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Application of EU Trade Defence Instruments in regard to imports from China now and beyond December 2016

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Executive Summary

In the *history* of the world trading system, no country, as of yet, had been allowed to enter the *WTO* that was comparable to *China.* On the one hand, its economic system appears ill-suited to fit the 'WTO-requirements' – but on the other hand its trade offers, natural resources and financial capacities are of substantial importance to the world. The points raised and conclusions made in this paper intend to inform about the legal background of the application of trade defence instruments against China as well as to nourish ideas for their modification; consequently, economic effects have been considered if at all only to a small degree, the same holds true for political economy aspects.

Part of the problems resulting from imported Chinese products, which often originate in a state-controlled economic environment, were in the past frequently addressed and meant to be solved via AD law. ADDs were and are used to block off or regulate imports and thereby make up for economic advantages reflected in sales prices that arose e.g. from insufficient environmental and labour standards, the lack of a functioning market and/or state influence onto the market by direct control and/or subsidies. Quite tellingly, the number of AD investigations against China increased in all major economies once China had become a WTO member in 2001.

ADDs as well as countervailing measures are adopted by countries and supranational organizations autonomously; nevertheless, WTO law sets limits to the use of these trade defence instruments. If WTO law obligations are not respected by WTO members, they might face complaints within the WTO Dispute Settlement System or before domestic courts.

If the EU expects China to 'play by WTO rules', it needs to respect a rules-based approach itself and would thus have to respect the conditions laid down in especially Article VI GATT for the adoption of AD measures and countervailing measures. Apart from Article VI GATT, the Agreement on Dumping (Agreement on the Implementation of Article VI GATT, ADA) and the Agreement on Subsidies and Countervailing Measures (ASCM) as well as the Chinese Accession Protocol (AP) are of utmost importance for determining the leeway of EU trade defence policy in this regard.

The AP allows for the application of 'special methodology' that is not based on a strict comparison with prices or costs in China in AD investigations; this 'special methodology' may envisage that prices are being 'calculated' by the investigation authorities using external benchmarks or that prices of like products originating from third countries in a particular third country market (analogue/surrogate country method) are being utilized; the availability of this 'special methodology' is the (only) legal effect of not granting China MES and instead continuing the application of Article 15(a) AP.

The decision to grant China MES and not to apply Article 15(a) AP anymore can be taken by every WTO member autonomously; i.a. the US, Canada, Japan and the EU have not granted China MES until now, whereas Australia, Brazil, Argentina, Russia and Switzerland have done so.

There is no obligation in WTO law to sign any kind of a legally binding bilateral agreement to grant China MES. Some countries sign (non-binding) Memoranda of Understanding; the EU in the past – in regard to Russia – has merely released a public statement and afterwards amended the ADR.

It can also be argued that parts of Article 15 AP remain applicable after 11 December 2016, which would allow the continued application of 'special methodology' during AD investigations beyond 11 December 2016. This view is shared by parts of the academic literature.

However, the possible consequences of not granting China MES need to be clear: China might take retaliatory measures against the EU, withdraw from the negotiations on the EU-China Investment Agreement, impose AD measures against EU products, hinder EU companies to engage in business in China etc. On the other hand, granting China MES would put more pressure on, and potentially lead to significant economic impacts for, specific EU industries, unless the EU finds other ways to protect its industries against detrimental effects caused by market distortions in China.

Continuing the application of the current set of EU AD instruments including the 'special methodology approach' should at least be possible until the WTO Appellate Body decides, presumably in 2018 or later, on the interpretation and application of the AP. Such decision would naturally only occur as a consequence of a corresponding Chi-

nese claim, thus only if China should not tolerate this approach. If the WTO Appellate Body should, in a few years time, deny the possibility of a continued application of 'special methodology' based on the Chinese AP, the EU would then have to bring its domestic law into conformity with WTO law; a duty to pay for damages is not provided for in WTO law. Consequently, the industries of WTO members could enjoy another three years of 'easy protection' in AD investigations based on this 'special methodology' approach. Not granting MES to China would, furthermore, give the EU the supplementary option to transpose methodology elements incorporated in the US and Canadian legal orders into EU AD law.

In US practice, the determination/revocation of a MES/NMES is a mere executive act, which is conducted by Commerce and cannot be reviewed by a court. In contrast, under EU law, as pointed out above, an ordinary legislative procedure in order to amend Article 2(7) EU ADR is required.

Transposing such an approach into EU law would necessitate a substantive modification of the EU ADR. At the same time, such an approach would mean that the EU would reveal its position not to grant China MES automatically and that, consequently, parts of Article 15(a) AP remain applicable. Such an approach would confer more discretion upon the Commission to decide on a case-by-case basis when to resort to either NME or ME treatment. Certainly, this would entail an enormous shift of competences towards the Commission. Yet, as a consequence the Commission could continue to use the 'analogue country' method, which would allow to exert pressure on China. At the same time, the approach entails a certain flexibility which also leaves possibilities of entering into a dialogue with China, e.g. on a case-by-case or sector-by-sector basis. Parts of this approach are already envisaged in Article 2(7)(c) EU ADR. Accordingly, producers under investigation have the opportunity to provide evidence that they operate under market economy conditions; should they be successful, 'special methodology' does not apply to them.

Most ADDs and CDs directed against imports from China concern specific sectors, especially the steel sector. Therefore, it might be worthwhile exploring the possibilities not only of an 'all-or-nothing' approach, as it is the case under the US 'NME test', but also of introducing a sector- or industry-related market economy test. Such an approach could also demonstrate the EU's continued interest to cooperate with Chi-

na irrespective of not granting MES at this stage – once China proves that significant reforms in specific sectors or industries are under way, it could possibly obtain market economy treatment at least in these sectors or industries. In this context, one could argue that the AP, in its in Article 15(d), third sentence explicitly allows a sector-based approach in AD investigations.

Under Canadian practice, if the CBSA wishes to apply a China-specific (NME) methodology for the determination of the normal value in AD investigations, it first has to either demonstrate that the Chinese sector does not operate under market economy conditions or obtain corresponding evidence from the Canadian domestic industries. The fact that the burden of proof falls with the Canadian industry and CBSA respectively and not with Chinese producers seems to comply in any case with the expiration of Article 15(a)(ii) AP. Consequently, Canada factually employs a legal presumption in favour of Chinese MES. This technique of 'burden shifting' could well be an option for the future EU approach since it is in conformity with the AP, but still allows for the application of 'special methodology' including surrogate/analogue country methods wherever EU producers and/or authorities are able to demonstrate NME structures in a certain Chinese sector. Such an 'open approach' would demonstrate the EU's will to a 'political compromise' with China on the AD issue and therefore help to further improve trade relations with Beijing. Each sector or product under investigation would be treated as subject to market economy conditions unless there is evidence to the contrary.

Market economy treatment of China under EU trade defence instruments after December 2016 does not necessarily bring about weaker or less trade defence. The EU will have plenty of tools available to apply protective trade measures against imports from China. Besides AD measures – that will presumably be applied differently (on the basis of the 'particular market situation' approach) than before – the Commission can also make use of CDs.

In general, sector-specific protections of the EU industry should be promoted. Such an approach might also bring about more information from the sectors concerned (as regards their domestic impacts as well as their conditions in China) and consequently make AD as well as CD investigations easier.

Still, especially applying Articles 2(3) and (5) ADR to imports from China will give the EU authorities the possibility to adopt high ADDs when necessary, to confront Chinese exporters with more burdensome information requirements and, moreover, result in an increase of dumping margins (under the condition that investigations are intensive and all product-related production costs are included in the determination of the final price). The US Department of Commerce just as the Commission has already used this 'particular market situation'-approach in the past, for example regarding imports from Russia. Also Australia regularly follows this approach, which often results in high ADDs against China.

The difference between the 'analogue/surrogate country' method, which is possible only under the AP, and the alternative cost calculation/constructed value method – provided for in the ADA – concerns primarily the availability of certain types of external benchmarks. Whereas the former allows for the utilization of benchmarks found in third countries/markets, i.e. respective prices of like (foreign) products, the latter is more restrictive in that it solely allows to replace certain price-building factors of the 'dumped' product with more 'general' external benchmarks, e.g. world market prices.

Further options include 'grandfathering', giving the Commission more discretion if and when to apply the 'lesser duty rule' (LDR), adopting 'double remedies' and intensifying AS investigations.

Already during the modernisation review of the trade defence instruments (TDIs) that is currently on-going, the Commission proposed to limit the use of the LDR, which currently caps the ADDs at the level of the injury (of the domestic economy), therefore causing lower ADDs. Thus, if the 'lesser duty' approach is eliminated from EU AD policy, this could result in higher ADDs. Nevertheless, this measure would not have any effect on the investigations and applied methodologies themselves.

