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**China's Nonmarket Economy Treatment  
and U.S. Trade Remedy Actions**

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China's Nonmarket Economy Treatment and U.S. Trade Remedy Actions  
Jieun Lee<sup>1</sup>

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Abstract

The price comparability provision of China's accession protocol recognizes that WTO members may face special difficulty in determining subsidies and dumping from China, due to its government's pervasive intervention in the economy. The provision permits importing members to disregard domestic prices or costs in China and to use alternative benchmarks in determining the normal value of Chinese exports. Consequently, this so-called nonmarket economy methodology tends to inflate antidumping and countervailing duty rates.

Certain paragraphs of the provision determining dumping expire on 11 December 2016, and yet the heated debate on China's economic status post-December 2016 remains ongoing. This paper studies the history of U.S. trade remedy actions against nonmarket economies and traces recent developments and findings at the WTO dispute settlement body. Congressional history shows that antidumping regulations in the U.S. have been constantly amended to catch up with agency practices that discriminate against nonmarket economies. Meanwhile, the Department of Commerce recently started to apply countervailing duties on Chinese imports and has finally codified such practices into law. The paper offers many reasons to believe that the U.S. is equipped with various trade remedy measures to continue 'special treatment' against China, even if the country graduates from a nonmarket economy status.

## 1 INTRODUCTION

### 1.1 NONMARKET ECONOMIES IN THE WORLD TRADING SYSTEM

Under the GATT and now the WTO, the "normal value" of a good is determined under an assumption that the exporting country is a market economy. For anomalies, when the price of goods and their relevant costs of producing are no longer determined by free market interactions of supply and demand, the normal value becomes difficult to determine.

One of the earliest incidents of this challenge arose during the 1950s, when Czechoslovakia, one of the GATT's founding members, transitioned towards a centrally-planned economy. In response, the world trading system invented the term "nonmarket economy (NME)" in order to accommodate centrally-planned countries' participation in the GATT.

At the time, Czechoslovakia argued that it was impossible to determine the normal value of its goods, as their domestic prices were fixed by the State, rather than freely determined in the market. Practically, their main problem was that the fixed domestic prices were often higher than export prices. This automatically led other countries to determine that there was dumping, which resulted in the application of antidumping duties against Czechoslovakian exports.

Czechoslovakia eventually proposed an amendment to GATT Article VI, so that, for nonmarket economies, the dumping margins be calculated using (i) the "average comparable price for the like product for export by third countries to the importing country in question in the

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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 to third countries,” or (iii) “the cost of production plus a reasonable addition for selling cost and profit.”<sup>2</sup>

The GATT contracting parties of the time did not accept the proposal, but agreed on adding an Interpretative *Ad Note* to Article VI. This interpretative note recognizes that strict comparison of domestic prices for the purposes of antidumping determination may not always be appropriate in the case of imports from a country that has “complete or substantially complete monopoly of trade and where domestic prices are fixed by the State.”<sup>3</sup>

Soon after, in 1960, it was the United States Treasury Department that first used the “prevailing domestic or export prices of similar products manufactured in a surrogate market economy country” for determining the normal value of bicycles imported from Czechoslovakia.<sup>4</sup> Other countries started to follow the U.S. practice of applying surrogate prices in determining antidumping duties from nonmarket economies.

## 1.2 CHINA’S NME STATUS

One of today’s most important and timely discussions in trade centers around China’s NME status. When China became a WTO member in 2001, the country agreed to be treated as a nonmarket economy in antidumping duty cases for the first 15 years of its membership. The 15-year period expires December 11, 2016.<sup>5</sup>

This condition put China in a disadvantageous position in trade remedy disputes. In many disputes, to determine the “normal value” of Chinese products, importing investigators have relied on costs and prices from third-party surrogate countries, often perceived to be arbitrary or inappropriate. Consequently, China has not only frequently lost antidumping cases at the WTO Dispute Settlement Body but also faced punitive antidumping charges by the importing countries.

Since its inception to the WTO, the Chinese government has vigorously pursued a country-by-country persuasion strategy in order to change its disadvantageous position in trade remedy cases. Studies document how Chinese diplomats have utilized a variety of economic and political tools at their disposal. As one example, they would condition broader trade and diplomatic relations on the partnering country’s recognition of China’s market economy status (MES).<sup>6</sup>

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<sup>2</sup> GATT Secretariat, *Article VI – Proposals by the Czechoslovakia Delegation*, W.9/86/Rev.1, 21 December 1954.

<sup>3</sup> Paragraph 1.2 of the *Interpretative Ad Note Article VI from Annex 1*, GATT (1947) states 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 purposes of paragraph 1 (...).”

<sup>4</sup> See *Bicycles From Czechoslovakia*, 25 FR 6,657 (1960).

<sup>5</sup> See China’s special commitments under Article 15 of the Accession Protocol and certain articles of the Antidumping Agreement. The text of the Accession Protocol at issue is discussed in detail in Section 3.1 of this article.

<sup>6</sup> See, e.g., Z. Shuang and S. Kennedy, ‘China’s Frustrating Pursuit of Market Economy Status: Implications for China and the World’, In S. Kennedy and S. 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 Centre for Trade & Sustainable Development, 2012):63-70. The authors state that some countries have been “sufficiently motivated to recognize China’s MES in their own pursuit of WTO membership” while other countries have been willing to recognize China’s MES “in return for negotiating free trade agreements” (New Zealand, Australia, and Costa Rica are given as examples). They also find that China’s economic cooperation with other countries, such as infrastructure building projects and labor cooperation, and China’s outward foreign direct investment to be positively related conditional on MES recognition. Finally, Chinese high-level diplomacy, state visits by President Hu Jintao and Premier Wen Jiabao, have been occasions to reach agreement on MES recognition in Latin America and Africa.

As result of these efforts, from 2004 to 2007, China gathered market economy recognition from over seventy countries.<sup>7</sup> However, since 2008, additional MES recognitions have dramatically slowed down.

Most importantly, two of China's largest trading partners, the United States and the European Union, have refused to grant market economy status to China so far. They argue that China's currency is still not convertible on the financial account and its financial system is heavily controlled by the State. They also point to China's governmental influence on its private businesses and how a substantial amount of China's economy is closed to foreign industries.<sup>8</sup> Another unstated but highly relevant reason why the countries refuse to grant market economy status would be to maintain their advantage in antidumping cases.<sup>9</sup>

## 2 HISTORY OF U.S. TRADE REMEDY ACTIONS AGAINST NMES

### 2.1 DESIGNATION OF NME STATUS

Under U.S. trade law, the term nonmarket economy country is designated to any foreign country that the administering authority determines as not operating 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."<sup>10</sup> The agency that determines NME status of a trading country today is the Department of Commerce (DOC).

