normal value in certain circumstances. Specifically, they allow for the construction of normal value 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.[776] The requirements for "no sales...in the ordinary course of trade", and "particular market situation" are vague. They do not necessarily concern an exporting country's whole economy and can be evaluated on a case specific basis. As was shown before, importing countries commonly use normal value construction as an excuse for their employment of NME treatment. It is therefore necessary to clarify if those prerequisites sufficiently embrace various NME circumstances, i.e. government intervention into a county's domestic market, and if the information permitted to use for constructing normal value includes surrogate country benchmarks. Since nowadays it is difficult, or extremely controversial, to declare a country to be a complete NME, the assessment of the conformity of NME treatment with these general international AD rules, which are applied against the specificities of individual cases, in light of recent WTO cases is of considerable significance.

China.

[773] WTO Trade Policy Review Body, *Trade Policy Review Report by the Secretariat - China*, supra note 609, pp.85-87.

[774] Judgment of the General Court, Case T-512/09 *Rusal Armenal ZAO v. Council of the European Union*, supra note 587, para.47.

[775] Recitals 4, 5, Article 1, Council Regulation (EC) No. 905/98 of 27 April 1998 amending Regulation (EC) No 384/96 on protecting against dumped imports from countries not members of the European Community, OJ L 128, 30.4.1998, p.18.

[776] Article 2.2, WTO AD Agreement.

1.1 Not in the ordinary course of trade

Domestic sales in NMEs may firstly be argued as not being made in the ordinary course of trade. The prerequisite of price comparability "in the ordinary course of trade" is held to require that both importing and exporting countries be market economies.[777] Concerning the term "in the ordinary course of trade", WTO rules contain no comprehensive definition.[778] Only Article 2.2.1 of the WTO AD Agreement provides an example of sales not made in the ordinary course of trade, i.e. "sales of the like product...at prices below per unit (fixed and variable) costs of production plus administrative, selling and general costs".[779] This case is only an illustration and Article 2.2.1 does not purport to exhaust the range of sales not in the ordinary course of trade.[780] What specific requirements this standard indicates, the scope of which seems quite broad, are subject to interpretation.

According to Article 3.2 of the DSU, provisions of WTO agreements have to be interpreted in accordance with customary rules of interpretation of public international law.[781] Rules in this regard are codified principally in Articles 31 and 32 of the VCLT.[782] By applying Article 31.1, "in the ordinary course of trade" must be interpreted in good faith in accordance with the ordinary meaning to be given to it in its context and in light of the object and purpose of the AD Agreement. The starting point for treaty interpretation is "the words actually used" in the treaty.[783] Turning to ordinary meaning, according to the Oxford English Dictionary, firstly, the word "ordinary" means "belonging to the regular or usual order or course of things, occurring in the course of regular custom or practice, normal, customary".[784] Secondly, the phrase "in the course of" means "in the process of, during the progress of".[785] Thirdly, the ordinary meaning of "trade" as indicating a commercial activity is "the buying and selling of goods and commodities".[786] Then, the term "in the ordinary course of trade" should indicate circumstances belonging to the "regular, usual, or normal process of buying and selling". The critical question here is what the normal or regular transactions of sale and purchase contemporarily are. It is pointed out that the regular or usual course of a trade is characterized by the sellers' intent to realize a profit.[787] To be more precise, the usual conduct of trade should be based solely on commercial considerations, rather than on other factors, with the aim of realizing commercial

[777] Yan Cai, Eun-Mi Kim, "Analyzing China's Non-market Economy Status: A Focus on Anti-dumping Measures", supra note 460, p.132.
[778] Appellate Body Report, *United States - Anti-dumping measures on certain hot-rolled steel products from Japan*, supra note 594, para.139.
[779] Article 2.2, WTO AD Agreement.
[780] Appellate Body Report, *United States - Anti-dumping measures on certain hot-rolled steel products from Japan*, supra note 594, para.147.
[781] Article 3.2, Understanding on rules and procedures governing the settlement of disputes.
[782] Appellate Body Report, *United States - Standards for reformulated and conventional gasoline*, supra note 538, p.17; Appellate Body Report, *India - Patent protection for pharmaceutical and agricultural chemical products*, supra note 544, paras.45-46; Appellate Body Report, *United States - Countervailing measures on certain hot-rolled carbon steel flat products from India*, WT/DS436/AB/R, 8 December 2014, para.4.395.
[783] Appellate Body Report, *United States - Standards for reformulated and conventional gasoline*, p.17, ibid.
[784] Oxford English Dictionary, see: http://www.oed.com/view/Entry/132361.
[785] Oxford English Dictionary, see: http://www.oed.com/view/Entry/43183.
[786] Oxford English Dictionary, see: http://www.oed.com/view/Entry/204274.
[787] Christian Tietje, Vinzenz Sacher, "The new Anti-dumping Methodology of the European Union - A Breach of WTO-law?", supra note 703, p.14.

interests. Such an understanding of the ordinary course of trade is substantiated by the French version of the treaty text, which translates "ordinary course of trade" as "*au cours d'opération commerciales normales*".[788] The wording "*opération commerciales*" indicates a strong connection of the trade to profit, commercial interests.[789] The French version is obviously more accurate and it is equally authentic in legal effect.[790] The AB of the *US - anti-dumping measures on certain hot-rolled steel products from Japan* also confirmed the conduction of business based on commercial accounts to be the key criterion for evaluating sales "in the ordinary course of trade". While clarifying the implication of "in the ordinary course of trade", it stated that "where a sales transaction is concluded on terms and conditions that are incompatible with normal commercial practice for sales of the like product, in the market in question at the relevant time, the transaction is not an appropriate basis for calculating 'normal' value".[791] It made its assessment in this regard focused on specific sales transactions and proposed no requirement regarding the macro conditions of the market in which these specific transactions were made.

Moreover, the example given in Article 2.2.1 of the AD Agreement serves as a context for understanding the ordinary meaning of "in the ordinary course of trade". It states that "sales of the like product...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" and 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".[792] Article 2.2.1 describes a methodology for determining whether below-cost sales may be treated as not being made in the ordinary course of trade.[793] It indicates that unprofitable and uneconomic transactions can be regarded as outside the ordinary course of trade and reveals that the intent to make profit with transactions is indeed a decisive criterion for evaluating "in the ordinary course of trade".[794] Furthermore, national AD laws normally set transactions between linked parties, such as transfers within segments of an enterprise, as not in the ordinary course of trade.[795] Such stipulation is understandable since trade between linked parties is unusual and

[788] Ibid; Stéphanie Noël, "Why the European Union Must Dump So-called 'Non-market Economy' Methodologies and Adjustments in Its Anti-dumping Investigations", supra note 476, p.303.

[789] Stéphanie Noël, "Why the European Union Must Dump So-called 'Non-market Economy' Methodologies and Adjustments in Its Anti-dumping Investigations", ibid.

[790] Final provision, Agreement Establishing the World Trade Organization; Article 33.1, Vienna Convention on the Law of Treaties; Appellate Body Report, *European Communities - Measures affecting asbestos and asbestos-containing products*, WT/DS135/AB/R, 12 March 2001, para.91; Appellate Body Report, *United States - Final anti-dumping measures on stainless steel from Mexico*, WT/DS344/AB/R, 30 April 2008, fn.200.

[791] Appellate Body Report, *United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, supra note 594, para.140.

[792] Article 2.2.1, WTO AD Agreement.

[793] Panel Report, *European Communities - Anti-dumping measure on framed salmon from Norway*, WT/DS338/R, 16 November 2017, para.7.231.

[794] Christian Tietje, Vinzenz Sacher, "The new Anti-dumping Methodology of the European Union - A Breach of WTO-law?", supra note 703, p.14.

[795] For example, concerning the EU, the third subparagraph of Article 2(1) of its basic AD regulation stipulates: "[p]rices between parties which appear to be associated or to have a compensatory arrangement with each other my not be considered to be in the ordinary course of trade and may not be used to establish the normal value unless it is determined that they are unaffected by the relationship". With respect to the US, Section 771(15) of its Tariff Act of 1930 defines the term "ordinary course of trade" as meaning the conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to merchandise of the same class or kind. It further gives two examples of sales

the association between them may influence the terms and conditions of their transactions. The categorization of associated transactions into sales outside the ordinary course of trade was also supported by WTO jurisprudence based on the account that "usual commercial principles might not be respected".[796] In particular, sales between affiliates are highly probable of being used as a vehicle for transferring resources within a single economic enterprise.[797] Yet, the fact that the trading parties are related does not necessarily lead to the conclusion that sales and purchases between them are absolutely not in the ordinary course of trade. Normally, national AD laws provide simultaneously that transactions between related parties should be regarded as in the ordinary course of trade if the parties are unaffected by the relation between them, i.e. acting in the same way as independent trading parties and in conformity with commercial principles.[798] The US further introduces an arms-length test for its administering authority's decision in this regard, which was confirmed by the DSB, but was required to be applied in a even-handed fashion, i.e. not only low-priced, but also high-priced associated transactions both have to be excluded.[799] What really matters, therefore, is not the relationship between trading parties, but are the considerations underlying pertinent transactions. They should be based on economic pursuit for commercial interests rather than some other accounts. This understanding of "in the ordinary course of trade" though is stipulated merely in national legislation, it sheds some light on the ordinary meaning of this term and confirms that the key point of this requirement is the concerned transactions of sale and purchase being economically made to realize commercial profits.

The interpretation of this term cannot be liberally broadened since the words "course of trade" here has limited the analysis scope to the specific relationship between the sellers and buyers in specific transactions. As long as in specific transactions the sellers of the product concerned have freely made their sales on a commercially profitable basis, these transactions should be deemed as in the ordinary course of trade. In particular, "in the ordinary course of trade" cannot be read as requiring a trade to be made against market economy conditions, so as to embrace broad requirements concerning a country's macroeconomic regime. Such an understanding goes beyond the ordinary meaning of this term. Nonetheless, if a government interferes directly in individual transactions, such as appointing or restricting trading parties, fixing or regulating directly prices and amount of the transactions concerned, so as to prevent the free conduction of business on commercial terms and conditions, these sales can arguably be contended as not in the ordinary course of trade. Apart from such case, the fact that the formation of a price is influenced by factors other than market forces does not necessarily mean that the sellers and purchasers are not actually transacting following economic procedures. Broad use of the term "not in the ordinary course of trade" as including sales not made in arbitrarily

outside the ordinary course of trade. One is sales at less than cost of production stipulated in section 773(b)(1). The other is transactions between affiliated parties set in section 773(f)(2), which provides: "[a] transaction directly or indirectly between affiliated persons may be disregarded if , in the case of any element of value required to be considered, the amount representing that element does not fairly reflect the amount usually reflected in sales of merchandise under consideration in the market under consideration".

[796] Appellate Body Report, *United States- Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, supra note 594, paras.141, 143.

[797] Ibid, para.141.

[798] For example, Article 2(1) of the EU's basic AD regulation, Section 773b(f)(2) of the US Tariff Act of 1930.