Currently, the application of Art. 2(7) ADR (an NME approach) plus the simultaneous imposition of countervailing measures as well as of ADDs in regard to the same imports would most likely result in the imposition of what is called a 'double remedy' for the same subsidy. This (US) practice was successfully challenged by China in the WTO dispute settlement system. Nevertheless, 'double remedies' will be more readi-

ly available when one uses the market economy AD methodology instead of the 'special (NME) methodology.'

Whether or not China is granted MES is, as stated above, only relevant for AD law and the calculation of the 'normal value' during AD investigations. Concerning state subsidies and respective countervailing measures it is completely irrelevant whether or not MES is 'officially' granted to China. Exposing China to countervailing measures implies a trend towards incrementally recognizing its market orientation. Nevertheless, having or being a market economy is not a condition for the application of AS law, as WTO law is intended to protect international trade; a distortion of third markets might be sufficient to justify the adoption of countervailing measures to state subsidies.

Nevertheless, it has to be stressed that the adoption of ADDs under the special methodology approach is less burdensome than the adoption of CDs after AS investigations. Once MES has been recognized, AD investigations against China will also be more time- and work-intensive, thus in this regard the preference given to AD investigations over AS investigations might diminish. Nevertheless, it is argued that AD investigations generally lead to higher duty margins compared to AS investigations. However, if a 'special methodology' for AS investigations involving Chinese imports can be developed, it might in the end even be easier to impose high duties as a result of AS investigations than through AD investigations. Such approach would be possible in accordance with Article 15(b) AP, which allows developing a new 'countervailing measures methodology' in regard to China, e.g. the use of external benchmarks etc. (In both cases of CDs as well as ADDs, the applied instruments are identical in that they involve the imposition of duties onto imports).

Therefore, countervailing measures could be made broader use of – as it is already the case in Canada, Australia and the US. The US Department of Commerce in 2007 altered a 23-year old policy of not applying CD law to NMEs; it is since this point in time that the US initiates CD investigations concerning Chinese imports in a more frequent manner. In this context, it shall be stressed that the EU should abstain from agreeing to any kind of a binding text, which sets out that the EU will no longer rely on Article 15(b) AP in the future. The option to apply some kind of 'special methodol-

ogy' in AS investigations could always be useful as a sort of 'last resort' against imports distorted due to Chinese state influence.

Should China be granted MES in the short or long run, i.a. the application of the ADR with the possibility of disregarding distorted prices or costs because of a 'particular market situation' in China as indicated above remains possible; it has to be evaluated whether the application of this legal basis is more labour-intensive for the Commission than applying the current 'analogue country approach' in AD law. 'Protecting' EU industries might in the future (in case MES is granted) entail an increased need for human resources within the Commission. This boils down to 'more personnel' for the Commission (that would conduct more profound – AS and AD – investigations and reviews) in order to avoid a 'trade war' with China.

An environment-related TDI – the introduction of carbon tariffs – is another instrument discussed that would most likely open up the possibility for treating Chinese products differently than others.

The current negotiations of an EU-China-Bilateral Investment Agreement could provide an opportunity to include transparency obligations for Chinese enterprises. The European Parliament already asked for the incorporation of the Santiago Principles into such an agreement. More transparency might lead to a more competition-oriented Chinese economy as well as more information on Chinese State Owned Enterprises and state subsidies being available; this information could then potentially be used in AS investigations.

Abbreviations

AB	Appellate Body
AD	Anti-dumping
ADA	Anti-Dumping Agreement (Agreement on Implementation of Article VI GATT)
ADD(s)	Anti-dumping duty(ies)
ADR	Anti-Dumping Regulation
AP	Accession Protocol
AS	Anti-subsidy
ASCM	Agreement on Subsidies and Countervailing Measures
ASR	Anti-Subsidy Regulation
BIT	Bilateral investment treaty
CBSI	Canada Border Services Agency
CD(s)	Countervailing duty(ies)
cf.	compare
CFI	Court of First Instance
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
ECJ	(European) Court of Justice
e.g.	for example
EU	European Union
GATT	General Agreement on Tariffs and Trade
i.a.	inter alia
i.e.	id est (that is)
ITAC	International Trade Commission of South Africa
LDR	Lesser duty rule
LTAR	Less than adequate renumeration
ME	Market economy

MES	Market economy status
MOI	Market orientated industry
NME	Non-market economy
NMES	Non-market economy status
OJ	Official Journal
PIR	Preliminary Information Request
PMS	Particular Market Situation
RFIs	Requests for Information
RMB	Renminbi
SIMA	Special Import Measures Act
SM	Safeguard measures
SOCB	State Owned Commercial Banks
SOE	State Owned Enterprises
TDI(s)	Trade defence instrument(s)
US	United States of America
USDOC	US Department of Commerce
USITC	US International Trade Commission
WTO	World Trade Organization

I. Introduction

China was one of the signatories to GATT 1947, but withdrew from it in already 1950. In 1986, China applied to re-enter the GATT; negotiations between China and the GATT/WTO Contracting Parties lasted 15 years before China was accepted as a WTO Member. In November 2001 China accepted the Protocol of Accession[1] and as of 11 December 2001 has been a member of the WTO. Therefore, China's accession is based on the AP, which contains provisions that have already been the subject of lengthy WTO-disputes. In 2001, China was considered to be in a transition phase towards becoming a market economy but not yet a veritable market economy. The central provision for treating China as a "Non-Market Economy", which up to now allows for an easier application of trade defence instruments against Chinese imports by other WTO-Members, is Article 15 of the AP. China currently has non-market economy status (NMES) with some WTO members and simultaneously market economy status (MES) with other WTO members.

Today, China is the second most important trading partner of the European Union (EU), the destination of much of its foreign direct investment and at the same time the country most targeted by EU anti-dumping (AD) allegations. Most AD investigations and measures imposed are initiated by the EU, the US, Canada and Australia, but lately also originate in developing economies like Argentina, Brazil, India, Mexico, South Africa and Turkey.[2] EU industries perceive a permanent danger of massive imports from China into the EU – currently the steel industry in particular, but also others. The Commission has just recently, in 2016, started new AD investigations in the steel sector. As was concluded already in 2010, there is no prima facie evidence that China's WTO membership has limited the incidences of Chinese exporters facing new investigations of dumping behaviour.[3]

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1 WTO, Protocol on the accession of the People's Republic of China, WT/L/432, p. 2 et seq., available at http://docsonline.wto.org/imrd/directdoc.asp?DDFDocuments/t/WT/L/432.doc (last accessed 2 May 2016).

2 *Chad P. Bown*, China's WTO Entry: Antidumping, Safeguards and Dispute Settlement, in: Robert C. Feenstra and Shang-Jin Wei (eds.): China's Growing role in World Trade, Chicago 2010, pp. 281-337; *Patrick A. Messerlin*, China in the World Trade Organization: Antidumping and safeguards, The World Bank Economy Review 18 (1) (2004), pp. 105-130.

3 *Francisco Urdinez and Gilmar Masiero*, China and the WTO: Will the Market Economy Status Make Any Difference after 2016?, The Chinese Economy 48 (2) (2015), pp. 155-172, at p. 161 with reference to *Chad P. Bown*, China's WTO Entry: Antidumping, Safeguards and Dispute Settlement, in: Robert C. Feenstra and Shang-Jin Wei (eds.): China's Growing role in World Trade, Chicago 2010, pp. 281-337.

The reason why the NMES/MES relates to the treatment of exports of Chinese goods lies in Art. VI GATT and the Chinese WTO AP; it provides that dumping is calculated differently for NME than for market economies. As long as China is not granted an MES, dumping calculations can be based on the market prices of a 'surrogate/analogue country' instead of using the real prices in the Chinese market. It is also this aspect that makes Chinese companies vulnerable in multiple AD investigations.[4] Since NMES entails being subjected to 'special methodology' – including the 'analogue country method' – in the calculation of ADDs, China launched a major diplomatic campaign more than ten years ago asking trade partners to accord China MES and thus to stop applying the analogue country method in with regards to Chinese (dumped) products. The campaign was partly successful; New Zealand, Singapore and Malaysia all accepted Chinese MES in 2004, Australia followed in 2005. The latter even concluded an FTA with China that also includes an AD and countervailing duty (CD) chapter. Also Brazil, Argentina and Switzerland granted China MES. Canada, the US and the EU, on the other hand, still treat China as an NME.