The Omnibus Trade and Competitiveness Act of 1988, which remains effective today, endowed the U.S. DOC with significant administrative discretion for determining NME status. The determination may be made "with respect to any foreign country at any time" and remains in force until expressly revoked by the DOC.<sup>11</sup> Only when an interested party claims that a country is no longer a NME and substantiates its claim with respect to each of the factors the DOC takes into consideration, will Commerce initiate a formal inquiry to determine whether the country should remain treated as a NME or not.<sup>12</sup>

As a recent example, the U.S. DOC recognized Russia as a market economy on June 7, 2002.<sup>13</sup> China's most recent formal request to be removed from the NME list was initiated in 2006. The DOC denied its request, but nevertheless noted that "the era of China's command

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<sup>7</sup> Countries that have recognized China's market economy status include New Zealand, Nigeria, Russia, Pakistan, Venezuela, Chile, Brazil, Argentina, Australia, Peru, Antigua and Barbuda, Benin, Costa Rica, Djibouti, South Africa, Togo, Ukraine, Guyana, Armenia, Kyrgyzstan and the ten member countries of the Association of Southeast Asian Nations (ASEAN). As of May 2016, more than eighty countries have recognized China's market economy status.

<sup>8</sup> This view is not shared by China. Liu Xiaoxi, a leading Chinese economist, attempted to demonstrate that "China is about 69% a market economy" in a 'Report on the Development of China's Market Economy (2003),' arguing that such level puts China above what he claims to meet internationally accepted standards of a market economy. As evidence, Liu showed that the Chinese government had dramatically reduced revenue from the state-owned enterprises, made capital and labor more mobile, and radically privatized state-owned enterprises. The research was sponsored by the Chinese Ministry of Commerce.

<sup>9</sup> Based on the latest WTO statistics (accessed 5 September 2016), from the inauguration of the WTO to the end of 2015, the EU made 125 antidumping initiations (of which 88 were later enforced) and the U.S. made 130 antidumping initiations (of which 105 were later enforced) against China.

<sup>10</sup> 19 U.S.C. 1677.

<sup>11</sup> 19 U.S.C. §1677(18)(C) (2006). Commerce's determinations are not subject to judicial review in any antidumping investigation.

<sup>12</sup> Factors taken into consideration of the "NME test" are explained in Section 2.2.iii. of this paper.

<sup>13</sup> Provided by Pub. L. 107-246, § 2, Oct. 23, 2002, 116 Stat. 1511.

economy has receded and the great majority of prices are liberalized.”<sup>14</sup> Despite such general agreement, Commerce highlighted a number of systemic and institutional policies that, in its view, prevented China from graduating from NME status.

## 2.2 DEVELOPMENT OF ANTIDUMPING LAW REGARDING NMEs

In the U.S., the antidumping law has consistently been amended to catch up with agency practices dealing with NMEs. Congress’s adoption of a specific statute authorizing the Department of Commerce to apply antidumping law to NMEs, along with provisions of legislative guidance regarding acceptable methodologies – namely, authorizing various surrogate country approaches – have spurred the antidumping law to become the exclusive remedy for U.S. industries when confronting unfair trade practices from NME countries.

### i. Trade Act of 1974<sup>15</sup>

In the early period, the application of U.S. antidumping law to NMEs was not stipulated in law but implemented through administrative agency action. In the 1960s, the Treasury Department, as the agency responsible for domestic trade remedy law of the time, developed and began using the so-called “surrogate country” methodology for applying antidumping law to NME countries.

The idea was to substitute comparable prices and costs from similarly situated third countries for the normal value determination, when the fair market value of a product in the originating NME country was not readily available. This approach was adopted and codified by Congress in the Trade Act of 1974.

However, the surrogate methodology proved difficult to apply due to occasions when an appropriate surrogate country could not be located. Meanwhile, NME manufacturers criticized the seemingly unpredictable and arbitrary dumping margins it produced, and the Treasury Department also found it challenging to locate surrogate countries willing and able to provide reliable price data.<sup>16</sup>

### ii. Trade Agreements Act of 1979<sup>17</sup>

The Treasury Department devised an alternative strategy by adopting the “factors of production” approach in 1975.<sup>18</sup> The factors of production methodology requires that “the amount of each factor input of the NME in consideration be taken from a market economy country considered to be at a comparable stage of economic development and value those inputs on the basis of prices in a surrogate country.”<sup>19</sup> Factors of production normally include materials, labor, energy and other utilities, and representative capital cost including depreciation.

Congress adopted this approach in the Trade Agreements Act of 1979 as an alternative to

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<sup>14</sup> See ‘Import Administration Memorandum, Antidumping Duty Investigation of Certain Lined Paper Products from the People’s Republic of China—China’s Status as a Non-market Economy’, *NME memo* (2006): 77.

<sup>15</sup> Trade Act of 1974, P.L. 93-618, §321, 88 Stat. 1978, 2074 (1974).

<sup>16</sup> For more information, see R.H. Lantz, ‘The Search for Consistency: Treatment of Nonmarket Economies in Transition under United States Antidumping and Countervailing Duty Laws’, *American University International Law Review* 10, no. 3 (1995): 993-1073.

<sup>17</sup> Trade Agreements Act of 1979, P.L. 96-39, §776, 93 Stat. 144, 186 (1979) (codified as amended at 19 U.S.C. §1677e).

<sup>18</sup> See *Electric Golf Cars From Poland*, 40 FR 25,497. In *Golf Cars*, Treasury determined the amount of each factor input of the Polish manufacturer and the cost of each factor input from Spain, a market country considered to be at a comparable stage of economic development.

<sup>19</sup> J.M. Smith, ‘U.S. Trade Remedy Laws and Nonmarket Economies: A Legal Overview’, *Congressional Research Service* (2013).

be used in NME cases where there was no appropriate surrogate country. The 1979 Act also transferred administrative authority from the Treasury to the Department of Commerce.

iii. Omnibus Trade and Competitiveness Act of 1988<sup>20</sup>

Following the collapse of communism in the late 1980s and early 1990s, there was a surge in transitional economies newly embracing capitalism. Antidumping authorities in the U.S. responded by adopting new antidumping provisions for dealing with NMEs.

In the Omnibus Trade and Competitiveness Act (OTCA) of 1988, Congress made major reforms to the existing antidumping law. It is through the OTCA that Congress formally defined a nonmarket economy as a country that DOC determines “does not operate on market principles of cost of pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise.”<sup>21</sup> Congress also set standards that DOC was to take into consideration when determining whether a specific country qualified as a NME.