[799] Appellate Body Report, *United States- Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, supra note 594, para.148.

market economy circumstances is a liberal construction of this term unjustifiable in international law. In addition, one thing worth mentioning is that there must be not any sales in the ordinary course of trade in the respective country in question for an investigating authority's disregarding of domestic prices.[800] This restrictive condition actually poses a very high requirement for constructing normal value for the sake of sales not in the ordinary course of trade.

In conclusion, the term "in the ordinary course of trade" at first glance seems to indicate broad and abstract requirements including requiring economic transactions to be made in market economy conditions. Legal interpretation of this term, however, does not allow for arbitrary reading of it. Although the WTO AD Agreement affords Members discretion "to determine how to ensure that normal value is not distorted through the inclusion of sales that are not 'in the ordinary course of trade', that discretion is not without limits".[801] As revealed above, the legal meaning of this term is not flexible to include deliberation of trade distortions caused by government intervention which does not step directly into the conduction of specific transactions of the product concerned. The application of NME treatment in the name of normal value construction therefore cannot be sufficiently based on the premise of no sales in the ordinary course of trade.

1.2 Particular market situation

The other remaining possibility which is closely related to the NME situation for investigating authorities to construct normal value under WTO law is the case of "particular market situation" which disqualifies domestic sales from a proper comparison. Regarding this broad and abstract term, the WTO AD Agreement provides neither a comprehensive definition, nor any guidance, including any example, on how to interpret it. The meaning of this wording has to be understood following the same customary interpretation rules codified in Article 31 of the VCLT.

The word "particular" ordinarily means "distinguished in some way among others of the same kind; not ordinary; special".[802] "Market" means "the arena in which commercial dealings in a particular commodity or product are conducted".[803] The ordinary meaning of "situation" is "condition or state".[804] It is pointed out that "situation" refers to the state itself but not to the circumstances leading to the situation.[805] The language "particular market situation" then should point to some condition or state of a market, where commercial dealings in a particular product are made, that is different from the ordinary state of the market. The implication of the wording "particular" and "situation" both has to be understood in the context of "market". Therefore, to clarify what particular market situation is, it is firstly necessary to figure out the usual state of a market. Since a market is the arena where commercial dealings take place, it normally should be

[800] GATT Panel Report, *EC - Imposition of anti-dumping duties on imports of cotton yarn from Brazil*, ADP/137, 4 July 1995, para.477.
[801] Appellate Body Report, *United States- Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, supra note 594, para.148.
[802] Oxford English Dictionary, see: http://www.oed.com/view/Entry/138260.
[803] Oxford English Dictionary, see: http://www.oed.com/view/Entry/114178.
[804] Oxford English Dictionary, see: http://www.oed.com/view/Entry/180520.
[805] Christian Tietje, Vinzenz Sacher, "The new Anti-dumping Methodology of the European Union - A Breach of WTO-law?", supra note 703, p.15.

balanced by the interplay of supply and demand from sellers and buyers, i.e. free market force. In certain context, such as the phrasing "free market force", the word "market" is directly used to indicate "the operation of supply and demand".[806] However, currently, hardly can we find a *laissez-faire* market which is completely free from government intervention. Conversely, it is generally recognized that a modern market is controlled by both an invisible hand, market force, and a visible hand, government regulation. Therefore, the situation of a market cannot be deemed as particular as long as government intervention is present. But, the particularity of the state of a market indeed can come from the existence in that market of external factors, other than market force, which influence pricing, and the fact that pricing in that market indeed is determined not solely by market force. Yet, considerable flexibility is left for investigating authorities' determination. For some extreme circumstances, such as the case stipulated in the second Ad Note to Article VI:1 GATT 1994, judgment can be easily made. For some transitional cases in the spectrum, a clear decision can be tricky. As the language "particular market situation" bestows considerable discretion for Members' application of this standard, prerequisites set in national AD laws for the application of NME treatment can possibly be justified on this basis, including explicit national NME criteria, standards of significant distortions, and direct employment and/or clarification of particular market situation in national AD laws, as long as they concern the interaction between government intervention and market force. Since a clear boundary dividing normal and particular market situation is difficult to make. Assessment in this regard will have to be made case by case. Nonetheless, national criteria concerning the evaluation of government intervention into market have to be equally applied regarding all Members as the WTO non-discrimination principle requires. Then there will be risk that WTO Members may capture practices they themselves employ or their strategic allies widely use.

In addition, as the word "situation" narrows this determination to the actual circumstances of the market itself, it is pointed out that the demonstration of the existence of government intervention alone is not enough for an affirmative decision of the presence of particular market situation. It must be further substantiated by analysis of dysfunction of free market forces of supply and demand caused by the government intervention.[807] The intervention itself does not trigger normal value construction. The EU's new approach is deemed to have met this requirement since it requires construction of normal value "when reported prices or costs, including the costs of raw materials and energy, are not the result of free market forces because they are affected by substantial government intervention".[808] It demands for a positive finding that relevant pricing is no longer the result of free market forces, rather than remaining merely at the stage of requiring for proving the existence of government intervention.

The meaning of the term "particular market situation" has not been extensively interpreted in WTO jurisprudence. The DSB has not given Members much guidance on what this term means. In practice, WTO Members frequently regard substantial government intervention into the supply and/or price of a main input of the product under consideration, i.e. a distorted input market, as

[806] Oxford English Dictionary, see: http://www.oed.com/view/Entry/114178.
[807] Christian Tietje, Vinzenz Sacher, "The new Anti-dumping Methodology of the European Union - A Breach of WTO-law?", supra note 703, p.15.
[808] Article 2(6a)(b) of Regulation (EU) 2016/1036 inserted by Article 1(1), Regulation (EU) 2017/2321, supra note 454.

a major reason justifying the existence of particular market situation. For example, in the case *Australia - Anti-dumping measures on A4 copy paper*, Australia based its affirmative determination of particular market situation in the Indonesian A4 copy paper market on the factual circumstances that the Indonesian government involved in its forestry and pulp industries through its support for the development of timber plantations and its prohibition on the export of timber logs.[809] These government measures on main raw material inputs of A4 copy paper were decided to have directly resulted in the distortions of Indonesia's domestic price for A4 paper, which was significantly below comparable regional benchmarks.[810] Furthermore, Article 2(6a) of the EU basic AD regulation, which establishes its new "significant distortions" approach, explicitly stipulates that significant distortions occur when reported costs, including the costs of raw materials and energy, are not the result of free market forces because they are affected by substantial government intervention.[811] This EU approach hinges most closely on the international AD discipline on particular market situation. It confirmed that distorted costs can be a case of particular market situation.

It is noteworthy that while assessing a particular market situation, Australia has made its stance clear that an affirmative decision cannot be made based merely on the existence of government involvement in either an input or final product market. Further analysis must be made concerning the effect this government intervention has on the domestic market of the product under investigation. In the parallel AD investigation concerning imports of Chinese A4 copy paper, the Australian investigating authority determined that there was not a particular market situation in the Chinese domestic market of A4 copy paper.[812] It firstly confirmed that the government of China exerted significant influence over the size and structure of the Chinese pulp industry and involved in the Chinese paper industry.[813] But it then clarified that these circumstances did not prevent the suitability of Chinese domestic A4 copy paper prices for determining normal value since relevant Chinese producers used significant quantities of imported pulp.[814] That is to say, what determines an investigating authority's judgment should be the final situation of the domestic market of the product at issue, its price formation in the market, rather than the *prima facie* presence of government involvement. Or, put it differently, the proved government intervention must reach such a degree that materially distorts domestic prices of the product concerned. Nonetheless, the Australian practices confirmed that a case of particular market situation can result from government intervention into input markets. The key point is that such intervention should be significant enough to distort the prices of inputs and expense for these inputs should be the principal costs for producers of the product at issue so as to materially influence their prices.

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[809] Anti-Dumping Commission, Department of Industry, Innovation and Science, Australian Government, Customs Act 1901 - Part XVB, report No. 341, *Alleged dumping of A4 copy paper exported from the Federal Republic of Brazil, the People's republic of China, the Republic of Indonesia and the Kingdom of Thailand and alleged subsidisation of A4 copy paper exported from the People's Republic of China and the Republic of Indonesia*, p.165.

[810] Ibid.

[811] Subparagraph (b), Article 2(6a) of Regulation (EU) 2016/1036 inserted by Article 1(1), Regulation (EU) 2017/2321, supra note 454.

[812] Anti-Dumping Commission, Department of Industry, Innovation and Science, Australian Government, Customs Act 1901 - Part XVB, report No. 341, supra note 809, p.146.

[813] Ibid, pp.153-165.

[814] Ibid.

With respect to the EU's new approach, Article 2(6a) of its basic AD regulation confirms distorted domestic costs and prices both to be "significant distortions" define by it.[815] Yet, the circumstances of distorted costs actually cannot be an independent case of particular market situation in parallel with distorted domestic prices of the final product. Only the latter genuinely reveals a particular situation of the domestic market of the product concerned, while the former is just a possible cause of particular market situation. It must be supplemented by further analysis of its influence on the price formation of the final product in the domestic market of the exporting country. Minor cost distortions or distortions of minor inputs alone cannot lead to particular market situation. Since no requirement concerning such further analysis in cases of distorted domestic costs is stipulated, provisions of the EU's new legislation which apparently counteract the so-called cost-dumping are not well-drafted to be cogently justified by "particular market situation" in international AD law.

The ordinary meaning of the term "particular market situation" proposes no restrictive requirement on the cause of this situation. The market of a final product indeed is distorted if its costs of production are distorted. In practice, a government also frequently interferes in the market of a specific product through influencing the supply and/or prices of its inputs, normally its proportionally largest components, rather than regulating directly domestic market of the product *per se*. However, we must note that an additional condition has to be satisfied to substantiate an investigating authority's construction of normal value in cases of particular market situation, i.e. "such sales do not permit a proper comparison".[816] This requirement obviously is rather vague and ambiguous. In legal text, the WTO AD Agreement makes no further clarification of it. In WTO jurisprudence, even the implications of "particular market situation" are not thoroughly examined and investigated, let alone this additional requirement of it. Neither has the term "proper comparison" been interpreted in cases of insufficient domestic sales, a scenario juxtaposed with "particular market situation", which also requires for its prevention of a proper comparison to exclude domestic prices from establishing normal value.