This paper does not primarily concern the question whether the EU is obliged to grant China MES or not;[5] it is mainly about which instruments currently exist for the EU to react to market and trade distortions stemming from third countries, especially those with state influenced competition, and which currently existing instruments will remain applicable also beyond 11 December 2016. The Commission already acknowledges that removing China from the list of NMEs is expected to result, on average, in lower

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4 *Francisco Urdinez and Gilmar Masiero*, China and the WTO: Will the Market Economy Status Make Any Difference after 2016?, The Chinese Economy 48 (2) (2015), pp. 155-172, at p. 156; *David Shambaugh and Dawn Murphy*, U.S.-China Interactions in the Middle East, Africa, Europe and Latin America, in: David Shambaugh (ed.): Tangled Titans: The United States and China, Plymouth 2013, pp. 315-346, at p. 320.

5 In order for a country to be considered a market economy by the EU it must meet the following criteria:

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

dumping margins, because the standard methodology normally does not take into account the remaining distortions in the Chinese economy and/or other non-market economies.'[6] As is pointed out, being a country that recognized China's MES decreases the expected number of AD investigations initiated per year by 57.8%, holding all other variables constant. Excluding Argentina and Brazil – both countries recognized Chinas MES already in 2004 – the decrease even amounts to 78,5 %.[7] Such a modification of EU AD law may 'render the EU's Trade Defence Instruments (TDIs) less effective, i.e. dumped imports will continue to enter the EU market, which will negatively affect the EU industry in terms of output and may ultimately put jobs at risk.'[8]

Over the past twenty years, the EU Commission focused its investigations related to a possible application of TDIs to a large degree on Chinese imports. More than 20 % of all investigations[9] – most of them AD investigations as the prevailing instrument of EU trade defence[10] – focus on goods imported from China. Future trade defence cases between the EU and China will depend largely on how the issue regarding China's potential MES will be resolved by the end of 2016. In this context, the question will be what trade defence instruments can be applied under which circumstances.

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6 European Commission, Open public consultation regarding the possible change in the methodology to establish dumping/subsidization in trade defence investigations concerning the Peoples' Republic of China, available at: http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154258.pdf (last accessed 2 May 2016), at p. 2; for more information on the consultations see http://trade.ec.europa.eu/consultations/index.cfm?consul_id=191 (last accessed 2 May 2016). The online consultation was closed on 20 April 2016.

7 *Francisco Urdinez and Gilmar Masiero*, China and the WTO: Will the Market Economy Status Make Any Difference after 2016?, The Chinese Economy 48 (2) (2015), pp. 155-172, at. p. 167.

8 European Commission, Open public consultation regarding the possible change in the methodology to establish dumping/subsidization in trade defence investigations concerning the Peoples' Republic of China, available at: http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154258.pdf (last accessed 2 May 2016), at p. 2; for more information on the consultations see http://trade.ec.europa.eu/consultations/index.cfm?consul_id=191 (last accessed 2 May 2016). The online consultation was closed on 20 April 2016.

9 See European Commission, Anti-Dumping and Anti-Subsidy Measures list (last updated: 11 December 2015), available at http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_113191.12.2015.xls (last accessed 2 May 2016).

10 See *Sophia Mueller*, The Prospects of EU Trade Defence against Chinese Imports after 2016 – Taming the Dragon through Countervailing Duties?, 2015, available at http://ssrn.com/abstract=2665960 (last accessed 2 May 2016), p. 2.

The EU uses a particular system of TDIs. These include Anti-Dumping Duties (ADD) against dumping, Countervailing Duties (CD) against subsidies and Safeguard measures (SM). These instruments find their basis in WTO-Law and are transformed into EU Law via regulations. These regulations – especially the AD regulation[11] (ADR) and the anti-subsidy (AS) regulation[12] (ASR) – allow the EU to defend its producers against distortions of international market competition that result from dumped or subsidised imports. Against dramatic shifts in trade flows – in so far as these are harmful to the EU economy –, the EU can react by adopting 'safeguards' based on the 'import regulation.'[13] The aim of especially ADDs and CDs is thus to counter the artificial advantages which third countries may enjoy in international trade through state induced or privately organised distortions.

If the EU does not grant MES to China after 11 December 2016, on the one hand a negative impact for EU-China relations is expected, i.a. Dispute Settlement Body (DSB) proceedings against the EU for not granting a MES, a 'trade war', but also negative influence on the on-going EU-China BIT negotiations. On the other hand, different studies point out the negative economic impact an MES would have on the European economy.[14]

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11 Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community, OJ 2009 L 343, pp. 51-73, last amended by Regulation (EU) No 37/2014 of the European Parliament and of the Council of 15 January 2014 amending certain regulations relating to the common commercial policy as regards the procedures for the adoption of certain measures, OJ 2014 L 18, pp. 1-51; see also European Commission, Proposal for a Regulation of the European Parliament and of the Council on protection against dumped imports from countries not members of the European Union, COM(2014) 667 final.

12 Council Regulation (EC) No 597/2009 of 11 June 2009 on protection against subsidised imports from countries not members of the European Community, OJ 2009 L 188, pp. 93-126, last amended by Regulation (EU) No 37/2014 of the European Parliament and of the Council of 15 January 2014 amending certain regulations relating to the common commercial policy as regards the procedures for the adoption of certain measures, OJ 2014 L 18, pp. 1-51; see also European Commission, Proposal for a Regulation of the European Parliament and of the Council on protection against subsidised imports from countries not members of the European Union, COM(2014) 660 final.

13 Regulation (EU) 2015/478 of the European Parliament and of the Council of 11 March 2015 on common rules for imports, OJ 2015 L 83, pp. 16-33.

14 See for example *Robert E. Scott and Xiao Jiang*, Unilateral Grant of Market Economy Status to China would put Millions of EU Jobs at Risk, Economic Policy Institute, EPI Briefing Paper #407, 18 September 2015, available at http://www.epi.org/files/pdf/92370.pdf (last accessed 2 May 2016).

II. The Chinese WTO Accession Protocol and Recognizing China's MES

As China was never considered to be a market economy, all WTO members accepted that there might be difficulties in determining costs and prices in AD investigations and that a strict comparison between the domestic Chinese price and export prices would not always be appropriate.[15]

In contrast to other WTO accession protocols, the Chinese AP is not a standardized text; instead it contains special provisions that elaborate, expand, modify or derivate from the existing WTO agreements.[16] The AP consists of a main text of 11 pages and 143 paragraphs incorporated by reference from the 77 pages Working Party Report[17] (compared to a main text of often not more than 2-3 pages of standardized provisions for accession protocols of some other countries). The AP permitted other WTO Members to consider China as an NME in AD investigations *at least* for a time period of 15 years – since China became a WTO member on 11 December 2001 this period lasts until 11 December 2016, unless China should be able to demonstrate beforehand that it has developed into a market economy.

1. Granting MES through a formal and binding act?

WTO AD law leaves it to the discretion of each WTO member whether it recognizes China as a market economy or not – this legal situation is undisputed for the time being until 11 December 2016.[18] WTO law does not provide for any obligation to conclude any kind of a binding bilateral agreement with China on the acceptance of MES in AD investigations. MES therefore is generally conceded in political declarations or granted in a Memorandum of Understanding/Recognition, which constitutes an unregulated agreement without monitoring institutions that exclusively originates in and depends on the goodwill of the parties.[19] In other words, an MoU is not legally binding, but rather constitutes an arrangement that is typically guided by political/diplomatic considerations. For example China signed a respective MoU with Swit-

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15 WTO Working Party on the Accession of China, Report of the Working Party on the Accession of China, WT/ACC/CHN/49, 1 October 2001, para. 150.

16 *Julia Ya Qin*, 'WTO-Plus' obligations and their implications for the World Trade Organization legal system – An appraisal of the China accession protocol, Journal of World Trade 37 (3) (2003), pp. 483-522, at p. 489.

17 WTO Working Party on the Accession of China, Report of the Working Party on the Accession of China, WT/ACC/CHN/49, 1 October 2001.

18 On the highly debated legal implications of the expiration of certain provisions of the AP on 11 December 2016 cf. the subsequent paragraphs.

19 *Francisco Urdinez and Gilmar Masiero*, China and the WTO: Will the Market Economy Status Make Any Difference after 2016?, The Chinese Economy 48 (2) (2015), pp. 155-172, at. p. 156.

zerland in 2007 and with Australia in 2005.[20] The EU, in the case of Russia, simply made a public announcement during the EU-Russia summit in 2002 and recognized Russia as a ME by this means;[21] subsequent to this summit the ADR was modified.