The so-called NME test includes (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 [i.e., DOC] considers appropriate.”<sup>22</sup>

With respect to antidumping methodologies, the OTCA revised the antidumping laws to require that the “factors of production” approach be the preferred method of determining normal value in NMEs when domestic prices and costs are not readily available.<sup>23</sup> Despite this statutory change, however, the legislative history of the OTCA seems to support DOC’s broad claims of discretion. For instance, the DOC is to determine on a case-by-case basis whether the available information allows the use of the standard methodology or an alternative approach should Commerce prefer.

iv. Further Developments by the Department of Commerce

In 1992, Commerce developed its own approach known as the market-oriented industry (MOI) test.<sup>24</sup> Under the MOI test, a respondent exporter can theoretically avoid NME treatment by establishing that its *industry* as a whole is sufficiently free of State control.

The test has three criteria: (i) virtually no government involvement in setting prices or amounts to be produced, (ii) typically private or collective ownership of firms in the industry, and (iii) market-determined prices for all significant inputs.<sup>25</sup> As shown later in the paper, the Chinese accession protocol paragraphs (a) and (d) of Article 15 closely mimic this MOI approach.

So far, Commerce has denied any China-wide attempts to have its NME status

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<sup>20</sup> Omnibus Trade and Competitiveness Act of 1988, P.L. 100-418, 102 Stat. 1107 (1988).

<sup>21</sup> 19 U.S.C. §1677(18)(A) (2006).

<sup>22</sup> 19 U.S.C. §1677(18)(B) (2006).

<sup>23</sup> See 19 U.S.C. §1677b(c)(2006) stating that when “(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 ... 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.”

<sup>24</sup> See, e.g., *Sulfanilic Acid from the People’s Republic of China*, 57 FR 9,409 (18 March 1992).

<sup>25</sup> See, e.g., *Chrome-Plated Lug Nuts from the People’s Republic of China*, 57 FR 15,052 (24 April 1992).

reconsidered. It has also refused to acknowledge a single Chinese industry as independent from State control in investigations and reviews.<sup>26</sup> Moreover, the DOC went a step further to assign an “entity-wide” antidumping rate to any Chinese producer who fails or does not apply for “separate rates,” treating it as if it is part of a China-wide entity.<sup>27</sup> Due to the procedural difficulties and burden on the Chinese producer, this final duty measure is almost always whatever rate the petitioners alleged in their complaint.<sup>28</sup>

### 2.3 COUNTERVAILING DUTY LAW REGARDING NMEs

While the U.S. statute allows countervailing duties (CVDs) to offset injurious subsidization of foreign goods, it had been the DOC’s long-standing policy not to apply countervailing measures against imports from NMEs.<sup>29</sup> Only recently, in 2007, has the DOC reversed its policy to investigate and apply CVDs to NME countries.<sup>30</sup>

#### i. Court Decisions Regarding the Non-Appliance of CVD Law to NMEs in 1986

For many years, the Department of Commerce maintained a position that government activities in a NME cannot confer a subsidy. Commerce reasoned that it was theoretically and practically impossible to determine a subsidy in a NME country which is subject to central planning rather than market forces – a subsidy, by definition, means an act that distorts the operation of a market. The DOC summarized the methodological problems it faced in earlier cases regarding NMEs as follows:

We believe a subsidy (or bounty or grant) is definitionally any action that distorts or subverts the market process and results in a misallocation of resources. ... In NMEs, resources are not allocated by a market. With varying degrees of control, allocation is achieved by central planning. Without a market, it is obviously meaningless to look for a misallocation of resources caused by subsidies. There is no market process to distort or subvert. ... It is a fundamental distinction—that in a NME system the government does not interfere in the market process but supplants it that has led us to conclude that subsidies have no meaning outside the context of a market economy.<sup>31</sup>

Similarly, Congress was silent about the issue of subsidies in an NME context. After

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<sup>26</sup> The current MOI test is neither codified in the Act nor in the Department’s regulations. The MOI test was first articulated in *Lug Nuts From China*, 57 FR 15,053-55 (1992). Since its inception through 2008, the Department has received occasional requests from industries for consideration of MOI status.

<sup>27</sup> See *Enforcement and Compliance 2015 Antidumping Manual* Chapter 10. The DOC begins with “a rebuttable presumption that all companies within the country are essentially operating units of a single, government-wide entity and, thus, should receive a single antidumping duty rate (i.e., an NME-wide rate).” As an exception, if the NME respondent is owned wholly by entities located in market-economy countries, a separate rate analysis is not necessary to determine whether its export activities are independent or not.

<sup>28</sup> See, e.g., P. Alagiri, ‘Reform, Reality, and Recognition: Reassessing U.S. Antidumping Policy toward China’, *Law and Policy in International Business* 26 (1995): 1068–69. The separate rates test was created in the late 1980s, and seemingly appeared as a transition mechanism devised to allow independent companies to escape from categorical NME treatment. However, prior to the test, assigning separate rates used to be the default practice. Consequently, the test actually creates new burdens on NME respondents that is difficult, although not impossible, to meet.

<sup>29</sup> See 19 U.S.C. § 1671(a).

<sup>30</sup> For a detailed legal history and analysis of the U.S. DOC’s policy reversal, see D. Ahn and J. Lee, ‘Countervailing Duty against China: Opening a Pandora’s Box in the WTO System?’, *Journal of International Economic Law* 14 (2011).

<sup>31</sup> See *Carbon Steel Wire Rod from Czechoslovakia*; Final Negative Countervailing Duty Determination, 49 FR 19, 370-71 (7 May 1984).

Congress enacted the first generally applicable CVD law in Section V of the Tariff Act of 1897, the statutory language of a ‘bounty or grant’ had remained substantially unaltered through several subsequent revisions. Even with growing imports from NMEs, the option of applying CVD law to NMEs was never raised.

Rather, Congress turned to other trade remedy measures for dealing with this problem. Specifically, in the Trade Act of 1974, Congress amended section 205 of the Antidumping Act of 1921 to establish rules to administer unfair competition from NME countries.<sup>32</sup> Congress also enacted section 406, a special ‘market disruption’ rule in the Trade Act of 1974, in order to protect U.S. industries from trade harm caused by Communist countries.<sup>33</sup>

Likewise, Congress did not amend any CVD provisions relating to NMEs in the Trade Agreement Act of 1979, in which Congress substantially revised the general U.S. CVD law. Although Article 15 of the very Act implementing the Subsidies and Countervailing Code of the GATT explicitly permitted regulation of unfairly priced imports from NME countries under either the antidumping or countervailing duty legislation, Congress remained silent about the CVD track. Instead, Congress reenacted the separate provision of the antidumping law governing NME country cases.