Article 2.4 of the WTO AD Agreement embodies a term - "fair comparison", which closely resembles this "proper comparison" requirement in Article 2.2.[817] Yet these two articles concern different matters. Article 2.4 requires for a fair comparison to be made between the export price and the normal value after they both have been determined according to their respective discipline in international AD law.[818] It specifically requires for investigating authorities' adjustments of either the normal value or the export price, in each case, on its merits, to give due allowance to factors influencing price comparability.[819] These factors, as illustrated in Article 2.4, include, *inter alia*, differences in conditions and terms of sale, taxation, levels of trade,

[815] Subparagraph (b), Article 2(6a) of Regulation (EU) 2016/1036 inserted by Article 1(1), Regulation (EU) 2017/2321, supra note 454.
[816] Article 2.2, WTO AD Agreement.
[817] Article 2.4, ibid.
[818] Panel Report, *European Union - Anti-dumping measures on biodiesel from Argentina*, WT/DS473/R, 29 March 2016, para.7.296; Panel Report, *Egypt - Definitive anti-dumping measures on steel rebar from Turkey*, WT/DS211/R, 8 August 2002, para.7.333; Panel Report, *European Union - Anti-dumping measures on certain footwear from China*, WT/DS405/R, 18 October 2011, para.7.263.
[819] Article 2.4, WTO AD Agreement.

quantities, physical characteristics.[820] In short, such differences are those in the characteristics of the compared transactions that have an impact, or are likely to have an impact, on the prices involved in the transactions.[821] WTO jurisprudence has clarified repeatedly the scope of the fair comparison requirement specified in Article 2.4, especially by stating that fair comparison does not require adjustment to be made to methodological approach establishing normal value, which are subject to provisions separately dealing with this matter.[822] The term "proper comparison" is right stipulated in a provision on the determination of normal value. Though it relates also to price comparability, it concerns comparability only of domestic prices in special cases of particular market situation and insufficient domestic sales so as to determine whether these domestic prices should still be used to establish normal value. Underlying this implication, this term should have a significant bearing in normal value determination. But actually no authoritative clarification and interpretation is given to it and great discretion is left to WTO Members.

National legislation in this regard actually is equally rough.[823] Some national AD provisions, such as Article 2(3) of the EU basic AD regulation, largely replicate relevant WTO rules. Moreover, in practice, an affirmative determination of particular market situation normally naturally leads to the exclusion of domestic prices for determining normal value, without making any analysis to the influence of this particular market situation on the comparability of domestic prices. As long as they are decided to be abnormally or artificially low, less than some competitive market prices, they are naturally regarded as not permitting for a proper comparison with export prices.[824] The additional restrictive condition in WTO AD Agreement is of little substantial significance in reality. Obviously, it is difficult to define precisely, or even illustrate, what a proper comparison is. Assessment in this regard will have to be made case-by-case. But one circumstance is actually clear. That is, distorted domestic prices should not be regarded as improper for comparison with export prices if they are distorted due to government intervention that equally affects both domestic and export sales. An example in this regard is distorted domestic prices caused merely by distorted costs which are equally used to produce products for export sales. These distortions in costs, however serious they are, influence both sides of the comparison, i.e. domestic and

[820] Ibid.

[821] Panel Report, *European Union - Anti-dumping measures on biodiesel from Argentina*, supra note 818, para.6.86; Appellate Body Report, *United States - Laws, regulations and methodology for calculating dumping margins ("zeroing")*, WT/DS294/AB/R, 18 April 2006, para.157; Panel Report, *United States - Anti-dumping measures on stainless steel plate in coils and stainless steel sheet and strip from Korea*, WT/DS179/R, 22 December 2000, para.6.77.

[822] Panel Report, *European Union - Anti-dumping measures on certain footwear from China*, supra note 356, para.7.263; Panel Report, *European Union - Anti-dumping measures on biodiesel from Argentina*, supra note 818, paras.7.301, 7.304; Panel Report, *European Communities - Definitive anti-dumping measures on certain iron or steel fasteners from China (recourse to Article 21.5 of the DSU by China)*, WT/DS397/RW, 7 August 2015, para. 7.304. It is noticeable that AB Report of the *EU - Anti-dumping measures from on biodiesel from Argentine* made serious reservation regarding what the Panel referred to as the "general proposition" that differences arising from the methodology applied for establishing the normal value cannot, in principle, be challenged under Article 2.4 as "differences affecting price comparability". It also pointed out that the reasoning in the AB report in *EC - Fasteners (China) (Article 21.5 - China)* is tailored to the circumstances of that dispute, in which the analogue country methodology was used. Yet it is confirmed that the need to make due allowance must be assessed in light of the specific circumstances of each case. Appellate Body Report, *European Union - Anti-dumping measures on biodiesel from Argentina*, supra note 435, paras. 6.86-6.87.

[823] For example Section 269TAC(2) of Customs Act 1901 of Australia, Article 2(3) of Regulation (EU) 2016/1036.

[824] Anti-Dumping Commission, Department of Industry, Innovation and Science, Australian Government, Customs Act 1901 - Part XVB, report No. 341, supra note 809, p.147.

export sales prices, to the same extent. The distortions themselves do not cause international price discrimination conducted by individual exporters and producers, i.e. dumping is not taking place due to them. Such kind of distortions should not prevent the comparability of domestic prices and they can still be used to establish normal value. Conclusion as such is made based on the nature of dumping - international price discrimination. The price comparability requirement underlying Article 2.4 of the WTO AD Agreement is actually also based on the same rationale. Due allowance has to be made to exclude price differences which do not reveal individual enterprises' discriminatory pricing from comparison to ensure a "fair comparison". Key AD legal terms, e.g. "normal value", "price comparability", "proper comparison", "fair comparison", are not some abstract notions that allow for subjective and arbitrary interpretation. They all have to be read in the context of international AD law and in light of the nature of dumping.

In the case *Australia - Anti-dumping measures on A4 copy paper*, Indonesia already challenged Australia's AD measures based, among others, the contention that Australia did not properly consider that Indonesian domestic sales price permitted a proper comparison since Indonesian A4 producers used the same raw material of the same cost, though distorted, to product A4 copy paper for domestic, Australian, and export markets.[825] This case is still ongoing. The panel's clarification of "proper comparison", rather than "particular market situation", will be at core for the settlement of this case. In conclusion, the existence of particular market situation *per se*, does not warrant the incomparability of domestic sales prices. A "particular market situation" is only relevant insofar as it has the effect of rendering domestic sales themselves unfit to permit a proper comparison.[826] There must be "something intrinsic to the nature of the sales themselves that dictates they cannot permit a proper comparison".[827]

Compared with "no sales of the like product in the ordinary course of trade", the scope of the premise "because of the particular market situation such sales do not permit a proper comparison" is much broader, even though both are equivocally worded and not expounded in WTO jurisprudence. This is in particular because while the former limits the investigating scope to the sales relationship between the sellers and buyers of specific goods, the latter allows for the deliberation of the overall market conditions of an economy. Even specific sales are made posited against particular market situation, such sales cannot be regarded as outside the ordinary course of trade as long as the trading parties have freely conducted their transactions based on commercial interests. The targeted scope of these two premises is different. Or there will be no need to specify these two cases distinctly and separately. If we recall the drafting history of this provision, as analyzed before in chapter 3 of this thesis, it was firstly introduced into the multilateral trade legal regime in the Kennedy round AD Code. And it was introduced at that time probably to cross-refer only the particular market situation stipulated in the second Ad Note to Article VI:1.[828] However, as the time changes, such an understanding currently is obviously too narrow, neither conforming to the reality nor supported by the ordinary meaning of the wording

[825] Request for the establishment of a panel by Indonesia, *Australia - Anti-dumping measures on A4 copy paper*, WT/DS529/6, 16 March, 2018, para. 1.
[826] GATT Panel Report, *EC - Imposition of anti-dumping duties on imports of cotton yarn from Brazil*, supra note 800, para.478.
[827] Ibid.
[828] For details, see Section 2.1 of Chapter 3 of this thesis.

interpreted in good faith as given above.[829] In conclusion, the abstract requirement "particular market situation" basically can support the construction of normal value in cases of substantial government intervention existing in an exporting Member's economy. In particular, China's satisfaction of this requirement can be relatively easily proved, since there are multiple reasons that the Chinese economic structure today is unique and not reflective of those found in other market-oriented capitalist systems.[830] However, though it is not unfounded to attribute circumstances of prevailing government intervention into a market to "particular market situation", the additional requirement "do not permit a proper comparison" substantially impedes an investigating authority's recourse to normal value construction in these circumstances. Moreover, while constructing normal value, a distinct and critical question still has to be clarified: according to WTO rules, what costs should and could be used?

1.3 Cost to be used in constructing normal value

Though WTO rules allow for investigating authorities' construction of normal value in certain circumstances, they are not permitted to construct in an arbitrary manner. Rules are specified to regulate their construction behavior, including restricting the cost information they can resort to. DSB rulings have also been rendered to clarify relevant provisions and practices. Both legal materials are of great importance for us to make it clear if surrogate country benchmarks can be utilized for price comparison, i.e. if surrogate country methodologies can be justifiably based on normal value construction.

Provisions concerning the cost information to be used for constructing normal value are stipulated in Article 2.2.1.1 of the AD Agreement. This Article sets that "costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration".[831] Obviously, what investigating authorities should normally rely on for constructing normal value are the recorded costs of the export or producer under investigation. The language "shall normally" is interpreted as preference should be given to recorded costs insofar as they are available and qualified.[832] Two prerequisites are specified for eligible recorded costs. One is that the records of costs should have been made in accordance with the generally accepted accounting principles of the exporting country. The other is that the records of costs should have reasonably reflected the costs associated with the production and sale of the product under consideration. Concerning the interpretation and application of the

[829] Some Members, for example Russian, still hold the point of view that "a particular market situation for the product concerned" is limited only to the situation described in the second Supplementary Provision to paragraph 1 of Article VI in Annex I to the GATT 1994, Request for the establishment of a panel by the Russian Federation, European Union - *Cost adjustment methodologies and certain anti-dumping measures on imports from Russia* (second complaint), 11 November 2016, WT/DS494/4.

[830] Mark Wu, "The WTO and China's Unique Economic Structure", supra note 373, pp.328-334.

[831] Article 2.2.1.1, WTO AD Agreement.

[832] Appellate Body Report, *European Union - Anti-dumping measures on biodiesel from Argentina*, supra note 435, paras.6.18, 6.46; Panel Report, *European Union - Anti-dumping measures on biodiesel from Indonesia*, supra note 435, para.7.20; Appellate Body Report, *European Communities - Anti-dumping duties on malleable cast iron tube or pipe fitting from Brazil*, WT/DS219/AB/R, 22 July 2003, para.99.

first prerequisite, there is not much controversy. An accountant also does not need to take macroeconomic conditions into account while recording relevant costs in accordance with the GAAP of the exporting country. Yet, the latter requirement has caused considerable disputes. The crux of these disputes lies on the question that if the recorded costs are distorted due to government intervention, should they still be regarded as reasonably reflecting the costs associated with the production and sale of the product concerned.

Fortunately, authoritative interpretation of this provision has already been given by the DSB while dealing with the EU's cost adjustment methodology in the two EU - biodiesel cases concerning imports of biodiesel from Argentina and Indonesia respectively.[833] In these two cases, the EU had argued that the prerequisite of the records to reasonably reflect the costs associated with the production and sale of the product concerned actually proposes a substantial requirement for the recorded costs - they should be reasonable, i.e. undistorted.[834] Furthermore, based on this requirement, the investigating authorities are justified to resort to surrogate country costs that are not distorted and driven by market force as substitutes for constructing the normal value of the product concerned.[835] However, both final DSB reports ruled against the EU's argument by clarifying clearly the requirement for "reasonableness" and the overall requirement in WTO law regarding the costs of production to be used for constructing normal value.