China has been treated as an NME in the EU AD system from the outset. In order to grant China MES EU law requires the modification of the ADR – more precisely the elimination of China from the list of countries mentioned in Art. 2(7)(b) ADR. As a consequence, 'special methodology' in AD investigations would no longer be available.

Nevertheless, conceding MES to China should be limited to AD investigations; the EU should avoid declarations that might be interpreted as barring the Commission from applying Article 15 AP in general since such a consequence would entail that the EU could no longer resort to 'special methodology' in AS investigations.

Concluding an MoU with China, which provides that NME methodology will no longer be used in EU AD investigations, however, might be a means to 'appease' China politically and possibly induce Beijing to refrain from initiating WTO DSU proceedings against the EU.

2. Obligation to grant MES in AD investigations after 11 December 2016?

Article 15(a) AP contains special rules for the determination of normal value in AD investigations against China. The provision generally allowed the investigating authorities of other WTO members to disregard Chinese prices and costs in AD cases

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20 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, Paragraph 2: 'Recognising that Australia and China should negotiate on an equal basis, Australia acknowledges China as an equal WTO trading partner by recognising China's full market economy status by permanently not seeking recourse to sections 15 and 16 of the Protocol of Accession of the People's Republic of China to the WTO and paragraph 242 of the WTO Report of the Working Party on the Accession of China.', available at http://dfat.gov.au/trade/agreements/chafta/Documents/mou_aust-china_fta.pdf (last accessed 2 May 2016).

21 See European Commission, Press release, EU announces formal recognition of Russia as "Market Economy" in major milestone on road to WTO membership, IP/02/775, 29 May 2002, available at http://europa.eu/rapid/press-release_IP-02-775_en.html (last accessed 2 May 2016). See also in this regard Council Regulation (EC) No 1972/2002 of 5 November 2002 amending Regulation (EC) No 384/96 on the protection against dumped imports from countries not members of the European Community, OJ 2002 L 305 pp. 1-3, repealed by Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community, OJ 2009 L 343, pp. 51-73.

and to instead base the calculation of dumping margins on data from other market economies.[22]

The reason for this is that Chinese export prices are at times considered to be unreliable because of pervasive State influence in the economy. Countries that do not grant MES to China may apply as already pointed out the so-called 'surrogate' or 'analogue country' method to establish dumping, relying on price or production data from third countries.[23] Therefore, a determination of the normal value of products targeted by an AD investigation can be made on the basis of analogue third country methodology, which is often 'very unfavourable for Chinese exports because the choice of a surrogate country is often perceived as arbitrary or inappropriate, and the resulting antidumping duties tend to be exceedingly high.'[24] Nevertheless, the WTO Appellate Body affirmed that Article 15 AP 'does not authorize WTO members to treat China differently from other members except for the determination of price compara-

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[22] Article 15 of the AP states:
'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.
[…]
(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.'

[23] *Francisco Urdinez and Gilmar Masiero*, China and the WTO: Will the Market Economy Status Make Any Difference after 2016?, The Chinese Economy 48 (2) (2015), pp. 155-172, at. p. 156; *Michelle Q. Zang*, EC-fasteners: Opening the Pandora's box of non-market economy treatment, Journal of International Economic Law 14 (4) (2011), pp. 869-892.

[24] *International Bar Association*, Anti-Dumping Investigations Against China in Latin America, 2010, available at http://ssrn.com/abstract=1555619 (last accessed 2 May 2016), p. 5.

bility in respect to domestic prices and costs in China, which relates to the determination of normal value.'[25]

An exception to this rule exists where Chinese producers can 'clearly show' that market economy conditions prevail in the industry. Article 15 therefore essentially authorized NME methodologies that had been used for a considerable time by the US and the EU in AD cases concerning imports from former communist countries including i.a. Vietnam, Armenia and Kazakhstan.

Due to an unclear wording and systematic inconsistencies of Article 15 of the AP, the opinions differ whether Article 15(a) AP and thus special AD methodology in regard to Chinese imports remains applicable beyond 11 December 2016. This includes i.a. the questions whether China is granted MES automatically after that date, whether only the provision of subparagraph (a)(ii) shall expire 15 years after the date of accession and if the introductory sentence of Article 15(a) AP in conjunction with Article 15(a)(i) AP remains applicable for unlimited time. This latter question is particularly strongly discussed, the contentious issue being until when and under what conditions – e.g. until China has established that it is in fact a market economy – the introductory part of Article 15(a) as well as Article 15(a)(i) AP, and thus the 'analogue country method', shall still be applicable.

Chinese officials and part of the academic literature argue that Article 15(d), second sentence AP requires all countries to accord China MES on 11 December 2016, 15 years after China's accession; and that, as a consequence, WTO members can no longer use surrogate costs and prices in AD cases beyond that date. As reported in the media, the EU Commission's Legal Service apparently arrived at the conclusion that China should be formally designated a 'market economy' at the end of this year.[26]

a) An analysis of the wording of Article 15 AP could also lead to a different result. Several US and EU lawyers agree that Article 15(a)(ii) AP effectively disap-

[25] Appellate Body Report, WT/DS397/AB/R, EC – Fasteners (China), para. 290. See on this also *Michelle Q. Zang*, EC-fasteners: Opening the Pandora's box of non-market economy treatment, Journal of International Economic Law 14 (4) (2011), pp. 869-892, at p. 877.

[26] *Matthew Dalton*, EU Lawyers Favor Market-Economy Status for China Next Year, Wall Street Journal of 9 June 2015, available at http://www.wsj.com/articles/eu-lawyers-favor-market-economy-status-for-china-next-year-1433873355 (last accessed 2 May 2016), citing EU officials.

pears on 11 December 2016, but simultaneously point to the opening language in Article 15(a) AP, which states '[…] 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 […]' and which is not linked to specific termination dates. This reading can lead to the conclusion that this part of Article 15 remains in force for an unlimited period of time, unless China establishes that it is a market economy.

In this context, it is necessary to further analyse Article 15(d) AP. The provision's first sentence applies for those WTO Members that did envisage in their national laws market economy criteria as of the date of China's accession in 2001.[27] This is the case e.g. for the US, which already introduced the so-called 'NME test' in 1988. In conformity with Article 15(d), sentence one AP this test shifts the burden of proof onto China. The EU did not – at least not to the knowledge of the author of this study – provide for comparable criteria in 2001. The view that Article 15(a) AP only remains in force for those countries that had already laid down market economy criteria at the date of accession also make sense given that together with Article 15(a), introductory sentence AP also Article 15(a)(i) AP would remain in force – at least for the US – which provides that as long as no overall MES has been granted, producers under investigation shall have the opportunity to demonstrate on a case-by-case basis that market economy conditions prevail. This is congruent with the 'Market Oriented Industry (MOI) test' applied by the US since 1992.[28]

b) The question remains, whether also the EU will be able to argue that Article 15(a) AP remains applicable after 11 December 2016. Besides keeping an NMES in force by those countries that did provide for market economy criteria in their national laws in 2001, such a result could be extended to those countries that did not. This line of reasoning would be based on an isolated inter-

[27] See in this regard WTO Working Party on the Accession of China, Report of the Working Party on the Accession of China, WT/ACC/CHN/49, 1 October 2001, para. 149: 'Members 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.'

[28] Cf. section IV.2.a) below. A test comparable to the 'MOI test' is also known under EU law, cf. Article 2(7)(c) Regulation (EC) No 1225/2009.

pretation of Article 15(a) in conjunction with (d), sentence three AP. The latter states: '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.' The EU has spelled out market economy criteria in its domestic (non-binding) law.[29] An isolated application of this sentence would allow for an implementation of sector- or industry-specific market economy tests in the EU. Therefore, the EU could still generally treat China as an NME, whereas specific sectors could be excluded from this approach once China establishes that market conditions prevail in the specific sector or industry. As long as China has not delivered sufficient evidence according to EU law in this respect, the EU could fulfil its burden of proof in individual state-producer proceedings by simply pointing to this lack thereof. Given that also Article 15(b) AP – the possibility to use special methodology when adopting countervailing measures – does not provide for specific time limits either, this perception is supported by systematic considerations regarding the overall interpretation of Article 15 AP.

c) Lastly, denying China MES in view of its failure to meet its obligations under the AP is also discussed. Article 9 AP prescribes an overall market economy obligation for China 'to allow prices for traded goods and services in every sector to be determined by market forces except for those specified in Annex 4 of the Protocol.' Therefore, the EU and the US could argue that China has not carried out all steps necessary in order to change its economy and the government's and Communist Party's influence thereon. As was pointed out by Prof. *O'Connor*[30]*,* the EU could i.a. argue that as long as China does not comply with its commitment made to establish an economy in which prices are set by the market, importing WTO members would continue to enjoy the rights provided for in Article 15(a) AP; consequently, the EU would not be obliged to grant MES as long as China is not willing to change its economic system towards a market driven one. China would then be treated in just the same way

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29 European Commission, Commission Staff Working Document on Progress by the People's Republic of China towards Graduation to Market Economy Status in Trade Investigations, SEC(2008) 2503 final, 19 September 2008.