After investigating several petitions to apply the CVD law on subsidized goods from NMEs, the DOC concluded that, as a matter of law, countervailing duty orders were inapplicable to NMEs. This position was once reversed by the U.S. Court of International Trade in 1985. The next year, the U.S. Court of Appeals for the Federal Circuit reversed and reinstated the DOC’s original determinations, thus affirming that the agency has the discretion to *not* apply CVD law to NME countries.

ii. Policy Reversal by the Department of Commerce in 2007

In its decisions in *Coated Free Sheet Paper from China*, the DOC reversed its long-standing practice to exempt NMEs from U.S. CVD law on the basis of the inherent challenges in defining and measuring subsidies in a state-distorted market.<sup>34</sup> The DOC distinguished the current Chinese economy from the Soviet-style economies at issue in *Georgetown Steel* and found that the imported Chinese paper was subsidized.<sup>35</sup> Although the U.S. International Trade Commission did not make the requisite final affirmative material injury determination in this case, subsequent CVD petitions were successful, resulting in more than sixty CVD orders on Chinese merchandise.<sup>36</sup>

iii. Legalized Appliance of CVD Law to NMEs in 2012<sup>37</sup>

In 2012, the U.S. Congress responded to both the WTO Appellate Body and Court of Appeals for the Federal Circuit (CAFC) decisions by passing H.R. 4105.<sup>38</sup> Section 1 stated that

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<sup>32</sup> See 773(c) of the Tariff Act of 1930, 19 U.S.C. § 1677b(c) (1982).

<sup>33</sup> See 19 U.S.C. § 2436 (1974).

<sup>34</sup> See *Coated Free Sheet Paper from the People’s Republic of China*: Amended Preliminary Affirmative Countervailing Duty Determination, 72 FR 17,484 (9 April 2007).

<sup>35</sup> See *Georgetown Steel Co. v. United States*, 801 F.2d. 1,308 (18 September 1986).

<sup>36</sup> According to the latest WTO statistics (accessed 31 August 2016), from 1995 to the end of 2015, a total of 66 countervailing measures were enforced against China. Amongst these, 35 were enforced by the United States.

<sup>37</sup> See Committee on Ways and Means, ‘Summary of A Bill to Apply the Countervailing Duty Provisions of the Tariff Act of 1930 to Nonmarket Economy Countries, and For Other Purposes’, <[http://waysandmeans.house.gov/UploadedFiles/FINAL\\_CVD\\_One\\_Pager.pdf](http://waysandmeans.house.gov/UploadedFiles/FINAL_CVD_One_Pager.pdf)>, access date: 5 Jan. 2016.

<sup>38</sup> See 19 U.S.C. §§ 1671, 1677(f)(1). Congress legitimized U.S. CVD to NMEs as response to the Appellate Body Report, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 Mar. 2011.



NMEs could be subject to CVDs, thus, addressing the CAFC ruling in 2011 that U.S. law did not authorize Commerce to impose CVDs on imports from NMEs. Section 2 amended U.S. law to address the NME “double count” in a manner intended to address the Appellate Body decision which found U.S. practices inconsistent with Article 19.3 – the U.S. failed to investigate and avoid double remedies potentially arising from the concurrent imposition of antidumping and countervailing duties on the same imported products from China.<sup>39</sup>

The legislation legalizes the DOC’s authorization to apply CVD law to nonmarket economies, and is now consistent with WTO obligations that do not preclude the application of CVD laws to NMEs. The legislation also preserves the validity of existing countervailing duty orders and addresses the adverse WTO finding on “double remedies.”<sup>40</sup>

### 3 DEBATE ON CHINA’S SPECIAL TREATMENT BASED ON ITS ACCESSION PROTOCOL

#### 3.1 TEXT OF THE ACCESSION PROTOCOL<sup>41</sup>

China’s accession protocol Article 15 exclusively concerns price comparability in determining subsidies and dumping. Paragraph 15(a) opens with the general obligations of the importing WTO Member in determining antidumping investigations involving China. Its subparagraphs compare and give guidance to the separate cases where producers under investigation can or cannot clearly show that market conditions prevail in the exporting industry.<sup>42</sup> Paragraph 15(d) time-constrains the so-called NME methodology used for China for 15 years and sets out certain conditions that may lead to early termination of China’s special treatment prior to expiration.<sup>43</sup>

Such separate provisions of China’s accession protocol do not strictly follow the requirements of the 1955 GATT Interpretive Note which already stipulates that antidumping investigators may ignore domestic prices of countries with a state-controlled economy.<sup>44</sup> Rather, the accession protocol grants WTO Member countries the right to use the NME methodology in determining the normal value of Chinese imports regardless of whether the country is in fact a nonmarket economy till December 2016.

According to O’Conner, the insertion of “[i]n any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession” into the text of the second sentence of

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<sup>39</sup> Refer to the Appellate Body Report, supra n. 38.

<sup>40</sup> Ibid.

<sup>41</sup> WTO, Protocol on the Accession of the People’s Republic of China (WTO/L/432; 23 November 2001). Refer to Annex 1 for the entire text of Article 15.

<sup>42</sup> Paragraph 15(a)(i) guides the importing WTO Member to use Chinese prices or costs for the industry under investigation in determining price comparability when the producer can demonstrate that market conditions prevail; paragraph 15(a)(ii) allows the importing Member to use a methodology that is not based on strict comparison with domestic prices or costs in China when the producer cannot demonstrate that market conditions prevail.

<sup>43</sup> Meanwhile, paragraphs 15(b) and (c) regulate subsidies and take into account the possibility that the prevailing terms and conditions in China may not always be available as appropriate benchmarks, and thus, allows for the importing WTO Member to use methodologies considering the use of terms and conditions that prevail outside China.

<sup>44</sup> Recall the first section of this paper which introduces the origin of the Interpretative *Ad Note*. China was the first major hybrid economy containing NME features to accede to the WTO in 2001. A few weeks before China’s accession to the WTO became official, Long Yongtu, Head of the Chinese Delegation, said that “the WTO accession is a strategic decision made by the Chinese Government under economic globalization and is in line with China’s reform and opening-up policy and the goal of establishing a socialist market economic system.”

paragraph 15(d) was done intentionally and late in the accession negotiations.<sup>45</sup> While this sentence plainly illustrates that the NME methodology used against China can no longer find any legal basis in China's accession protocol paragraph 15(a)(ii) after 11 December 2016, there do not appear to be other documents indicating why this was done. This lack of explanation probably explains the controversy surrounding the utility and textual interpretation of the rest of paragraph 15.