It is emphasized that the word "reasonably" is an adverb modifying the verb "reflect", not an adjective modifying the noun "costs".[836] The subject of the sentence moreover is the records kept by the exporter or producer under investigation.[837] Therefore, it is the "records" of the individual exporters or producers under investigation that are subject to the condition to "reasonably reflect" the "costs".[838] It is the action of reflection that has to be reasonable, i.e. suitably and sufficiently reproduces or corresponds to the "costs", rather than the costs reported in the records themselves.[839] Concerning costs, this provision stipulates no additional subjective requirement, neither a highly abstract standard of "reasonableness", to govern its meaning.[840] The introduction of the ambiguous and subjective standard "reasonable" into this requirement reads into words and implications that are not present in the treaty text. This practice violates customary rules of interpretation and does not respect the intent of the contracting parties.[841] According to its ordinary meaning, the term "costs" refers to "the price paid or to be paid to

[833] WT/DS473: *European Union - Anti-dumping measures on biodiesel from Argentina*, WT/DS473, WT/DS480: European Union - Anti-dumping measures on biodiesel from Indonesia.
[834] Appellate Body Report, *European Union - Anti-dumping measures on biodiesel from Argentina*, supra note 435, para.6.11; Panel Report, *European Union - Anti-dumping measures on biodiesel from Indonesia*, supra note 435, para.7.13. The claims and defences of these two cases concerning pertinent EU measures' consistency with Articles 2.2.1.1 and 2.2 of the WTO ADA and Article VI:1(b)(ii) of the GATT 1994 are indistinguishable and no divergent findings was made by the two dispute settlement proceedings.
[835] Ibid.
[836] Appellate Body Report, *European Union - Anti-dumping measures on biodiesel from Argentina*, supra note 435, paras. 6.37, 6.39.
[837] Ibid, paras.6.17, 6.20, 6.37.
[838] Ibid, para.6.20.
[839] Ibid, para.6.19.
[840] Ibid, para.6.37
[841] Appellate Body Report, *United States - final countervailing duty determination with respect to certain softwood lumber from Canada*, WT/DS257/AB/R, 19 January 2004, para.58; Appellate Body Report, *India - Patent protection for pharmaceutical and agricultural chemical products*, supra note 544, para.45.

acquire or produce something".[842] That is to say, it indicates costs incurred by the individual producers or exporters under investigation. An investigating authority does not enjoy "unfettered discretion to define subjectively" what costs should reasonably be, and "to apply a benchmark of 'reasonableness'".[843] According to the treaty text, the restrictive condition of "costs" is that they have to be "associated with the production and sale of the product under consideration". The language "associated" here is not drafted in relatively general and abstract terms, but indicates a genuine relationship.[844] The object of association is the production and sale of the product under consideration. "The product under consideration" is the specific product from the exporting country with respect to which dumping is being assessed in a specific AD proceeding.[845] In it entirety, the phrase "costs associated with the production and sale of the product under consideration" points to those costs incurred by the investigated exporter or producer that have a genuine relationship with the production and sale of the specific product from the exporting country with respect to which dumping is being assessed.[846] This in essence means the actual costs incurred by the investigated exporter or producer for producing and selling the product at issue. It in particular does not require the records to reasonably reflect some "hypothetical costs that might have been incurred under a different set of conditions or circumstances and which the investigating authority considers more 'reasonable' than the costs actually incurred".[847] The overall requirement of this condition is that the records kept by the exporter or producer under investigation suitably and sufficiently correspond to or reproduce those costs incurred by the investigated exporter or producer that have a genuine relationship with the production and sale of the specific product under investigation.[848] What an investigating authority should compare is the costs reported in the producer's or exporter's records with the costs actually incurred by that exporter or producer associated with the production and sale of the product concerned. It is not permitted to examine and evaluate the reasonableness of the recorded costs actually incurred, which are found within acceptable limits to be accurate and faithful, pursuant to a benchmark unrelated to the cost of production in the country of origin.[849] Moreover, Article 2.2 of the WTO ADA and Article VI:1(b)(ii) of the GATT 1994 directly and explicitly set the cost of production as "in the country of origin", i.e. "the price paid or to be paid to produce something within the country of origin".[850] This requires that the costs of production established by an investigating authority reflect conditions prevailing in the country of origin.[851] WTO jurisprudence actually has not yet clarified if the use of the word "normally" in "shall normally be calculated on the basis of

[842] Appellate Body Report, *European Union - Anti-dumping measures on biodiesel from Argentina*, supra note 435, para.6.18.
[843] Ibid, para.6.39.
[844] Ibid, para.6.28.
[845] Ibid, para.6.21.
[846] Ibid, para.6.19.
[847] Ibid, para.6.41; Panel Report, *European Union - Anti-dumping measures on biodiesel from Indonesia*, supra note 435, para.7.22.
[848] Appellate Body Report, *European Union - Anti-dumping measures on biodiesel from Argentina*, supra note 435, paras.6.26, 6.56; Panel Report, *European Union - Anti-dumping measures on biodiesel from Indonesia*, supra note 435, para.7.21.
[849] Appellate Body Report, *European Union - Anti-dumping measures on biodiesel from Argentina*, supra note 435, paras.6.23, 6.56; Panel Report, *European Union - Anti-dumping measures on biodiesel from Indonesia*, supra note 435, paras.7.21-7.22.
[850] Panel Report, *European Union - Anti-dumping measures on biodiesel from Indonesia,* supra note 435, para.7.30.
[851] Appellate Body Report, *European Union - Anti-dumping measures on biodiesel from Argentina*, supra note 435, paras.6.73.

the records kept" suggested there could be some basis other than the specified two conditions to reject the recorded costs.[852] Or, put it differently, is there possibility to reject the recorded costs even though the two conditions are met. But the requirement for costs to be in the country of origin strictly constrains investigating authorities' use of any information or evidence, rather than the records kept by the investigated exporter or producer, that reflects costs outside the country of origin. In conclusion, these two provisions make it clear that an investigating authority has to construct normal value based on costs actually incurred by the investigated producer in the country of origin, which reflect its market conditions, even distorted, rather than those in some other markets free from government-led distortions not actually incurred by the producer. The possibility of constructing normal value using surrogate country benchmarks is therefore excluded.

A question then may arise - what is the difference between the two prerequisites specified in the first sentence of Article 2.2.1.1 if the second one is to be understood as requiring merely the reasonable reflection of the actual costs in the country of origin? Or put it differently, is there any possibility that the costs recorded in accordance with the GAAP of the exporting country are not reasonably reflecting the actual costs incurred by the investigated producer in the country of origin associated with the production and sale of the product concerned? The answer is yes. Conformity with the GAAP does not necessarily ensure that the records reasonably reflect the costs associated with the production and sale of the product under consideration in a specific AD proceeding.[853] A few convincing examples can be easily given. Firstly, sometimes, costs reported in individual exporters' or producers' records are associated with the production and sale of several different products or benefiting past, current, and future production and sale, which can not be separately recorded and are allowed to be recorded as a whole. Then the costs recorded in accordance with GAAP have to be fairly allocated to reasonably reflect the costs associated with the production and sale of the product concerned.[854] This case happens frequently since the manner in which costs are recorded in financial statement in general may not necessarily correspond to how the product under consideration is defined for purposes of a specific AD investigation.[855] Proper allocation of costs is also often necessary to be made for depreciation or amortization or the relevant time periods.[856] Secondly, there are factual circumstances where the exporter or producer under investigation is part of a group of companies in which the costs of certain inputs associated with the production and sale of the product under consideration are spread across different companies' records.[857] Thirdly, there is also case of associated transactions where the costs reported in the records are not based on transactions of inputs at arm's length, therefore not reflecting the costs genuinely associated with the producer's production and sale of the product concerned in the country of origin.[858] A precise calculation of the costs associated with the production and sale of the product concerned requires for assessment to be made according to the circumstances of each investigated exporter or producer

[852] Panel report, *Ukraine - anti-dumping measures on ammonium nitrate*, supra note 494, para. 7.68.
[853] Appellate Body Report, *European Union - Anti-dumping measures on biodiesel from Argentina*, supra note 435, para.6.21.
[854] Ibid, para.6.33.
[855] Ibid, paras.6.21, 6.33.
[856] Ibid, para.6.30.
[857] Ibid, para.6.33.
[858] Ibid.

in the exporting country.[859] It is right because of all above potential cases, among others, that investigating authorities have to freely examine the reliability and accuracy of the records, duly making appropriate and adequate adjustment and allocation to arrive at the costs incurred by the investigated exporter or producer genuinely associated with the production and sale of the product at issue in the country of origin. This is right the significance of the second condition and it is by no means a superfluous requirement.[860] The reliability here refers to if the records concerned genuinely reflect the costs actually incurred. It does not concern whether unrelated suppliers' prices of an input are government regulated, lower than the prices prevailing in other countries.[861] The direct or indirect nature of the regulation in question is also irrelevant.[862]

Based on the above understandings, the DSB reports of the two EU - biodiesel cases both have ruled the EU's specific concerned AD measures imposed in according with its cost adjustment methodology as WTO-inconsistent since its investigating authority used "undistorted" surrogate costs not actually incurred by the producers to construct normal value.[863] The EU's argument of "reasonableness of costs" was not supported. Its specific AD measures were judged as in violation of Articles 2.2.1.1 and 2.2 of the ADA as well as Article VI:1(b)(ii) of the GATT 1994.[864] Relevant EU AD rules, which establish its cost adjustment methodology, however, were not ruled as WTO-inconsistent "as such", since the complainants failed to prove, *prima facie*, such a violation.[865]

Regarding an "as such" claim, it concerns WTO Members' abstract legislation which is generally and prospectively applicable, rather than concrete measures applying a Member's legislation in specific instances.[866] WTO Members are allowed to initiate "as such" claims, even regarding national legislation which provides for discretionary margin for its implementation.[867] And discretionary legislation, juxtaposed with mandatory legislation, can also be found to violate certain WTO obligations.[868] Specific to the concerned EU AD rule, the second subparagraph of Article 2.5 of its basic AD regulation, it specifies as follows.