30 *Bernard O'Connor*, Market-economy status for China is not automatic, CEPR's Policy Portal, 27 November 2011, available at: http://www.voxeu.org/article/china-market-economy (last accessed 2 May 2016).

as comparable countries are treated. As already mentioned, this position would – as also other authors point out – quite likely lead to a Chinese action against the EU within the WTO Dispute Settlement system.

To summarize: It goes beyond doubt that Article 15(a)(ii) AP will no longer be applicable after 11 December 2016. The interpretation of the AP leads to the conclusion that for those countries that provided for market economy criteria in their national laws as of the date of accession, Article 15(a), introductory sentence in conjunction with Article 15(a)(i) AP continue to apply. These States are thus clearly free to maintain China's NMES and to apply 'special methodology' for the determination of the normal value as provided for in the AP (thus including the analogue/surrogate country approach). At the same time, the producer under investigation is to be given the opportunity to demonstrate that market economy conditions prevail in his industry; furthermore, also the Chinese government shall have the chance to establish that particular industries or sectors are subject to market economy conditions.

This interpretation leads to the conclusion that the US does not have to treat China as market economy as of 11 December 2016. It is debatable whether this is also the case for the EU since the EU did not provide for market economy criteria in its national laws at the date of China's accession in 2001. Article 15(d), third sentence could be read as allowing the EU to generally maintain China's NMES unless China demonstrates that particular sectors function in a market-oriented manner; in that event, the EU would have to grant sector-specific MES. Arguments for the EU to continue treating China as an NME are that China did not fulfil its own obligations under the AP and, furthermore, that Article 15(b) AP – the possibility to use special methodology when adopting countervailing measures – does not set out specific time limits either.

Whether or not Article 15(a), introductory sentence AP remains applicable beyond 11 December 2016 will most likely have to be decided by the WTO Appellate Body, whereas 2019 seems the earliest date for a final decision in this respect. Even if the Appellate Body should rule against the respective approaches taken by the US and the EU, China would not receive retroactive compensation for ADDs collected prior to the ruling.

As already briefly mentioned above, the AP not only deals with AD issues, but also follows a similar approach in AS investigations and moreover obliges China to develop into a market economy. Granting China MES does neither have any effect on the applicability of AS measures in regard to Chinese imports nor on the possibility to adopt CDs after AS investigations. To the contrary, it has to be emphasized that Article 15(b) AP authorizes the use of alternative benchmarks in calculating the amount of a subsidy granted by China.[31]

This provision has up to now received only very little attention in the discussion. However, the Commission pointed out that it would discuss the possibility of making broader use of its AS instruments – a development that one likely needs to conceive against the backdrop of Article 15(d) AP.

III. Application of the current system of EU Trade Defence Instruments against China

Irrespective of granting China MES, the current system of EU TDIs remains applicable and will be analysed in this section. TDIs are regularly applied against imports from third states. To apply these defence mechanisms no modification of secondary EU Law is necessary. Yet, it has to be kept in mind that TDIs regularly are at issue in proceedings within the WTO Dispute Settlement system. Third countries are increasingly becoming major users of AD instruments, also against the EU (104 measures). They are by now using these rules more often than the EU (252 measures in force in the USA, 208 in India, 134 in Turkey, 128 in Brazil and even 102 in China, while the EU has 107 measures in force).[32] The United States has 98 ADD orders in place against China, which account for 37 % of all US AD cases. Consequently, China is by far the primary target for the US.

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31 Article 15(b) AP reads: '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.'

32 For current Statistics on the use of AD measures see *Chad P. Bown*, Global Antidumping Database, 2015, available at http://econ.worldbank.org/ttbd/gad/ (last accessed 2 May 2016).

WTO Law – as the basic international legal order for the application of TDIs and thus also for the economic relationship between the EU and China – allows under certain conditions for the imposition of

- Anti-Dumping Duties (directed against 'dumped' goods),
- Countervailing duties (in cases of 'subsidized' goods/producers) or
- Safeguard measures (in cases of increased imports).

Furthermore, under EU antitrust law measures against foreign producers can be adopted.

The application of EU TDI against China so far mostly focused on AD measures, for example in the time period between January and November 2015 six new AD investigations were initiated against China, but no AS investigations.[33]

The adoption of ADDs under the special methodology approach is far less burdensome than the adoption of CDs after AS investigations. Once MES has been recognized, AD investigations against China will also be far more time- and work-intensive, thus in this regard the preference given to AD investigations over AS investigations might diminish.

Yet, for now it has to be noted that the EU Commission also in view of other countries has primarily introduced measures based on the ADR; in the time period between 2011 and 2015 only 19 AS investigations were initiated, but 60 AD investigations.[34] It has to be pointed out that the instruments utilized in cases of CDs in AS investigations and of ADDs in AD investigations are identical – both result in the imposition of duties. The reason why AD investigations are generally preferred to AS investigations lies in the fact that through the former, it is more likely to reach positive determinations and higher AD margins.[35]

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33 See European Commission, Anti-Dumping/Anti-Subsidy/Safeguard Statistics covering the full year of 2015, available at http://trade.ec.europa.eu/doclib/docs/2016/april/tradoc_154456.pdf (last accessed 2 May 2016), Annex A.

34 See European Commission, Anti-Dumping/Anti-Subsidy/Safeguard Statistics covering the full year of 2015, available at http://trade.ec.europa.eu/doclib/docs/2016/april/tradoc_154456.pdf (last accessed 2 May 2016), Annex B.

35 See *Edwin Vermulst and Brian Gatta*, Concurrent Trade Defence Investigations in the EU, the EU`s new Anti-Subsidy Practice against China, and the Future of Both, World Trade Review 11 (3) (2012), pp. 527-553, at p. 531.

Nevertheless, developing a 'special methodology' in regard to AS investigations against Chinese imports might facilitate the successful implementation of AS investigations – and eventually even make them more effective than AD investigations.

1. Application of the Anti-Dumping Regulation

Dumping is normally the result of a lack of competition, a non-functioning market, a non-existing market economy, state interference in economic operations such as specific protection in the exporting countries' markets etc. These non-market circumstances generally allow local producers to charge artificially high prices in their home market – or for non-market production conditions in general. Thus, subsequently they are free to use the exceptional profits arising from such activities or conditions to 'subsidise' exports and to therefore offer prices below real market costs. Dumping as defined in Article VI GATT and as further elaborated in the WTO Agreement on Implementation of Article VI GATT[36] (ADA) means charging an export price of 2% or more below the normal price. The normal price is derived from the domestic price of like products[37] or, in absence of a domestic market price, the export price offered to buyers in third states or the 'cost of production … plus a reasonable addition for selling cost and profit.' This provision has been integrated into EU Law via the Anti-Dumping Regulation No 1225/2009 (ADR).

Under EU Law, the European Commission is responsible to investigate allegations of dumping by exporting producers in non-EU countries. It usually opens an investigation after receiving a complaint from the Union producers of the product concerned, but it can also do so on its own initiative. The EU investigates if

(1) there is dumping by the exporting producers in the country/countries concerned,
(2) material injury has been suffered by the Community industry concerned,
(3) there is a causal link between the dumping and injury found,
(4) the imposition of measures is not against the Community interest.[38]

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[36] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, available at https://www.wto.org/english/docs_e/legal_e/19-adp.pdf (last accessed 2 May 2016).

[37] Under the standard rules, in normal market circumstances, dumping is calculated by comparing the export price of a product exported to the EU with the domestic prices (or, if these are not reliable, with the costs of production) of the same product in the exporting country.

[38] The Commission services have a maximum 45 days to reject or approve a complaint. The investigation is conducted in two parts, within a maximum of nine months after the proceedings' initiation, provisional measures are disclosed and within a maximum of six months thereafter the defin-

Granting China MES solely affects the manner how the 'nomal value' of a good is calculated during investigations against China. If China is granted MES, the ADR still remains applicable, only the methodology available for the calculation of normal value changes. Currently, during AD investigations against countries with an NMES like China, the Commission considers that the domestic market prices are not veritable market prices and thus cannot be used to calculate the 'normal value'; therefore, the Commission selects an appropriate third ('surrogate'/'analogue') country to calculate the 'normal value.' All in all, the Commission has a significant degree of discretion.