### 3.2 CHINA'S SPECIAL TREATMENT POST-DECEMBER 2016

One agreement shared across the literature is that paragraph 15(a)(ii) expires on 11 December 2016, regardless of whether China qualifies as a market economy under the national laws or not of an investigating authority. The literature diverges, however, on whether investigating authorities in importing WTO member countries may continue to invoke paragraph 15 of China's accession protocol as a justification for resorting to an NME methodology or not.

#### i. NME Provision of the Accession Protocol Ineffective Post-December 2016

One side of the debate argues that paragraph 15 no longer authorizes any special price comparison for Chinese imports starting 12 December 2016. Proponents of this view interpret the entirety of paragraph 15(a) as *the* NME provision – the Chinese exception to normal antidumping proceedings under the WTO – which becomes inutile altogether once 15(a)(ii) expires.<sup>46</sup>

In their view, the sub-provisions (a)(i) and (a)(ii) are merely the obverse of one another – indicating what an importing country “shall” do if the producers being examined “can” clearly show that market conditions prevail in the industry, and what the importing country “may” do if the producers in question “cannot.”<sup>47</sup> Once paragraph (a)(ii) expires, the other rules pertaining to it are also invalidated.

The significance of the expiration of this 15-year NME provision is, then, determined by the possibility of alternative NME measures guided by the WTO. If any WTO member were to apply special treatment to China post 11 December 2016, it should find its basis in the general regime on WTO antidumping law as articulated in Article VI of GATT 1994 and the WTO Antidumping Agreement.

The starting point would be to resort to the text of Article VI, containing dispositions on subsidies and antidumping matters. While Article VI does not differentiate products originating from market and nonmarket economy countries, an interpretative note to Article VI (second provision to Paragraph 1 of the *Ad Note*) recognizes the unusual difficulty that government-controlled economies bear in making price comparisons and determining the normal value of goods. Similar to paragraph 15(a) of China's accession protocol, the text allows investigating authorities to resort to prices in a third country market economy and disregard domestic prices and costs of the NME.

Some raise skepticism about this option. For instance, Vermulst et al. make a point that China's accession protocol incorporated an NME provision outside the pillars of Article VI,

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<sup>45</sup> See NCTM B. O'Connor's 'The Myth of China and Market Economy Status in 2016', <<http://worldtradelaw.typepad.com/files/oconnorresponse.pdf>>, access date: 5 Dec. 2015.

<sup>46</sup> See F. Graafsma and E. Kumashova, 'In re China's Protocol of Accession and the Anti-Dumping Agreement: Temporary Derogation or Permanent Modification?', *Global Trade & Customs Journal* 9, no. 4 (2014). It is argued that China's accession protocol should be read as a “temporary derogation” and not as a permanent modification of the Antidumping Agreement.

<sup>47</sup> See M. Nicely, 'Time to Eliminate Outdated Non-Market Economy Methodologies', *Global Trade & Customs Journal* 9, no. 4 (2014).

precisely because the Chinese economy at the time of the WTO-inception was transitional and already could not be squared by the characterization of countries to be covered by the second *Ad Note*.<sup>48</sup> Tiejte and Nowrot go much further, arguing that the provision assumes China to achieve market economy status *erga omnes* (towards everyone) in December 2016 and the graduation process is automated.<sup>49</sup>

Relatedly, the Appellate Body recently remarked in *EC–Fasteners* that the *Ad Note* “appears to describe a *certain* type of NME,” where the State monopolizes trade and sets all domestic prices. Importantly, this interpretation suggests that there could be economies still recognized as a NME but for which the *Ad Note* is not applicable.<sup>50</sup> While it is not inconceivable that some WTO members will find ways to continue to qualify China as an NME, many doubt that the high thresholds of the interpretative *Ad Note* can ever be proven with regard to any current and future WTO member.<sup>51</sup>

Meanwhile, Article 2.2 of the WTO Antidumping Agreement indicates that alternatives to home market prices can be used when a “particular market situation” prevents a proper price comparison. This is what the U.S. DOC relied on when Russia first graduated from NME status in June 2002, and remains as an option to countervail China within the contours of the WTO system, once the NME provision under the accession protocol expires.<sup>52</sup>

ii. NME Provision of the Accession Protocol Still Effective Post-December 2016

On the other side of the debate, some critics hold the view that the textual interpretation of paragraph 15 suggests that all but paragraph 15(a)(ii) remains effective. In their view, the significance of the expiration of paragraph 15(a)(ii) is rather minimal, since the remaining sub-provisions continue to provide guidance for investigating authorities to apply the NME methodology relating to Chinese dumping, and for China, the prerequisites for market economy status.

Miranda, one of the most cited writers on this topic, interprets the special legal instruments authorized under the accession protocol to be contingent upon the facts at issue, subject to a “rebuttable presumption” that the industries or sectors do not operate under market economy

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<sup>48</sup> See E. Vermulst et al., ‘Normal Value in Anti-Dumping Proceedings against China Post-2016: Are Some Animals Less Equal Than Others?’, *Global Trade & Customs Journal* 11, no. 5 (2016).

<sup>49</sup> C. Tiejte and K. Nowrot, ‘Myth or Reality? China’s Market Economy Status under WTO Anti-Dumping Law after 2016’, *Transnational Economic Law Research Center*, no. 34 (2011).

<sup>50</sup> Appellate Body Report, *European Communities—Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, para. 285, WT/DS397/AB/R, adopted 15 Jul. 2011. In a footnote to its decision, the Appellate Body notes:

We observe that the second *Ad Note* to Article VI:1 refers to a “country which has a complete or substantially complete monopoly of its trade” and “where all domestic prices are fixed by the State.”

<sup>51</sup> For instance, the Cato Institute argues that “the most important thing to know about the NME provision in China’s accession protocol is that it expires in December 2016.” See W. K. Watson, ‘Will Nonmarket Economy Methodology Go Quietly into the Night? - U.S. Antidumping Policy toward China After 2016,’ *Policy Analysis* no. 763, Cato Institute (28 October 2014). Watson is skeptical that the United States would be able to treat China as an NME after 2016, independent of whether Commerce thinks its economy, industries, or manufacturers have passed the market economy test. Considering that Vietnam has a similar provision in its WTO accession agreement that expires in 2018, Watson further forecasts that the United States will no longer have the right to use the NME methodology against imports from any of its trading partners at the WTO after that time. Vermulst et al. in *supra* n. 48. shares this view.