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[859] Ibid, para.6.22.
[860] Ibid, para.6.33.
[861] Panel report, *Ukraine - Anti-dumping measures on ammonium nitrate*, supra note 494, para.7.90.
[862] Ibid, para. 7.91.
[863] Appellate Body Report, *European Union - Anti-dumping measures on biodiesel from Argentina*, supra note 435, paras.6.56, 6.57, 6.82, 6.83, 7.2, 7.3; Panel Report, European Union - Anti-dumping measures on biodiesel from Indonesia, supra note 435, paras. 7.34, 8.1.
[864] Ibid.
[865] Appellate Body Report, *European Union - Anti-dumping measures on biodiesel from Argentina*, supra note 435, paras.6.282, 6.286.
[866] Appellate Body Report, *Unites States - Sunset review of anti-dumping duties on corrosion-resistant carbon steel flat product from Japan*, WT/DS244/AB/R, 15 December 2003, para.82; Appellate Body Report, *United States - Sunset reviews of anti-dumping measures on oil country country tubular goods from Argentina*, WT/DS268/AB/R, 19 November 2004, paras.172, 187; Appellate Body Report, *United States - Certain methodologies and their application to anti-dumping proceedings involving China*, WT/DS471/AB/R, 11 May 2017, para.5.127; Appellate Body Report, *United States - Laws, regulations and methodology for calculating dumping margins ("zeroing")*, supra note 821, para.198.
[867] Appellate Body Report, *United States - Anti-dumping act of 1916*, supra note 345, fn. 59 to para.99, (referring to Panel Report, *United States - Section 301-310 of the Trade Act of 1974*, WT/DS152/R, 22 December 1999, paras.7.53-7.54); Appellate Body Report, *European Union - Anti-dumping measures on biodiesel from Argentina*, supra note 435, para. 6.229.
[868] Ibid.

If costs associated with the production and sale of the product under investigation are not reasonably reflected in the records of the party concerned, they shall be adjusted or established on the basis of the costs of other producers or exporters in the same country or, where such information is not available or cannot be used, on any other reasonable basis, including ***information from other representative markets****.*[869] [emphasis added]

The term employed here is "information", rather than "costs". With respect to information, WTO rules actually do not include a reference to information or evidence.[870] Article 2.2.1.1 of the WTO ADA specifies records kept by the exporter or producer under investigation as the preferred source of information. This provision, however, is pointed to do not prevent an investigating authority's resort to information or evidence from other sources, including from sources outside the country of origin. The AB of the *EU - Biodiesel (Argentina)* case stated that:

[w]e do not see, however, that the first sentence of Article 2.2.1.1 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 or producer under investigation may need to be analysed or verified using documents, information, or evidence from other sources, including from sources outside the "country of origin".[871]

Article 2.2 of the WTO ADA and GATT VI:1(b)(ii) require normal value to be constructed based on costs of production in the country of origin. Nonetheless, they do not contain "additional words or qualifying language specifying the type of evidence that must be used, or limiting the sources of information or evidence to only those sources inside the country of origin".[872] An investigating authority will naturally look for sources inside the country of origin, but this does not preclude the possibility of its using of information or evidence from outside the country.[873] But, the key point is that whatever information or evidence is used to determine the "cost of production", it must be "apt to or capable of yielding a cost of production in the country of origin", and investigating authority has to ensure that "such information is used to arrive at 'the cost of production in the country of origin'".[874] An investigating authority has to adapt the information it collects from external sources to reflect the cost of production in the country of origin, but cannot simply substitute the costs from other markets for the cost of production in the country of origin for constructing normal value.[875] Article 2.2 of the ADA and Article VI:1(b)(ii) make it clear that the determination shall be made based on "the cost of production in the country of origin".

The second subparagraph of Article 2(5) of the EU's basic AD regulation, neither requires

[869] Article 2(5), Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016, supra note 738.
[870] Appellate Body Report, *European Union - Anti-dumping measures on biodiesel from Argentina*, supra note 435, para. 6.69.
[871] Ibid, para.6.71.
[872] Ibid, paras. 6.70, 6.74, 6.82.
[873] Ibid.
[874] Panel Report, *European Union - Anti-dumping measures on biodiesel from Indonesia*, para.7.30; Appellate Body Report, *European Union - Anti-dumping measures on biodiesel from Argentina*, paras.6.73, 6.82.
[875] Appellate Body Report, *European Union - Anti-dumping measures on biodiesel from Argentina*, paras.6.73, 6.82.

investigating authorities to use surrogate country costs to establish the normal value, nor precludes the possibility for EU authorities to adapt information from other representative markets to reflect the costs of production in the country of origin.[876] In other words, This provision can be applied in a WTO-consistent manner. Regarding "as such" challenge, there is no precise legal standard, especially with respect to challenge concerning discretionary legislation. Determination in this regard has to be made depending on the particular circumstances of each case since the standard will vary.[877] In the case at issue, the AB contended that an affirmative "as such" inconsistency determination does not need to be based only on extreme circumstances that there is completely no room for challenged legislation to be applied in a WTO-consistent manner.[878] It also does not suffice to base such a determination on the mere fact that relevant legislation is capable of being applied inconsistently with WTO rules in some circumstances.[879] Concerning pertinent EU AD rule, though it can be applied both in a WTO - compatible and incompatible manner, it was assessed to not restrict, in a material way, the discretion of the EU authorities to construct the normal value in a manner consistent with WTO law.[880] The "as such" claim was therefore rejected in light of the specific circumstances of the case at issue and given the procedural legal rule that it is the complainant's burden to prove WTO-inconsistency of a challenged measure, including a *prima facie* case of "as such" challenge.[881]

However, circumstances of some other national legislation providing for cost adjustment or reestablishment may be different. National legislation in this regard includes, *inter alia*, Article 2(6a)(a) of the EU basic AD regulation, Section 43(2)(b) of the Customs (International Obligation) Regulation 2015 of Australia, and Section 504 of the US Trade Preferences Extension Act of 2015. To be specific, Article 2(6a)(a) of the EU basic AD regulation stipulates that

> *[in] case it is determined ... that it is not appropriate to use **domestic prices and costs** in the exporting country due to the existence in that country of significant distortions within the meaning of point(b), the normal value **shall** be constructed **exclusively** on the basis of costs of production and sale reflecting **undistorted** prices or benchmarks...*[882] [emphasis added]

Relevant Australian legislation sets two requirements concerning records kept by the investigated exporter or producer for its investigating authorities' reliance on them to determine the amount of costs of production. These two requirements are: "the records: (i) are in accordance with generally accepted accounting principles in the country of export; and (ii) reasonably reflect **competitive market** costs associated with the production or manufacture of like goods" [emphasis added].[883] Australian investigating authorities "must work out the amount by using the information set out in the records" insofar as these two requirements are fulfilled.[884]

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[876] Ibid, paras.6.281, 6.284.
[877] Ibid, para. 6.285.
[878] Ibid, paras. 6.279, 6.286.
[879] Ibid, paras. 6.282, 7.11
[880] Ibid, paras. 6.281, 7.10
[881] Ibid, paras. 6.271, 6.286. 7.11
[882] Subparagraph (a), Article 2(6a) of Regulation (EU) 2016/1036 inserted by Article 1(1), Regulation (EU) 2017/2321, supra note 454.
[883] Section 43(2), Customs (International Obligations) Regulation 2015, Select Legislative Instrument No. 32, 2015, made under the Customs Act 1901.
[884] Ibid.

These two regulatory requirements appear to largely resemble those specified in Article 2.2.1.1 of the WTO ADA. Yet, with the introduction of the emphasized words, the second condition actually puts forward an extra substantial requirement concerning recorded costs which materially distinguishes it from the WTO one.

Pertinent US provision specifies as follows:

> *...if **a particular market situation** exists such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production **in the ordinary course of trade**, the administering authority **may** use another calculation methodology under this subtitle or any other methodology.*[885] [emphasis added]

This provision employs the wording "particular market situation" and "in the ordinary course or trade", which is identical to the WTO terms used in Article 2.2 of the WTO ADA, which have been investigated above. However, legal implications underlying these two terms are distinct in the two contexts. As analyzed above, in WTO law, "in the ordinary course of trade" and "particular market situation" are standards for the examination of domestic sales so as to determine comparability of their prices. They respectively refer to two exceptional circumstances, though overlaps may happen, under which investigating authorities may resort to normal value construction, one of the two equal alternatives to domestic sales prices. In US AD law, however, they are used to assess the cost of production, which do not have any counterpart in WTO law. And the presence of a particular market situation as described gives US administering authorities the power to use any methodology for determining normal value, including implicitly the use of costs of production not in the country of origin.

The above provisions actually all require for "reasonableness" of costs of production to be used for constructing normal value, crafting or incorporating this requirement by introducing either the adjective "undistorted", or the restrictive language "competitive market", or "in the ordinary course of trade". Their "reasonableness" requirement is to be evaluated in the context of the broader market situation of the country of origin, against some abstract and subjective benchmarks of reasonable costs, which may be retrieved outside the country of origin. It is not to inquire into the reliability and accuracy of the costs reported in the records of the investigated exporters or producers against their actually incurred costs genuinely associated with the production and sale of the production under investigation in the country of origin.

However, legal requirements in respect of investigating authorities' behaviors diverge among these three legal regimes if relevant recorded costs are determined to be "unreasonable", either "distorted", or not reflecting the level of a "comparative market" or "in the ordinary course of trade". In the cases of the US and Australia, investigating authorities are not obliged to disregard recorded costs, neither are they required to use surrogate costs of production not in the country of origin. They still have the discretion to act in a WTO-consistent manner, i.e. their discretionary national legislation does not prevent WTO-consistent application. Especially the Australian law, it

[885] Section 504(c)(2), Trade Preferences Extension Act of 2015, Public Law 114-27, 114th Congress, 129 STAT. 362, June 29, 2015.

only makes an affirmative and compulsory requirement that investigating authorities must work out the amount of costs of production based on information in the records if they fully satisfy those legal requirements. It provides no stipulation in regard to the sources of information or evidence, and costs to be otherwise used if those requirements are unfulfilled. This legislation, as well as the discretionary US legislation, is not "as such" inconsistent with WTO law if we examine the two through the standard of restricting WTO-consistent application in a material way in light of relevant WTO obligation and the respective nature of the two legislations. But an affirmative determination of "as applied" violation can be reasonably made if a US or Australian investigating authority indeed disregards recorded costs eligible in WTO law and/or resorts to "reasonable" costs outside the country of origin relying on these two sets of provisions.

The nature of the pertinent EU legislation, however, is fundamentally different. It is a mandatory legislation applicable in circumstances where both domestic prices and costs of an exporter or producer are determined to be inappropriate for establishing normal value due to the existence of significant distortions. This premise in itself is highly problematic in light of WTO Members' obligation to construct normal value based on costs of production in the country of origin, which should reflect conditions prevailing in its market, even distorted.[886] To be direct, according to WTO law, no such circumstance exists that domestic costs are deemed as inappropriate for constructing normal value on account of distortion. Furthermore, the EU legislation in question obliges an investigating authority's construction of normal value only on undistorted costs, which unavoidably induces its substitutive use of some undistorted surrogate country costs to remove distortions in the exporting country. The EU legislation at issue therefore mandates an investigating authority to act inconsistently with WTO law. There is no discretion and possibility to act in a WTO-consistent manner. This new EU rule clearly and definitely violates WTO law "as such".