On 31 December 2015, Chinese imports into the EU were subject to 53 definitive AD measures.[39] These measures affect 1.38% of imports from China into the EU.[40] China accounts for nearly 80% of the trade defence measures currently applied by the EU in sectors as diverse as steel, bicycles, solar panels or ceramics.

a) Continued application of Article 2(7) ADR (involves denial of MES)

Today, the Commission and the Council treat Chinese producers and goods with an NME approach. China is explicitly listed as an NME in Article 2(7) ADR, allowing the Commission to apply the analogue country approach. Therefore, if the EU decides to treat China as a market economy country, Art. 2(7)(b) ADR would have to be modified with China being removed from this paragraph; the special conditions contained in this provision would no longer be applicable. This modification would require an ordinary legislative procedure amending the ADR. Here the co-decision procedure would apply, which involves the proposal of an amendment by the Commission, and then the co-decision of Council and European Parliament.

On the other hand, if the EU decides not to grant this status to China, the EU could continue to apply Article 2(7) ADR.[41] This latter option would most likely lead to actions against the EU at the WTO level. These proceedings at the WTO would, including the Appellate Body phase, take approximately two years. As already discussed

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itive measures. Over the whole investigation period of maximum 15 months the Commission services constantly interact with the 'interested parties'.

39 See European Commission, Anti-Dumping/Anti-Subsidy/Safeguard Statistics covering the full year of 2015, available at http://trade.ec.europa.eu/doclib/docs/2016/april/tradoc_154456.pdf (last accessed 2 May 2016), Annex O.

40 European Commission, Fact Sheet, College orientation debate on the treatment of China in anti-dumping investigations, 13 January 2016, available at http://europa.eu/rapid/press-release_MEMO-16-61_en.pdf (last accessed 2 May 2016), p. 1.

41 See in this regard above section II.

above, the EU could argue that China has not undertaken all the steps necessary to change its economy and the governments' and Communist Party's influence thereon.

During such an on-going Dispute Settlement the US as well as Canada could, as third party participants, support the position of the EU. The EU thus could take advantage of the 'deficits' of the WTO DSU, which does not award compensation or damages for past violations of WTO obligations, but merely concludes with the finding that there is an inconsistency with covered WTO Agreements; subsequently the DSB recommends that the Member concerned brings the measure into conformity with that agreement.[42] Therefore, even in case that the EU did not respect a hypothetical obligation to grant China MES or that the EU was not allowed to 'grandfather' existing ADDs and was accordingly acting contrary to WTO obligations, this would not result in any retroactive financial liability for the EU. The obligation to comply is prospective; the violating Member has a 'reasonable time' in which to bring its legislation and practices into compliance.

b) 'Grandfathering'

As mentioned above, currently 53 definitive AD measures are in force. Numerous new investigations were started between December 2015 and March 2016. An option might be to continue applying the measures ('grandfathering') that are in force in December 2016, while nevertheless removing China from the list of Article 2(7) ADR. Should this option be envisaged, one might reflect the possibility to adopt as many AD Measures against Chinese producers as possible until December 2016 – or if the MES should/would be granted to China at a later date until this point in time. All AD measures adopted until that moment could be 'grandfathered'; thus the definitive AD measures remain in place, typically for a period of five years. These measures are then formally adopted in conformity with Article 2(7) ADR before a modification of this norm (eliminating China from the scope of application of this paragraph), or any WTO decision stating that the EU had violated its WTO obligations by not modifying the domestic EU law, would occur.

The Commission could also disregard interim review requests concerning any measures already in place on 11 December 2016. This approach clearly risks being challenged either at the European Court through individual claims or could be seen

[42] Article 19 DSU.

as a breach of WTO obligations and consequently be subject to a challenge by China via the WTO DS mechanism; moreover, it could constitute a violation of the respective Chinese producer's right to interim reviews following a change in circumstances.

c) Article 2(3) and (5) ADR

Even without having regard to whether a country is on the NME list, EU AD law already today allows disregarding distorted prices or costs. Article 2(3) ADR allows that a 'particular market situation' for the product concerned within the meaning of the first subparagraph 'may be deemed to exist, i.a., when prices are artificially low, when there is significant barter trade, or when there are non-commercial processing arrangements.' If the EU Commission is successful in proving that a particular market situation continues to prevail in a particular sector, domestic prices and costs in this sector must be disregarded and normal value must be calculated

- either on a constructed value basis, or
- based on third country costs on a case-by-case basis.

The Commission rarely uses the export price applicable to a third country, but normally resorts to the constructed value method.[43] The constructed value is the result of a number of assumptions; it thus confers a rather wide margin of discretion upon the Commission. The final finding of the dumping proceedings might thus be based on more or less artificial assumptions by the Commission, which were made as part of the determination of constructed value and in disregard of the exporter's actual behaviour.[44]

In the WTO case *China – Broilers*[45], the Panel decided, interpreting Article 2.2.1.1 that '[…] the investigating authority retains the right to decline to use such books if it determines that they […] do not reasonably reflect the costs associated with the production and sale of the product under consideration', even though there is a presumption under this Article that normally the records of the party concerned shall be used to calculate the cost of production when determining normal value.

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43 *Ivo Van Bael and Jean-François Bellis*, EU Anti-Dumping and other Trade Defence Instruments, 5th ed., Alphen aan den Rijn 2011, p. 59.

44 *Ivo Van Bael and Jean-François Bellis*, EU Anti-Dumping and other Trade Defence Instruments, 5th ed., Alphen aan den Rijn 2011, p. 60.

45 Panel Report, 2 August 2013, WT/DS427/R, China – Antidumping and Countervailing Duty Measures on Broiler Products from the United States.

Furthermore, Article 2(5) ADR provides for the possibility to calculate prices

> '[i]f costs associated with the production and sale of the product and 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.'

Thus, the cost adjustment methodology gives the EU Commission another possibility to use prices from third country markets to calculate the normal value, even when a country is recognized as a market economy. It needs to be stressed that such an adjustment does not depend on the respective country having an MES or NMES; this method thus has to be clearly differentiated from the 'analogue country method' applied by the Commission under Art. 2(7) ADR.

Hence, it is proposed to apply a method similar to that employed in investigations against Russia.[46] In the case of Russia, the Commission has argued at various occasions that domestic prices were artificially low because of government control affecting energy prices; consequently, they were regarded as not reasonably reflecting the exporting producers' records.[47] This practice towards Russia was confirmed in differ-

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46 *Stuart Newman*, To ME or not to ME: China's Status after 11 December 2016, FTA Position Paper, November 2015, p. 5 et seq.

47 See 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 2006 L 365, pp. 26-49; 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 2008 L 75, pp. 1-7; Council Regulation (EC) No 1256/2008 of 16 December 2008 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 following a proceeding pursuant to Article 5 of Regulation (EC) No 384/96, originating in Thailand following an expiry review pursuant to Article 11(2) of the same Regulation, originating in Ukraine following an expiry review pursuant to Article 11(2) and an interim review pursuant to Article 11(3) of the same Regulation, and terminating the proceedings in respect of imports of the same product originating in Bosnia and Herzegovina and Turkey, OJ 2008 L 343, pp. 1-38; Council Implementing Regulation (EU) No 1251/2009 of 18 December 2009 amending Regulation (EC) No 1911/2006 imposing a definitive anti-dumping duty on imports of solutions of urea and ammonium nitrate originating, inter alia, in Russia, OJ 2009 L 338, pp. 5-11; Council Implementing Regulation (EU) No 1269/2012 of 21 December 2012 amending Implementing Regulation (EU) No 585/2012 imposing a definitive anti-dumping duty on imports of certain seamless steel pipes, of iron or steel, originating, inter alia, in Russia, following a partial interim review pursuant to Article 11(3) of Regulation (EC) No 1225/2009, OJ 2012 L 357, pp. 1-6.

ent decisions by the General Court.[48] It has to be noted that this jurisprudence and EU practice is currently subject to a challenge at the WTO.[49] The main issue in these WTO disputes is the conformity of the practice set out in Article 2(5) ADR with the ADA, since the latter does not include a comparable provision. Until the WTO cases are decided, the Commission can, if market distortions are found in China, continue to rely on Article 2(5) ADR. Yet, one has to point out that Chinese exporters could take action against EU AD measures based on Article 2(5) ADR before the General Court (see Article 263(4) TFEU) and, moreover, China could launch proceedings within the WTO DS.

d) Article 2(10) ADR

Article 2(10) ADR gives room for adjustments of the normal value and the export price and thus confers discretion upon the Commission. This discretion may not be exercised in an arbitrary manner and the investigating authority must act in an unbiased and even-handed manner, even when there are practical difficulties and time constraints. The burden of proof is placed on the interested party, i.e. the EU producer claiming adjustment.[50]

2. Options arising from the application of the EU Anti-Subsidies Regulation

Low prices of Chinese products often result from Chinese government intervention. Thus, it needs to be examined in what way and to what extent CDs, applied as a

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48 CFI, 7 February 2013, T-84/07 (EuroChem MCC v Council), ECLI:EU:T:2013:64; CFI, 7 February 2013, T-235/08 (Acron & Dorobuzh v Council), ECLI:EU:T:2013:65; CFI, 7 February 2013, T-459/08 (EuroChem MCC v Council), ECLI:EU:T:2013:66; CFI, 7 February 2013, T-118/10 (Acron v Council), ECLI:EU:T:2013:67.