<sup>52</sup> See Nicely in *supra* n. 47. Specifically, the U.S. DOC asserted authority to selectively reject the foreign producer’s home market prices and costs due to lingering state influence.

conditions.<sup>53</sup> Following, he argues that the mere effect of the second sentence of paragraph 15(d) is to disable the *presumption* that China and the individual industries or sector remain under the NME regime, fifteen years after accession. Thus, the expiration of paragraph 15(a)(ii) does not prohibit the use of NME methodologies after the transition period. He also argues that the burden of proof shifts to domestic investigating authorities to validate that the Chinese industry at issue remains under NME conditions.<sup>54</sup>

While many agree with Miranda that the expiration of paragraph 15(a)(ii) revokes the presumption that China remains under NME conditions, and thus, does not require the wholesale abandonment of the NME methodology relating to China, the discussion on who has the burden of proof remains controversial.

For instance, one popular view is that Chinese producers must meet the market economy conditions under the national laws of the importing countries, based on the first and third sentences of paragraph 15(d) in order to avoid NME treatment.<sup>55</sup> More recently, it has been argued that such qualification as a market economy under WTO members' national laws was meant to have a "limited scope," to the extent that the members' national law had market economy status criteria at the time of China's inception to the WTO.<sup>56</sup>

A supporting argument is that there are simply no textual grounds to conclude that the language of the second sentence of paragraph 15(d) was intended to do anything other than precisely what it says – put a limit on the applicability of paragraph 15(a)(ii) only, and leaving everything else, including the burden of proof on China, in place.<sup>57</sup>

Finally, some believe that the ambiguity in the paragraph would require deference to a "permissible interpretation" applied by the investigating authorities of importing countries until the dispute settlement Panel and Appellate Body addresses whether it is assumed that there is a shifting of the burden of proof, in accordance to Article 17.6(ii) of the Antidumping Agreement.<sup>58</sup>

Meanwhile, it is important to note that the survival of subparagraph 15(a)(i) on its own has legal significance. The subparagraph places the burden on the individual producer to show market economy conditions in the *industry* producing the like product.<sup>59</sup> This deviates from the normal price comparison rules which are ordinarily based on the costs and prices of the

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<sup>53</sup> If this presumption is rebutted by the producers involved, the determination of normal value must revert to the general methodologies, but if by contrast, the presumption remains unrebutted, then special methodologies can be used.

<sup>54</sup> See J. Miranda, 'Interpreting Paragraph 15 of China's Protocol of Accession', *Global Trade & Customs Journal* 9, no. 3 (2014).

<sup>55</sup> See B. O'Connor, 'Much Ado About 'Nothing': 2016, China and Market Economy Status', *Global Trade & Customs Journal* 10, no. 5 (2015). Under this interpretation, the first and third sentences of paragraph 15(d) make it clear it is China that has the burden of proof to qualify as a market economy – either at the country or industry or sector level – under the national law of the importing WTO member. However, as clearly stated in the first sentence of paragraph 15(d), if China can demonstrate that it is entitled to market economy status according to the law of the importing WTO Member, then the provisions of subparagraph 15(a) shall no longer apply in the investigations conducted by that Member.

<sup>56</sup> See Vermult et al. in *supra* n. 48. The U.S. falls under this case.

<sup>57</sup> See A. Price et al., 'The Treatment of China as a Non-market Economy Country After 2016', Wiley Rein LLP (2015).

<sup>58</sup> See T. Posner, 'A Comment on Interpreting Paragraph 15 of China's Protocol of Accession by Jorge Miranda', *Global Trade & Customs Journal* 9, no. 4 (2014).

<sup>59</sup> While the Article itself does not state which standard must be applied, paragraph (d) indicates that the standard for MES as a whole is that of the importing Member. Thus, it can be argued that the standard to be applied in subparagraph (i) is the standard set out in the law of the importing Member.

*individual* producer.<sup>60</sup> If paragraph (a)(i) survives, it alone contributes to pose extra burden on individual Chinese producers to demonstrate that market conditions apply, and moreover, that these conditions prevail in relation to the whole industry which it is part of.<sup>61</sup>

#### 4 POST-DECEMBER 2016 IMPACT ON U.S. TRADE REMEDY ACTIONS AGAINST CHINA

##### 4.1 ANTIDUMPING TOOLS THAT ENSURE CHINA'S CONTINUED SPECIAL TREATMENT

###### i. U.S. Antidumping Law and Practices in Parallel to China's Accession Protocol

The legal debate surrounding China's accession protocol aside, there are many reasons to believe that the expiration of paragraph 15(a)(ii) will not make much practical difference to U.S. trade remedy actions against China. Mainly, China's accession protocol, with or without paragraph 15(a)(ii), closely mimics the current U.S. antidumping law and practices.

To start with, the U.S. is one of those countries that has had nonmarket economy criteria as of the date of China's accession to the WTO. The U.S. law allows for the graduation of an entire country to market economy treatment, but to date treats China as a nonmarket economy country, resulting from the failure of the test it requires. However, the U.S. practice, similar to paragraph 15(a) of the accession protocol, allows both individual producers and entire industries to argue that the Department should use some or all of their prices or costs in its dumping investigations.

While the U.S. DOC will no longer be able to resort to paragraph 15(a)(ii) for the use of the NME methodology, it may, as it did prior to China's accession to the WTO, continue to use surrogate data for dumping investigations as long as China fails to establish that it is a market economy, either at the state or industry level.

###### ii. Industry-wide Test and Entity-wide Rates Remain Effective

As discussed earlier, Article 15 of China's accession protocol embedded the idea of the market-oriented industry approach invented by U.S. Commerce. As opposed to what would be required in market economies, an individual producer from China must demonstrate that market conditions prevail in the *industry* producing the like product. While the MOI approach is yet to be codified in U.S. law, the U.S. investigating authorities may refer to the accession protocol for its usage until it alters its antidumping law.<sup>62</sup>

Meanwhile, the U.S. can continue to differentiate Chinese products through its separate rates test adopted in the 1980s. Application of the entity-wide antidumping duty to Chinese imports may no longer be automatic when the country graduates from its NME status. However, the DOC may still apply the entity-wide rate to China, when the corresponding companies are shown to have been non-responsive to the Department's questionnaire or its request for quantity and value information.

###### iii. Alternative Methodologies Available for the Use of Surrogate and Constructed Prices

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<sup>60</sup> Article 6.10 of the antidumping agreement states that "the authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation."

<sup>61</sup> This part of China's accession protocol seems to have incorporated the U.S.'s MOI test into the WTO law. The provision recognizes that China's economy is in transition and endorses the U.S. practice developed over the previous decade.