A good aspect of the rulings of the two biodiesel cases is that national investigating authorities are confirmed to be not limited in the sources of information usable for normal value determination. They showed that off-shore information can also be used as a reference. But adjustment is compulsory, the ultimate aim of which is to arrive at the cost of production in the country of origin. It is not yet finally clear how far-reaching this adjustment should be. But since the ultimate goal is to arrive at the cost of production in the country of origin, prevailing distortions in the market of the country of origin must be taken into account rather than excluded in the final cost. Any distortion in the market at issue is a circumstance in the country of origin that needs to be regarded.[887] In short: if an authority collects data from external sources, i.e. third countries or international reference prices, these data have to be adapted in a way that they reflect the prevailing distortions in the input markets at issue. This actually means that distortions in input markets of an exporting country are not counteracted by AD measures, i.e. the so-called cost-dumping is not addressed in international AD law. The rationale underlying this practice is the nature of dumping. Within the international AD legal regime, dumping is a private discriminatory pricing behavior of individual enterprises in international trade, rather than

[886] Appellate Body Report, *European Union - Anti-dumping measures on biodiesel from Argentina*, supra note 435, paras.6.73.
[887] Panel Report, *European Union - Anti-dumping measures on biodiesel from Indonesia*, supra note 435, para.7.32.

behaviors of states. Distortions of costs that have nothing to do with individual enterprises' private discriminatory pricing behavior therefore do not influence those costs' applicability. The issue of the nature of dumping will be further dealt with in detail in next section.

As concluded above, the additional requirement - not permitting a "proper comparison" in the case of "particular market situation" precludes an investigating authority's resort to normal value construction on account solely of distorted costs which are equally incurred by the investigated export or producer in domestic and export sales. WTO rules on costs of production, as already expounded in WTO jurisprudence, moreover, substantially and completely close the door for surrogate country methodologies applied in the name of normal value construction. NME treatment is anchored in surrogate country methodologies. It aims to subtract out distortions in the exporting country by using surrogate undistorted prices and/or costs reflecting costs of production in countries other than the country of origin. This practice is an outrageous violation of the WTO obligation on normal value construction.

Lastly, one thing worth mentioning is that WTO rules on costs of production refer not only to normal value construction, but also determination of if sales at issue have been made in the ordinary course of trade. According to Article 2.2.1 of the WTO ADA, sales at issue can be regarded as not in the ordinary course of trade if, in conjunction with the satisfaction with some additional requirements, they were made at prices below per unit costs of production plus SG&A costs.[888] The costs of production here are subject to the same discipline in WTO law, i.e. Article 2.2.1.1, as costs of production used for constructing normal value.[889] This means that they should also be the actually incurred costs as clarified and ascertained above. This requirement illegalize national ordinary-course-of-trade test that uses some fictitious surrogate costs inconsistent with Article 2.2.1.1 to determine if sales at issue have been made at prices above costs.[890] Actually, in theory, the use of surrogate cost benchmarks which have not been actually incurred by the investigated exporters or producers can not reveal if they have conducted their business based on commercial interests. The pursing for commercial profits, as analyzed before, is the key for assessing if sales are in the ordinary course of trade or not.

1.4 Dumping: a behavior of individual enterprises rather than states

In order to understand why costs in the country of origin, even distorted, have to be used for constructing normal value, we have to make it clear that dumping is a behavior of individual enterprises rather than states. As introduced before in Chapter one, dumping is price discrimination between national markets. It is condemned as unfair based on the contention that dumpers have gained artificial competitive advantages by selling their products at higher prices in

[888] Panel Report, *European Communities - Anti-dumping measure on framed salmon from Norway*, supra note 793, para.7.231; Panel Report, *Ukraine - anti-dumping measures on ammonium nitrate*, supra note 494, paras.7.109-7.110.
[889] Panel Report, *European Communities - Anti-dumping measure on framed salmon from Norway*, ibid, para.7.252; Panel Report, *Ukraine - anti-dumping measures on ammonium nitrate*, ibid, para.7.116.
[890] Panel report, *Ukraine - anti-dumping measures on ammonium nitrate*, ibid, para. 7.116.

their segregated home market, the sanctuary market which is not easily accessible to foreign producers, to cross-subsidize their export sales. It is a pricing behavior of individual enterprises, individual exporters or foreign producers.[891] They have the autonomy to decide whether to sell their products at different prices in international trade, to be more precise, at lower prices in foreign markets. Yet, the behavior of dumping is not completely free from government influence. A prerequisite for the conduction of international price discrimination is market segregation, which is commonly caused by government restrictions on imports. The government's provision of export subsidy is also a frequent incentive for an exporter to conduct dumping.

It should be reminded that there is constant controversy on the economic rationales underlying dumping and anti-dumping. The existence of a sanctuary home market cross-subsidizing export sales and the imposition of AD measures to ensure fairness is in particular questioned. Regardless of all controversy, what is clear is that dumping is a private discriminatory pricing behavior of individual enterprises, not a behavior of states, in international trade, even though the macroeconomic condition in an exporting country influences its exporters' decision of price setting. AD measures are imposed to defend against private discriminatorily-low pricing in international trade. Government export subsidies can also be offset by the imposition of AD measures, but they are offset since they are embodied in individual exporters' discriminatory pricing behaviors. The AD legal regime has limited itself to counteracting the private behavior of price discrimination of individual exporters and this is the essential characteristic distinguishing AD from other trade remedy mechanisms, especially the anti-subsidy regime. The AD Agreement seeks to provide the possibility to counteract injurious dumping by private actors.[892] The Agreement on Subsidies and Countervailing Measures, conversely, provides for the challenging and counteracting of state subsidies. The latter explicitly links to the action of a state, whereas the former ties in with economic actions of individuals.[893]

The term "normal value" in international AD law should be comprehended based on the above understanding of dumping. It has specific and limited meaning in the context of AD law and does not indicate some abstract value of a product, as its *prima facie* literal meaning indicates, which is pointed to should be formed free from government-led distortions.[894] The claim that home market prices must be the product of market principles of cost and pricing structures in order to be used does not adequately consider whether a particular market distortion affects home market prices only without affecting also export prices or affects actually prices of both kinds of sale.[895] If the prices a producer pay for inputs are distorted, this distortion

[891] Appellate Body Report, *United States - Final anti-dumping measures on stainless steel from Mexico*, WT/DS344/AB/R, 30 April 2008, para.98; Appellate Body Report, *United States - Measures relating to zeroing and sunset reviews*, WT/DS322/AB/R, 9 January 2007, para.111; Panel Report, *Ukraine - Anti-dumping measures on ammonium nitrate*, supra note 494, para.7.87.

[892] Appellate Body Report, *United States - Anti-dumping and countervailing measures on large residential washers from Korea*, WT/DS464/AB/R, 7 September 2016, para.5.52; Appellate Body Report, *European Union - Anti-dumping measures on biodiesel from Argentina*, supra note 435, para.6.25.

[893] Christian Tietje, Vinzenz Sacher, "The new Anti-dumping Methodology of the European Union - A Breach of WTO-law?", supra note 703, p.14.

[894] EU, First written submission by the EU in the World Trade Organization Panel Proceedings, *European Union - Measures related to price comparison methodologies* (DS516), supra note 605, para.45-47.

[895] K. William Watson, "Will Nonmarket Economy Methodology Go Quietly into the Night? US Antidumping Policy toward China after 2016", supra note 392, p.8.

will influence both its home market and export sales prices. The producer *per se* cannot be regarded as conducting discriminatory pricing strategy in international trade on account of this cost distortion. Free from other accounts, its home market prices are reliable benchmarks for establishing normal value, deciding dumping, and calculating dumping margin. Adjustment made to the allegedly distorted costs is not rectifying supra-competitive profits earned from domestic sales cross-subsidizing export sales, but competitive advantages gained from other sources, for example domestic subsidies in upstream industries, which are not embodied in the behavior of dumping.

Furthermore, in practice, if significant distortions in home market influence domestic sales prices without influencing a producer's costs, when domestic prices are considered to be artificially low, they normally will be substituted by surrogate country benchmarks, but rarely will domestic prices be substituted when they are considered to be artificially high. If normal value is to be understood as home market prices formed based on market principles, why artificially low and artificially high prices have been treated asymmetrically? The use of artificially high domestic prices for price comparison accords with the economic rationale underlying dumping, since this circumstance corresponds to the allegation that dumpers are gaining supra-competitive profits from domestic sales to cross-subsidize their lower-priced export sales. Yet, the disregard of artificially low domestic prices contradicts with this rationale since artificially low domestic prices exactly illustrate that there is no sanctuary domestic market for the exporters which substantiates them to undercut their export prices. Even if domestic prices are disregarded and normal value is to be constructed, it cannot be constructed on the basis of surrogate country benchmarks reflecting costs not actually incurred by the producer associated with the production and sale of the product concerned in the country of origin. This is because those costs have nothing to do with the producer's production and sale, bearing no significance in its pricing decision. AD duties calculated and imposed based on them are not counteracting individual exporters' discriminatory pricing behavior, what WTO AD law really regulates, but are used to serve much broader policy goals.

The circumstances of the two legal bases allowing for the use of surrogate country benchmarks, the second Ad Note to Article VI:1 and special NME treatment rules, however are different. The second Ad Note to Article VI:1 describes an exporting country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the state. In this circumstance, export sales are not made and priced by private enterprises but by the state. A state's decision making in trade and its prices does not need to be always driven by commercial interests. Its decision of export prices is not necessarily linked with that of domestic prices. A strict comparison between them therefore makes little significant sense in figuring out the existence and the margin of dumping.[896] The determination of dumping not based on a strict comparison with domestic prices is somewhat understandable in this circumstance. But once individual exporters are bestowed the autonomy to conduct trade and determine the prices thereof, their prices and costs should be used for price comparison to calculate dumping. The use of surrogate country benchmarks based on WTO Members' special

[896] Peter Buck Feller, "The Antidumping Act and the Future of East-West Trade", *Michigan Law Review*, Vol.66, No.1, November, 1967, pp.117-119.

commitments is another issue. These commitments are an integral part of relevant Members' international legal obligation. The use of surrogate country benchmarks is legally justified, even theoretically unreasonable. Such commitments are based on compromise, and are just a makeshift arrangement, rather than a permanent solution.

The understanding that dumping is a behavior of individual enterprises rather than state also limits the interpretation of general international AD rules on determining normal value. Since dumping concerns merely individual enterprises' private behavior, "in the ordinary course of trade" should be understood as indicating the specific trade relation between the seller and the purchaser of the product concerned. A "particular market situation" influencing price comparability cannot be identified based solely on government behavior. And "cost" has to be that actually incurred by the producer.