49 Request for Consultations by the Russian Federation, 9 January 2014, WT/DS474/1, G/L/1063, G/ADP/D102/1, G/SCM/D101/1, European Union – Cost Adjustment Methodologies and certain Anti-Dumping Measure on Imports from Russia; Request for Consultations by the Russian Federation, 19 May 2015, WT/DS494/1, G/L/1115, G/ADP/D110/1, G/SCM/D107/1, European Union – Cost Adjustment Methodologies and certain Anti-Dumping Measures on Imports from Russia (second complaint). Several EU AD decisions, which involved adjustments to 'artificially low' input costs of foreign exporters, including the above-mentioned 'biodiesel' case, are presently being challenged at the WTO. These countries claim that the cost adjustment methodology used by the EU to calculate dumping in these cases is inconsistent with the WTO Anti-Dumping Agreement (ADA). They argue that the ADA does not allow such upward adjustments of costs in situations other than an incorrect transposition in the exporter's accounting books of the costs actually incurred.

50 See *Ivo Van Bael and Jean-François Bellis*, EU Anti-Dumping and other Trade Defence Instruments, 5th ed., Alphen aan den Rijn 2011, p. 108, with reference to Panel Report, 7 March 2003, WT/DS219/R, European Communities – Anti-Dumping Duties on malleable Cast Iron Tube or Pipe Fittings from Brazil, par. 7.178.

consequence of AS investigations, might be an effective means and an alternative to the current AD approach based on China's NMES.

The possibility to impose CDs in subsidy cases is laid down in EU law in the ASR; this regulation mainly transposes the applicable WTO law (Agreement on Subsidies and Countervailing Measures (ASCM)) into EU law in order to ensure appropriate and transparent application of the WTO AS rules. The purpose of the ASR is to offset any subsidy granted, directly or indirectly, for the manufacture, production, export or transport of any product originating in a non-EU country whose release on the EU market causes injury to competitors.

Practice shows that for almost ten years the adoption of AS measures has constantly increased. Nevertheless, some argue that the AS instruments are not applicable since China's economy is not operating under market economy conditions and thus government intervention can simply not distort any markets. Others point to the fact that individual subsidies under NME conditions are generally not discernible[51] or argue that AS measures are just not suited to counter Chinese threats.[52] In regard to the first line of reasoning, it has to be noted that it would be inconsistent to modify the ADR (especially its Article 2(7)) based on granting China MES and yet to argue at the same time that the AS regulation is inapplicable, due to the allegation that China does not dispose of functioning market structures at all that could be distorted. Furthermore, it has to be noted that WTO AS law does not provide for – other than EU State Aid law (see Article 107 TFEU) – the requirement that an internal market has to be distorted; instead WTO AS law aims at subsidies negatively affecting foreign markets.[53] Therefore, it is only consistent to apply AS law also towards China – at least once an MES has been granted.

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51 *K. William Watson*, Will Nonmarket Economy Methodology Go Quietly into the Night, Cato Institute Policy Analysis No 763, October 2014, available at http://object.cato.org/sites/cato.org/files/pubs/pdf/pa763.pdf (last accessed 2 May 2016).

52 Aegis Europe: 'For a number of reasons, it is unrealistic to expect that the anti-subsidy instrument would 'fill the gap' left by the ineffectiveness of anti-dumping measures following a grant of MES to China. To begin with, the subsidies agreement was drafted to deal with conditions in a market economy and is ill-suited to deal with the economy-wide and fundamental distortions inherent in a planned economy like China's. Prices for key industrial inputs and end products in China's economy are shaped by government policy, are very low, and take no account of market conditions. An artificially low price, as such, is not a subsidy whereas under the AD Agreement, it is an unfair market distortion which is addressed by making reference to the full costs of production'.

53 *Mitsuo Matsushita, Thomas J. Schoenbaum, Petros C. Mavroidis and Michael Hahn*, The World Trade Organization, Law Practice and Policy, 3rd ed., Oxford 2015, p. 338.

Irrespective of the WTO AS instrument as well as the EU ASR – which transformed the respective WTO law into EU law – being difficult to apply, first findings against China already imposed CDs of 44.7%; these cases involved subsidies concerning raw materials, land use rights, water and electricity as well as preferential tax policies.[54] The EU so far has initiated nine AS proceedings against China (until 2014),[55] but none in 2015[56] and 2016[57]. The first investigations against China started as late (or early) as 2010,[58] following in this regard the United States (see IV.2.a below).[59] In comparison, the US has imposed more than 30 AS measures against China (until the end of 2015). Therefore, it has to be examined whether the AS system is an efficient and effective means against subsidy-induced market distortions related to Chinese imports.[60]

A subsidy that can be subject to countervailing measures is deemed to exist, if there is

- a financial contribution by a government (including public bodies), in the country of origin or export, or if there is any form of income or price support[61] and,

- a benefit is thereby conferred,

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54 Council Implementing Regulation (EU) No 215/2013 of 11 March 2013 imposing a countervailing duty on imports of certain organic coated steel products originating in the People's Republic of China, OJ 2013 L 73, pp. 16-97.

55 See European Commission, Anti-Dumping and Anti-Subsidy Measures list (last updated: 11 December 2015), available at http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_113191.12.2015.xls (last accessed 2 May 2016).

56 See European Commission, Anti-Dumping/Anti-Subsidy/Safeguard Statistics covering the full year of 2015, available at http://trade.ec.europa.eu/doclib/docs/2016/april/tradoc_154456.pdf (last accessed 2 May 2016), Annex A.

57 See European Commission, Ongoing Investigations (last updated 2 May 2016), available at http://trade.ec.europa.eu/tdi/ (last accessed 2 May 2016).

58 European Commission, Notice of initiation of an anti-subsidy proceeding concerning imports of coated fine paper originating in the People's Republic of China, OJ 2010 C 99, pp. 30-36; Council Implementing Regulation (EU) No. 452/2011 of 6 May 2011 imposing a definitive anti-subsidy duty on imports of coated fine paper originating in the People's Republic of China, OJ 2011 L 128, pp. 18-75; see *Wenjie Qian*, The Dilemma of China as Respondent to Anti-Subsidy Proceedings – A Study of the First EU Anti-Subsidy Investigation against China, Journal of World Trade 46 (4) (2012), pp. 961-977.

59 US Department of Commerce, Cases C-570-959 and A-570-958, Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses (initiated 20 October 2009), available at http://enforcement.trade.gov/stats/inv-initiations-2000-current.html, A-570-958 (last accessed 2 May 2016).

60 *Sophia Mueller*, The Prospects of EU Trade Defence against Chinese Imports after 2016 – Taming the Dragon through Countervailing Duties?, 2015, available at http://ssrn.com/abstract=2665960 (last accessed 2 May 2016), p. 4.

61 Within the meaning of Article XVI of the General Agreement on Tariffs and Trade 1994 (GATT 1994)

- this ‘subsidy’ is specific to an enterprise or industry or to a group of enterprises or industries,

- there is injury suffered by the EU industry,

- there is a causal link between the injury and the subsidised imports, and

- the imposition of measures is not against the Community interest.

If all these conditions laid down in the ASR are fulfilled, the Commission may impose countervailing measures.