<sup>62</sup> The legal text of the accession protocol regarding industry-wide provisions are not subject to the December 2016 deadline.

Even without China's accession protocol, U.S. law gives Commerce an option for bypassing Chinese companies' domestic prices. Commerce may decide that "the particular market situation in the exporting country does not permit a proper comparison with the export price or constructed export price."<sup>63</sup> This allows investigators to leverage alternatives to strict comparison.

For instance, domestic prices can be approximated, or "constructed," by adding together a producer's costs of production plus estimated profit. While consistent with the WTO Antidumping Agreement, the use of third country prices and constructed value tend to produce unrealistically high estimates of domestic normal values and so inflates the antidumping margins imposed. It is noteworthy that Commerce considered this approach after Russia graduated from NME status in 2002.<sup>64</sup>

#### iv. Double Remedies Still Possible Independent of NME Status

When an importing country pursues antidumping and countervailing duty investigations simultaneously against an import, the use of surrogate values creates the potential for a doubled remedy. While a domestic subsidy affects both the normal value and export price of a good, the use of prices or costs from a third-country in an antidumping investigation fails to capture the impact of the subsidy upon the normal value of investigated companies. Correspondingly, the antidumping duty is increased by the amount of the subsidy that artificially lowered the export price. Since the CVD theoretically equals the amount of the subsidy, the antidumping duty using such surrogate methodology double-counts the subsidy by the amount of the CVD.<sup>65</sup>

The use of surrogate country prices and costs was automatically granted to importing investigators by the NME methodology authorized under China's accession protocol. This naturally led to a plethora of double remedy actions against Chinese imports, many of which resulted in trade grievances with China.<sup>66</sup>

However, China's accession protocol or its NME status is not required for double remedy actions against the country. In fact, surrogates for normal value are quite commonly used in cases against market economies. This occurs when a company's own data reflects its normal value but are not fully comparable to the export price data, or in cases in which the trade authority disregards a company's normal value data in favor of information from another source. Therefore, even regarding market economy antidumping cases, the application of partial "facts available" often leads the investigating trade authority to use surrogate data leading to the potential of double remedies.<sup>67</sup>

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<sup>63</sup> 19 U.S.C. § 1677b(a)(1)(C)(iii).

<sup>64</sup> Import Administration, 'Inquiry into the Status of the Russian Federation as a Non-Market Economy Country under the U.S. Antidumping Law', <<http://enforcement.trade.gov/download/russia-nme-status/russia-nme-decision-final.htm>>, access date: 3 Dec. 2015.

<sup>65</sup> Refer to Ahn and Lee, supra n. 30.

<sup>66</sup> In a recent *US-Countervailing and Antidumping Measures* (DS 449) WTO case, the Panel found that in 25 of the 26 countervailing duty investigations or reviews against China, the United States acted inconsistently with Articles 19.3, 19.10 and 32.1 of the WTO. The U.S. failed to avoid double remedies potentially arising from the concurrent imposition of antidumping and countervailing duties on identical imports. See Appellate Body Report, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS449/AB/R, adopted 22 Jul. 2014. Even after Congress amended the U.S. law to address NME double-count in a manner intended to address the Appellate Body's decision, Commerce continues to have much discretion in determining the pass-through of subsidy.

<sup>67</sup> B.D. Kelly, 'Market Economies and Concurrent Antidumping and Countervailing Duty Remedies'. *Journal of International Economic Law* 17 (2014): 105-123.

## 4.2 COUNTERVAILING TOOLS THAT ENSURE CHINA'S CONTINUED SPECIAL TREATMENT

### i. Use of the NME Methodology for Countervailing Measures Permanently Authorized Under China's Accession Protocol

Two specific remedy rules were added to China's accession protocol in order to protect the producers of other member countries from the potential adverse effects of Chinese subsidies. First, the accession protocol designates subsidies to state-owned-enterprises (SOEs) in China as automatically specific under the WTO Subsidies and Countervailing Measures (SCM) agreement, as long as state-owned enterprises are the predominant recipients of such subsidies or state-owned enterprises receive disproportionately large amounts of such subsidies.<sup>68</sup>

Second, paragraph 15(b) of the accession protocol authorizes the importing Member to use the NME methodology to identify and calculate Chinese subsidies. This is the first and only WTO provision that explicitly authorizes the use of alternative benchmarks in determining CVDs. Importantly, unlike certain antidumping provisions under paragraph 15 that are conditioned by the December 2016 deadline, paragraph 15(b) is incorporated on a permanent basis. As long as the U.S. DOC determines that prevailing terms and conditions in China create special difficulties in using domestic costs and prices as appropriate benchmarks, the NME methodology can be applied for CVD determination, regardless of the nature of China's economy.

### ii. Resort to Anti-Subsidy Remedies Encouraged by Recent WTO Appellate Body Ruling

In *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* (DS 379), the WTO Appellate Body ruled that Chinese state-owned commercial banks (SOCBs) may be considered “public entities,” and hence, loans from them can be considered subsidies.<sup>69</sup> The Appellate Body also upheld the Panel's interpretation of Article 14(b) and ruled that the U.S. DOC's decision to reject interest rates in China as benchmarks for RMB-denominated loans as *not* inconsistent with this provision. The Appellate Body stated that:

[It saw] no inherent limitations in Article 14(b) that would prevent an investigating authority from using benchmark interest rates on loans denominated in currencies other than the currency of the investigated loan, or from using proxies instead of observed interest rates, in situations where the interest rates on loans in the currency of the investigated loans are distorted and thus cannot be used as benchmarks. ... In the absence of an actual comparable commercial loan that is available on the market, an investigations authority should be allowed to use a proxy for what ‘would’ have been paid on a comparable commercial loan that ‘could’ have been obtained on the market.<sup>70</sup>

Considering the strong government intervention in financial markets, this ruling may put Chinese companies at a long-term disadvantage in CVD cases given. It is highly likely that countervailing duties resulting from the use of benchmark interest rates will be punitive.

Meanwhile, the Appellate Body, citing its findings in *U.S.—Softwood Lumber IV*, found further scope in Article 14 for the use of cross-border benchmark.<sup>71</sup> Under Article 14(d), an investigating authority may use a benchmark other than private prices of the goods in question in

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<sup>68</sup> Refer to Article 10.2 of China's Accession Protocol.

<sup>69</sup> Appellate Body Report, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 Mar. 2011.