It is noticeable that while evaluating NMEs, identifying the existence of significant distortions and particular market situation, a series of factors have been incorporated in the assessment. The prevailing majority of them have nothing to do with individual exporters' discriminatory pricing behavior, but concern state intervention that influences both domestic and export sales prices. NME treatment requires for an investigating authority's use of surrogate country benchmarks to establish normal value so as to rectify market distortions in the exporting country caused by government intervention. What surrogate country methodologies counteract is therefore not exporters' private behavior of dumping, but rather a state's behavior of economic regulation and intervention. NME treatment proponents intentionally overlook or simply ignore the nature of dumping by beclouding the actual legal meaning of "normal value" in international AD law. As it is showed in the EU's new approach, considerations irrelevant to exporters' discriminatory pricing behavior are being increasingly introduced in normal value establishment. An adequate level of environment and labor protection is also required to be taken into account while choosing surrogate country benchmarks. The regulatory scope of AD measures has been widely broadened in NME cases given the limited specific meaning of dumping in international AD law. The AD legal regime is not an all-in mechanism and cannot be transformed into one by WTO Members' arbitrary use of NME treatment. The current broadening trend cannot be substantiate by economic rationales of dumping and anti-dumping, but simply reflects the rising trade protectionism and unilateralism that caters the priorities of politically powerful business.

There is division of regulatory matters among different international legal regimes. The AD legal regime authorizes and regulates measures taken against injurious dumping, a private discriminatory pricing behavior of individual enterprises in international trade, rather than state behaviors. It is even more impossible for AD to be an all-in mechanism to counteract various kinds of government intervention, which may be the regulatory subjects of other legal regimes, by arbitrarily broadening the meaning of "normal value" and constructing it through using surrogate country benchmarks. Some issues like adequate level of environmental and labor protection even go beyond the sphere of market distortion by government intervention. Broader considerations are incorporated in the application of NME treatment based on the vague argument of protecting fairness. Yet, the AD legal regime *per se* is not founded on a sound basis of defending against unfair trade. Nor is it the only international trade legal regime tasked with

protecting fairness. Moreover, fairness is a highly subjective concept. In international trade law, fairness is rule-based fairness. It is protected by rule of law and should be enhanced by improving relevant rules, rather than arbitrarily applying AD measures. The improvement of the rules system is difficult since the negotiation of new provisions involves tough balancing of conflicting state interests. Their enforceability also cannot always be ensured. Nonetheless, the use of NME treatment to bypass other regimes is not justifiable both in theory and in law. It moreover introduces discrimination and arbitrariness, facilitates trade protectionism, and destroys rule of law in international trade, which is more detrimental to the international society.

2. Recommendations for the revision of the anti-dumping legal regime in relation to NME treatment

The rationality of the whole AD legal regime has long been called into question and there is constant appeal for the abolishment of this regime, a legal and administrative non-tariff barrier, in its entirety.[897] Within the AD legal regime, NME treatment is the weirdest mechanism, which actually acts as a discriminatory and protectionist strategy to raise AD duties to higher levels. WTO Members' establishment and maintenance of AD regime is based on international rules. NME treatment, however, currently can hardly be justified by international AD rules any longer. As analyzed before in detail, Members' special commitments cease to be sound legal basis for NME treatment after they expire. The second Ad Note to Article VI:1 GATT 1994 has already lost its practical significance. General rules on normal value construction cannot be reasonably interpreted as supporting NME treatment, especially in light of the recent rulings of the EU-biodiesel cases concerning the EU's cost adjustment methodology. It is highly likely that China will succeed in the current WTO dispute settlement cases initiated against the continuous application of surrogate country methodologies regarding it from 11 December 2016, including against the EU's new "significant distortions" approach. Controversy on the interpretation of pertinent international AD rules will be clarified in these cases. The continuation of NME treatment will turn it into a lawless protectionism.[898]

NME treatment cannot be applied in any form to WTO Members providing no effective special commitment in this respect. In order to ensure WTO-conformity of their AD laws, WTO Members have to abolish completely their application of NME treatment regarding Members other than Vietnam and Tajikistan, whose special commitments in this regard are still effective. This abolishment should include the application of NME treatment both in the name of explicit NME treatment and on accounts of cost adjustment, and significant distortions. Since Vietnam's and Tajikistan's special commitments will also expire in the coming near future, the simultaneous

[897] David Palmeter, *The WTO as a Legal System: Essays on International Trade Law and Policy*, supra note 492, pp.31-33; Robert W. Staiger, Frank A. Wolak, "Measuring Industry-specific Protection: Antidumping in the United States", *Brookings Papers: Microeconomics*, Vol. 1994 (1994), pp.51-118; Thomas J. Prusa, "On the spread and impact of anti-dumping", *The Canadian Journal of Economics*, Vol.34, No.3, August 2001, pp.591-611; Gunnar Niels, "What is antidumping policy really about?", supra note 8, pp.467-492; Raj Bhala, "Rethinking Antidumping Law", *George Washington Journal of International Law and Economics*, Vol.29, 1995, pp.1-144.

[898] K. William Watson, "Will Nonmarket Economy Methodology Go Quietly into the Night? US Antidumping Policy toward China after 2016", supra note 392, p.1.

overall termination of NME treatment regarding them also makes sense.

The market and non-market economy dichotomy should be withdrawn from AD laws, though it may still have considerable political significance in reality. In international law, such a division is only permitted in several WTO Members' special commitments. General international rules, including AD rules, never mention this concept and the only relevant international criterion in this regard is the impossibly high standard set in the second Ad Note to Article VI:1 GATT 1994. For the prevalence of this division, it is rather unfortunate that a specific antidumping method has been elevated to the means of characterizing a country's economic regime. This means of characterizing is arguably unreasonable, which is not and cannot be based on any clear and scientific criteria that allow for objective assessment, but is based principally on protectionist needs. Such a clarification moreover leads to discrimination, harms rule of law in international trade, and politicizes trade issues. In overall, non-market economy, a concept introduced into international law based on political compromise, rather than economic justification and legal parsing, should be removed from the AD legal arena.

Surrogate country methodologies should be prohibited in all circumstances, including being applied to alleged market economy countries through existing mechanisms like cost adjustment. Price comparison should be made with benchmarks reflecting only costs in the country of origin, none of them can be substituted by costs in other economy, neither through adjustment nor reestablishment. Surrogate country methodologies cannot be justified by general international AD rules. In economic theory, surrogate country prices and costs also cannot be reasonably used since they have nothing to do with the investigated exporter's private discriminatory pricing behavior, i.e. being incapable of revealing dumping. The prohibition of surrogate country methodologies precludes fundamentally the applicability of NME treatment. Even in cases which can be justified by "no sales in the ordinary course of trade" or "particular market situation", normal value still can only be constructed based on costs of production in the country of origin. State intervention and/or regulation not reflected in private discriminatory pricing cannot be dealt with by AD through NME treatment, which bypasses domestic prices and costs. The unfairness claimed to be caused by state interventionism has to be handled through other regimes based on their rules.

In conclusion, NME treatment should be completely ended. As a mechanism rooted in the cold war period and a makeshift arrangement for contemporary transitional economies, NME treatment, including all its variants, all should be phased out. WTO Members cannot use surrogate country prices or costs for determining normal value by designating another Member as an NME, holding a Member's economy, in its entirety or concerning a part of it, as significantly distorted, or arguing some costs actually incurred by a Member's producers as not reasonable due to government intervention. If WTO Members are reluctant to give up their established practices in this regard and continue their application thereof, the WTO DSM should be utilized. To enhance the efficacy of AD measures as a trade defense instrument, actually a more practical and effective approach should be simplifying AD investigating and implementing procedures, which are normally long and costly especially for SMEs.[899]

[899] Cecilia Bellora & Sébasttien Jean, "Granting Market Economy Status to China in the EU: An Economic Impact

3. Improving the WTO legal regime as a whole to deal with government interventionism in economy

It should be noted here that this thesis though negates completely the reasonableness and legality of NME treatment after in-depth analysis, it does not hold the view that the current multilateral trade legal regime does not need to be improved and no action can be taken to treat prevailing concerns regarding China's rise as a state capitalist economy. The current controversy revolving China's economic regime and various measures destroying the WTO legal regime, for one thing result from the increasingly emerging trade protectionism and unilateralism in certain countries, especially the US, for another relate closely to the incongruity between the unchanged WTO rules system and the significantly varied trade circumstances. For the past 24 years, the WTO legal regime has remained substantially at a standstill, while the global trading landscape has shifted and entered into a new phase. Emerging economies are increasingly competing with traditional large international trading countries, posing considerable threat to their trade interests, with China being the leading and most striking challenging force. Moreover, China's strong competitiveness is frequently criticized as owing largely to its unique economic regime, regarding which the WTO legal regime lacks any robust discipline and therefore allows for China's growing taking advantage of its loopholes.[900] Regardless of if this contention is well-founded, what is clear is that the WTO legal regime currently needs to be reworked to rebalance conflicting interests and to resolve some prevailing concerns in the changed circumstances, especially those regarding China's particular economic regime, for its sustainable function. However, the AD legal regime is not the right arena where such effort should be put. WTO Members should give up their struggle in retaining NME treatment, stopping investigating the possibility of continuing their application. Instead, WTO Members should explore the improvement of some other regimes, or even the introduction of some new ones to reasonably deal with their current concerns. They should firstly make it clear if relevant issues can be justifiably dealt with in the realm of international trade law, if so, then explore the possibility and specific approaches to fill relevant gaps. All improvement work should be based on negotiation and finally fixed by rules. Effort in this regard should be aimed at facilitating free trade and encouraging competitiveness on a non-discriminatory basis, without prejudice to the rights of developing countries. In particular, the credibility of the rule-based system built under the WTO cannot be damaged.

The NME treatment controversy actually has already triggered or fueled the process of modernizing the WTO legal regime. The majority of Members agree that WTO rules have to be modernized to save the regime from going to an actual paralysis and they are now discussing how this aim can be satisfactorily achieved.[901] The EU and Canada moreover have put forward

Assessment", supra note 460, p.15.

[900] Testimony of Robert E. Lighthizer before the US House of Committee on Ways and Means, February 27, 2019, supra note 619.

[901] Canada has convened several meetings on this subject. On 24-25 October, 2018, Canada again invited 12 other WTO Members, including Australia, Brazil, Canada, Chile, EU, Japan, Kenya, Korea, Mexico, New Zealand, Norway, Singapore and Switzerland, with the exception of China and US, to attend such a meeting in Ottawa to discuss this issue. A joint communication was reached and released. "Joint Communiqué of the Ottawa Ministerial on WTO Reform", available at: https://www.wto.org/english/news_e/news18_e/dgra_26oct18_e.pdf. The EU is

some concrete proposals in this regard, which refer to a wide range of topics, including transparency, subsidies, SOEs, digital trade, dispute settlement, the monitoring role of the WTO, and so on.[902] Proposed rules on the regulation of SOEs, a strong government presence in market, *inter alia*, undeniably target principally China's unique economic regime. In addition, under the leadership of the US, some new regional trade agreements, such as TPP,[903] CPTPP,[904] and USMCA[905] have already incorporated considerable new rules dealing specifically and directly with some significant government intervention behaviors prevailing principally in China. These rules concern the regulation of currency manipulation by governments, and especially systemic and comprehensive discipline of SOEs.[906] Though they have been established outside the WTO legal regime, these rules set a model for future development of international trade rules and will definitely influence the reform of the WTO legal regime.