<sup>70</sup> *Ibid.*

<sup>71</sup> Appellate Body Report, *United States—Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, para. 103, WT/DS257/AB/R, adopted 19 Jan. 2004.

the country of provision when it has been established that those private prices are distorted because of the predominant role of the government in the market as a provider of the same or similar goods. While the Appellate Body stated that “it is price distortion that would allow an investigating authority to reject in-country private prices, not the fact that the government is the predominant supplier per se,” it also recognized cases where “the government’s role as a provider of goods is so predominant that price distortion is likely and other evidence carries only limited weight.”<sup>72</sup>

The Appellate Body went on to establish a limitation on the use of such benchmarks, requiring that their use must “relate or refer to, or be connected with, the prevailing market conditions in that country, and must reflect price, quality, availability, marketability, transportation and other conditions of purchase or sale, as required by Article 14(d).”<sup>73</sup> Nevertheless, the Appellate Body expressly refused to suggest or rule upon specific alternative methods that might be available to countries, noting that such a review must be established only on a case-by-case basis.

## 5 CONCLUSION

Antidumping regulations in the United States have been constantly amended to catch up with agency practices which are notoriously known for finding creative ways to inflate and impose antidumping duties. Regarding imports from China, the DOC determines antidumping duties using the NME methodology, which allows the agency to use estimates based on surrogate country data above costs and prices reported by Chinese producers. Unlike producers from market economies, individual Chinese producers are required to prove that market conditions prevail in the relevant industry in order to escape from NME treatment.

The U.S. DOC also presumes that all companies within the country are essentially operating units of a single, government-wide entity, and thus applies an entity-wide antidumping duty rate unless individual producers opt in for and pass a separate test. However, so far, Commerce has denied any challenge from China urging that it is no longer an NME. The agency has also refused to acknowledge a single Chinese industry as independent from government control in any investigation or review.

Independently, paragraph 15(a)(ii) of China’s accession protocol has authorized the U.S. and other WTO member countries to maintain this discriminatory antidumping measure regardless of China’s true market economy status until 11 December 2016. China’s accession protocol, for the first time in WTO history, explicitly authorized importing members to use alternative benchmarks for determining subsidies in China. Since then, both antidumping and countervailing investigations have increased, and the NME treatment in determining the normal value of Chinese imports produced cases in which Chinese goods were double-remedied.

Fifteen years after accession, China seems far from having completed its transition into a true market economy. In a recent publication by the World Bank, China was portrayed as a country where the government continues to control key sectors and where “close links between the government, big banks, and state enterprises have created vested interests that inhibit reforms and contribute to continued ad hoc state interventions in the economy.”<sup>74</sup> China still relies

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<sup>72</sup> Ibid.

<sup>73</sup> Ibid.

<sup>74</sup> World Bank, ‘China 2030 – Building a Modern, Harmonious, and Creative High-Income Society’, <<http://www.worldbank.org/content/dam/Worldbank/document/China-2030-complete.pdf>>, access date: 2 Dec.



heavily upon SOEs to implement public policies driven by the Communist Party and uses SOCBs to intervene in financial markets. Given the tight political and economic links between the government and private sector and intrinsic resistance to further privatization and liberalization, some commenters doubt that China could ever complete its transformation into a full market economy.

Even as 11 December 2016 closely approaches, the legal validity of the NME methodology authorized under China's accession protocol post-December 2016 remains unresolved. Regardless of China's status as either a NME or a market economy for antidumping purposes, this paper argues that the U.S. is still equipped with various trade remedy measures to discriminate against China. The current U.S. antidumping law and practices already are parallel to the NME methodology authorized under China's accession protocol. Similarly, industry-wide test and entity-wide rates are features of the U.S. antidumping law and practices. Independent of the accession protocol, the U.S. DOC reserves alternative methodologies available for the use of surrogate and constructed prices. This suggests that double remedies to Chinese goods are still possible regardless of China's NME status.

Despite judicial clarification that the WTO's NME exception is limited to normal value comparisons, the DOC is likely to continue its use of alternative methodologies based on its expressed view that China's economy structurally departs from that of a full market economy. Even the U.S. statute guides Commerce in taking a holistic approach to justify its use of NME methodologies by considering not only the degree of government control of prices and wages but also the extent of state ownership of the means of production and intervention in financial markets, and how free the investment environment is.

Meanwhile, China's accession protocol has permanently allowed the use of alternative benchmarks in subsidy cases. Also, recent findings by the Appellate Body foster anti-subsidy remedies against China by recognizing state-owned commercial banks as public bodies and authorizing alternative benchmarks when government intervention in the financial markets is strong.

Therefore, even though a certain NME provision of the accession protocol expires in December 2016, it is likely that the U.S. DOC will continue its 'special treatment' against goods from China.

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2015. The report states that "China's transition to a market economy is incomplete in many areas. A mix of market and non-market measures shapes incentives for producers and consumers, and there remains a lack of clarity in distinguishing the individual roles of government state enterprises, and the private sector. It is imperative, therefore that China resolve these issues, accelerate structural reforms and develop a market-based system with sound foundations in which the state focuses on providing key public goods and services – while a vigorous private sector plays the more important role of driving growth."

Annex 1. Protocol on the Accession of the People's Republic of China (WTO/L/432; 23 November 2001).

#### 15. Price Comparability in Determining Subsidies and Dumping

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

- (a) In determining price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement, the importing WTO Member shall use either Chinese prices or costs for the industry under investigation or a methodology that is not based on a strict comparison with domestic prices or costs in China based on the following rules:
  - (i) If the producers under investigation can clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product, the importing WTO Member shall use Chinese prices or costs for the industry under investigation in determining price comparability;
  - (ii) The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product.
- (b) In proceedings under Parts II, III and V of the SCM Agreement, when addressing subsidies described in Articles 14(a), 14(b), 14(c) and 14(d), relevant provisions of the SCM Agreement shall apply; however, if there are special difficulties in that application, the importing WTO Member may then use methodologies for identifying and measuring the subsidy benefit which take into account the possibility that prevailing terms and conditions in China may not always be available as appropriate benchmarks. In applying such methodologies, where practicable, the importing WTO Member should adjust such prevailing terms and conditions before considering the use of terms and conditions prevailing outside China.
- (c) The importing WTO Member shall notify methodologies used in accordance with subparagraph (a) to the Committee on Anti-Dumping Practices and shall notify methodologies used in accordance with subparagraph (b) to the Committee on Subsidies and Countervailing Measures.
- (d) Once China has established, under the national law of the importing WTO Member, that it is a market economy, the provisions of subparagraph (a) shall be terminated provided that the importing Member's national law contains market economy criteria as of the date of accession. In any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession. In addition, should China establish, pursuant to the national law of the importing WTO Member, that market economy conditions prevail in a particular industry or sector, the non-market economy provisions of subparagraph (a) shall no longer apply to that industry or sector.