In fact, the most pertinent arena to deal with unfair trade caused by government intervention into market should be the legal regime of subsidies and countervailing measures. China actually provides also for special commitments in this respect, which will not expire. These special commitments include firstly the permission of an investigating authority's use of external benchmarks in certain circumstances to measure the amount of subsidy in terms of the benefit conferred.[907] Actually, Article 14(d) of the SCM Agreement *per se* also provides for the room, though very limited, for the use of out-of-country benchmarks to calculate subsidy benefit in respect of all types of Members.[908] Secondly, an investigating authority is authorized to identify subsidies granted predominantly to SOEs directly as specific.[909] These special arrangements, however, are still considered to be insufficient. WTO Members for one thing have great concerns

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also engaging with Japan, the US, China and other G20 countries through some other approaches to discuss this matter, European Commission, "Press release: European Commission presents comprehensive approach for the modernization of the Word Trade Organization", Brussels, 18 September 2018, available at: http://europa.eu/rapid/press-release_IP-18-5786_en.htm.

[902] Communication from Canada, "Strengthening and modernizing the WTO: discussion paper", 24 September 2018, JOB/GC/201; European Commission, "Concept paper: WTO modernization", supra note 543. Concerning proposed amendments aiming at improving the DSU, Communication from the European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore and Mexico to the General Council, WT/GC/W/752, 26 November 2018.

[903] The Trans-Pacific Partnership (TPP) was negotiated under the leadership of the US, who however later quit. Nonetheless, it established comprehensive and systematic discipline on SOEs for the first time and has had far-reaching influence on the treaty text of the later CPTPP. Specific treaty text available at: https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text.

[904] The Comprehensive and Progressive Agreement of Trans-Pacific Partnership (CPTPP) was negotiated and concluded under the leadership of Japan after the US quit the TPP negotiation. Its treaty text revamps that of the TPP. It in particular duplicates TPP's discipline on SOEs. With Australia, the 6th negotiating party, ratifying this agreement on 31 October 2018, the CPTPP entered into force on 30 December, 2018, specific treaty text available at: https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-text/.

[905] The United States-Mexico-Canada Agreement (USMCA) was reached in the renegotiation of the NAFTA. It was signed on 30 November 2018. Its rules on SOEs are largely developed from the discipline established by the TPP. Specific treaty text available at: https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between.

[906] For example, Chapter 22 "State-Owned Enterprises" and Chapter 33 "Macroeconomic Policies and Exchange Rate Matters" of the USMCA; Chapter 17 "State-Owned Enterprises and Designated Monopolies" of the CPTPP.

[907] Section 15(b), Protocol on the Accession of the People's Republic of China.

[908] AB Report, *United States - Final countervailing duty determination with respect to certain softwood lumber from Canada*, supra note 841, paras.96, 101-103.

[909] Section 10.2, Protocol on the Accession of the People's Republic of China.

about benefit conferred by Chinese government other than financial contributions.[910] For another, they deeply worry about market-distorting subsidies channeled through SOEs, especially state-owned banks providing loans at preferential terms and giant SOEs providing downstream producers crucial inputs at prices less than adequate remuneration.[911] Such subsidies are not adequately captured under the current international trade rules principally because there is material impediment for an investigating authority's identification of an SOE as a "public body" of the government. An affirmative determination in this regard requires not only government ownership and government control of an SOE, but also the SOE's exercise of government authority to perform government function.[912]

The failure to deal with these concerns is considered to be eroding considerably a level playing field.[913] Confronting these concerns, initiatives have been proposed principally concerning increasing transparency and introducing special discipline for SOEs.[914] The issue of how to regulate SOEs has been a focus of the present reforming process, which can hardly be circumvented while negotiating the modernization of the WTO rules system. Established rules in this regard normally firstly set a definition for SOEs, then specify relevant requirements concerning their operation, for example, non-discriminatory treatment, commercial considerations, transparency, competitive neutrality, and non-commercial assistance.[915] Regarding the legal regime of subsidies and countervailing measures, it should be noted that transitional economies are not the only Members that are providing financial support and SOEs are not the only problematic existence in this field. There is prolonged tough bargaining concerning subsidies granted to agricultural products and also heated debate about grants for trade in service. While the stage for ameliorating this regime is set, all these issues should be carefully reviewed and deliberated to improve international economic governance. In general, further in-depth research should be conducted concerning reforming the WTO legal regime.

[910] Government support other than financial contributions providing export benefits which arouses significant concerns typically includes currency devaluation and export restrains. However, they are not countervailable not only because they can hardly be regarded as financial contribution granted by government, but also because they are not specific but permeating a country's entire economy. In addition, apart from subsidies, SOEs also enjoy great competitive advantages derived from their privilege in market access and monopoly status.

[911] European Commission, "Concept paper: WTO modernization", supra note 543, pp.3-4.

[912] AB Report, *United States - Definitive anti-dumping and countervailing duties on certain products from China*, supra note 643, para.346; Panel Report, *United States - Countervailing duty measures on certain products from China*, WT/DS/437/R, 14 July 2014, paras.7.72, 7.73.

[913] European Commission, "Concept paper: WTO modernization", supra note 543, pp.3-4.

[914] Ibid.

[915] Chapter 17 "State-Owned Enterprises" of the TPP; Chapter 17 "State-Owned Enterprises and Designated Monopolies" of the CPTPP; Chapter 22 "State-Owned Enterprises" of the USMCA.

Conclusion

The NME treatment is nowadays practiced in multifarious forms, including being explicitly applied to countries directly labeled as NMEs, and implicitly applied in the name of cost adjustment or through the newly introduced EU "significant distortions" approach to transitional and even well-recognized market economies. Although NME treatment emerged in the cold war period to deal with alleged dumping from state trading economies, it has evolved into a protectionist mechanism being applied with significant arbitrariness to discriminate principally transitional economies in international trade. NME treatment can scarcely be justified by ensuring fairness in international trade as is frequently claimed. The AD regime as established in itself is not soundly based on levelling the global playing field. As a normal value calculation mechanism of AD, the NME treatment moreover introduces considerable arbitrariness and it is applied in an abusive manner going beyond the authorization under international AD rules. Nor can general international AD rules in the GATT 1994 and the WTO AD Agreement sufficiently justify the present day application of NME treatment to WTO Members, nor special NME treatment commitments subjecting to expiry can provide for a legal basis of this treatment after their expiry. The WTO legal regime is a rule based legal system. Being a continuously modified and increasingly utilized protectionist tool, NME treatment as currently applied has substantially challenged the rule of law in international economic governance. It should be terminated in its entirety due to the feeble international legal basis on which it rests and the considerable arbitrariness it introduces into the system of trade defences.

Confronting the currently prevailing calls for modernizing the WTO legal regime to deal with trade distortive government interventionism in exporting countries' economy, enhancing and broadening the application of NME treatment is not a suitable way forward towards reforming efforts given the specific and limited role AD is tasked to play in international trade. Instead, efforts should be made to improving some other existing regimes, in particular that of subsidies and countervailing measures, and establishing some new discipline, for example concerning the operation of SOEs, to meet WTO Members' needs. Fairness in international trade is a highly subjective notion. The multilateral trade legal regime consecrates rule-based fairness. The reform of the WTO legal regime to deal with trade distortive government interventionism in exporting country's economy should also be based on negotiation of introducing new rules and these rules have to be applied non-discriminatorily to all Members and their application be subjected to scrutiny of the DSB. To improve international economic governance, further research is required on the formulation and introduction of new international trade rules.

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Memorandum of Understanding between the Department of Foreign Affairs and Trade of Australia and the Ministry of Commerce of the People's Republic of China on the Recognition of China's Full Market Economy Status and the Commencement of Negotiation of a Free Trade Agreement between Australia and the People's Republic of China, signed 18 April 2005.

Abstract/Zusammenfassung

NME treatment in AD law indicates the use of surrogate country values for calculating dumping in cases of imports from countries where the market is deemed to be considerably influenced by government intervention. These countries' own prices and costs are considered to be unreliable for establishing normal value of their exports. Surrogate market economy benchmarks should be alternatively resorted to for calculating dumping to protect importing countries' domestic industries against unfair competition from NME imports. However, this thesis reveals that NME treatment is not established on a sound basis for ensuring fair trade, but functions as a protectionist mechanism, the application of which has been increasingly broadened in an arbitrary manner. Moreover, this treatment is not legally justifiable under general international AD rules. The continued application of this treatment to Chinese exports after 2016, regardless of the specific forms of its application, cannot be justified given the changed international legal environment. This thesis investigates the rationality and legality of NME treatment by firstly analyzing the economic justifications for AD and the historical development of AD law based on protectionist intent in general. It then traces the genesis of NME treatment, the pre-WTO era evolution of NME treatment rules and practices as well as elaborating WTO era rules and practices of NME treatment. Lastly, the changing international legal environment regarding NME treatment and the legality of this treatment given the changed legal context is clarified. After clarifying the rationality and legality of NME treatment, this thesis suggests that NME treatment be abandoned in its entirety. Concerning the modernization of WTO rules to respond to NME practices, it is argued that WTO Members should negotiate other adequate international trade rules rather than sticking to the hitherto practiced approach of broadening the application of NME treatment in AD law.

AD Recht ermöglicht die Anwendung des Instruments nichtmarktwirtschaftlicher Behandlung (NME) zwecks Bestimmung des normalen Ausfuhrpreises von importierten Waren aus Ländern deren Märkte als weitgehen von Regierungen beeinflusst und deren Preise und Kosten für diese Berechnung als unverlässlich angesehen werden. Stattdessen sollten diese Berechnungen auf der Basis von Preisen in einem Vergleichsland mit funktionierender Marktwirtschaft („surrogate country") erfolgen. Die vorliegende Dissertation legt dar, dass die Anwendung der NME Behandlung zum Schutz gegen unfairen Importwettbewerb nicht auf rechtlich gesicherter Grundlage erfolgt, sondern als willkürlich eingeseztes protektionistisches Instrument gehandhabt wird. Besonders die Anwendung dieser Methode auf Chinesische Exporte nach 2016 ist rechtlich fragwürdig. Die Dissertation untersucht die Rechtmäßigkeit und Zweckmäßigkeit diese Methode, erstens durch die Analyse der wirtschaftlichen Begründung des AD Rechts und der geschichtlichen Entwicklung seit seinen protektionistisch motivierten Anfängen. Sie untersucht sowohl die relevanten Regeln und Praktiken aus der Zeit vor der Gründung der WTO als auch solche die danach zur Anwendung kamen und kommt zum Schluss, dass sie angesichts des grundlegend geänderten globalen rechtlichen Umfelds nicht mehr tragbar

sind. Die Autorin empfiehlt daher, dass die auf NME Behandlung bezogenen Regeln und Praktiken vollständig aufgegeben werden und im Rahmen der gegenwärtigen Bemühungen um eine Modernisierung des gesamten WTO Regelwerks durch angemessene andere Regeln ersetzt werden sollten.