The amount of the countervailable subsidies is calculated in terms of the benefit conferred on the recipient during the investigation period. Necessary for the calculation of the CD is – as is the case in AD investigations – the existence of market based in-country prices.[62] In determining whether a contribution by the government has conferred a benefit upon the recipient, the guidelines set forth in Article 14 ASCM apply; as a counterpart to Article 14 ASCM on the EU law side, Article 6 ASR deals with the calculation of the benefit the recipient has obtained. The benefit typically equals the amount of advantage conferred by the governmental contribution. Article 6(d) ASR allows resorting to alternative prices if market prices in the exporting country are non-existent. If no market conditions exist that ‘can be used as appropriate benchmarks’, the distorted in-country terms and conditions shall be adjusted

- ‘by an appropriate amount’ to reflect market-driven circumstances, or
- terms and conditions ‘prevailing in the market of another country or on the world market’ may be employed.

The possibility of price deviation was already accepted by the WTO Appellate Body in *Softwood Lumber IV*.[63] In its finding, the AB allowed for the substitution of existing in-country prices with alternative prices in cases where no market economy conditions prevail at all or where the conditions in the respective market were distorted by gov-

62 *Sophia Müller*, The Prospects of EU Trade Defence against Chinese Imports after 2016 – Taming the Dragon through Countervailing Duties?, 2015, available at http://ssrn.com/abstract=2665960 (last accessed 2 May 2016), p. 3.

63 Appellate Body Report, 19 January 2004, WT/DS257/AB/R, United States – Final Countervailing Duty Investigation with Respect to Certain Softwood Lumber from Canada, para. 167 et seq.

ernment predominance.[64] In subsequent reports this approach was confirmed and extended. In *US – ADD and CVD*, for example, the Appellate Body decided – and thus confirmed the Panel – that Article 14(b) ASCM gives the possibility to disregard interest rates in China as benchmarks for SOCB loans denominated in renminbi (RMB); [65] this practice was held not to be inconsistent with the obligations of the United States under Article 14(b) ASCM.[66] Against this backdrop, the EU approach in Article 6(d) ASR seems to be in conformity with WTO law, especially with Article 14 ASCM.[67] Furthermore, it has to be noted that thus far it apparently was not necessary for States imposing CDs to rely on Article 15(b) AP.

In its practice the Commission regularly deemed the adjustment of Chinese prices impossible.[68] In the case of land-use rights, Taiwan was determined as the third market to be used for the calculation of the alternative prices; for steel products it chose Europe, the US, Turkey, Japan and/or Brazil; and for credit-lines in the case of Solar Panels the Commission selected a credit line of one Chinese producer that was obtained from a foreign bank at market terms.[69]

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64 Two conditions were set up for the use of alternative benchmarks:
(1) the investigating authority has established that 'private prices of the goods in question in the country of origin are distorted, because the dominant role of the market as the provider of the same or similar goods', and
(2) the alternative benchmark 'relates or refers to, or is connected with, prevailing market conditions in the country of provision'.

65 Appellate Body Report, 11 March 2011, WT/DS379/AB/R, United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, paras. 484, 488 et seq.

66 The Appellate Body upheld the Panel's interpretation of Article 14(d) of the ASCM as allowing an investigating authority to reject in-country private prices if these are distorted due to the government's predominant role in the market and found that the Panel properly concluded that, given the evidence of the Chinese Government's predominant role as a supplier of hot-rolled steel, and having considered evidence of other factors, the USDOC could determine that private prices in China were distorted and could not be used as benchmarks for calculating the amount of the benefit.

67 See also in regard to a broad discretion of WTO Members under Article 14 ASCD *Julia Ya Qin*, WTO Regulation of Subsidies to State-Owned Enterprises (SOEs) – A Critical Appraisal of the China Accession Protocol, Journal of International Economic Law 7 (4) (2004), pp. 863-919, at p. 870.

68 Council Implementing Regulation (EU) No 452/2011 of 6 May 2011 imposing a definitive anti-subsidy duty on imports of coated fine paper originating in the People's Republic of China, OJ 2011 L 128, pp. 18-75, para. 260; Council Implementing Regulation (EU) No 215/2013 of 11 March 2013 imposing a countervailing duty on imports of certain organic coated steel products originating in the People's Republic of China, OJ 2013 L 73, pp. 16-97, paras. 81 and 120.

69 Council Implementing Regulation (EU) No 1239/2013 of 2 December 2013 imposing a definitive countervailing duty on imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China, OJ 2013 L 325, pp. 66-213, para. 213 et seq.

All in all, the authorities generally use three different alternative approaches:[70]

(1) The existing in-country price is adjusted to reflect market economy conditions.

(2) An alternative price is constructed using the average data from the respective economic sector indicating the usual market based price.

(3) The authorities use the price of goods in a third market for the calculation of the alternative price.

3. Safeguard Measures and Import Regulation

The EU industry has thus far only made very limited use of safeguard measures. One of the main reasons for this is that safeguards have to be imposed on a non-selective basis and, moreover, must be claimed by Member States and not the industry. When applying safeguard measures to products from China, the EU is bound by specific obligations laid down in Article XIX GATT. More detailed standards can be found in the WTO Agreement on Safeguards. This agreement was transposed into EU law by means of Regulation (EU) 2015/478.

In times where a global overproduction occurs, products often are imported in such high quantities as to cause or threaten to cause serious injury to the domestic industry. In 2002, for example, the EU adopted safeguard measures on steel.[71] Safeguard measures generally apply to all imports regardless of their origin, as is also stated in Article 2.2 of the Agreement on Safeguards. Therefore, it is not possible to direct safeguards exclusively towards imports from one country, e.g. China.

IV. Third Country Approaches towards China

Whereas 11 December 2016 possibly marks a change in the WTO landscape or, more accurately, in the economic relations with China, the EU is evidently not the only economic actor facing the challenge stemming from a potentially mandatory recognition of China as a market economy. In a comparative study, third country ap-

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70 *Brian D. Kelly*, The Offsetting Duty Norm and the Simultaneous Application of Countervailing and Antidumping Duties, Global Economy Journal 11 (2) (Article 2) (2011), pp. 1-31, p. 11 et seq.

71 Commission Regulation (EC) No 1694/2002 of 27 September 2002 imposing definitive safeguard measures against imports of certain steel products, OJ 2002 L 261, pp. 1-123.

proaches in regard to the MES/NMES and the application of trade defence instruments will be analysed.

When comparing the approaches third countries have introduced towards China, one ascertains that there is not yet much information available on how other States and economic actors are planning to handle the very scenario. Evidently, many States have just yet initiated the deliberations on how to elaborate their antidumping instruments in order to stay fit to react to Chinese dumping measures also after 11 December 2016.[72] The information and data available from these States thus concerns the procedures on how the respective countries determine NMES/MES in AD investigations and how they categorized China until now, irrespective of the AP.

Insofar, more pertinent information can be found in countries that had already granted China MES at an earlier point in time. These countries include South Korea, New Zealand, South Africa and Australia.[73] As a general rule, most of these countries generally presume MES in favour of China, but make exceptions from this rule in case there is evidence that the sector concerned in the particular case is not exclusively subject to market forces. It is in such cases that they apply a 'special methodology' in order to determine the dumping margin/'normal value', i.a. by 'constructing' value which includes using external benchmarks instead of the domestic market price. Following this approach typically has the effect of shifting the 'burden of proof': MES of China is generally presumed and the burden to prove otherwise lies with the complainant and its authorities respectively that want to resort to 'special methodology.'

In this context, the EU Commission's 'roadmap paper' of January 2016 on how to deal with Chinese dumping measures beyond 11 December 2016 to a large extent

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72 Cf. *Barbara Barone*, One year to go: The debate over China's market economy status (MES) heats up, In-Depth Analysis, Policy Department, European Parliament, EXPO/B/PolDep/Note/2015_330, December 2015, available at http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/570453/EXPO_IDA(2015)570453_EN.pdf (last accessed 2 May 2016), p. 16.

73 Australia and New Zealand have also concluded FTAs with China. The list of countries that have granted China MES includes Australia, Brazil, Argentina, Costa Rica, South Africa, Norway, Switzerland, South Korea, Peru, Costa Rica, Chile and the ASEAN member states, according to *Barbara Barone*, One year to go: The debate over China's market economy status (MES) heats up, In-Depth Analysis, Policy Department, European Parliament, EXPO/B/PolDep/Note/2015_330, December 2015, available at http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/570453/EXPO_IDA (2015)570453_EN.pdf (last accessed 2 May 2016), p. 16, Fn. 25.

goes beyond the steps third countries have taken so far.[74] It is thus likely that the proposed changes to EU legislation and/or methodology would influence global regulation endeavours concerning trade responses to Chinese dumping measures.

At the time of writing the measures considered by the EU Commission included:

(1) 'Grandfathering',

(2) Limiting the 'lesser duty rule',

(3) Amending AS legislation,

(4) New/amended provisions in AD legislation.[75]

These measures would go beyond the method of 'cost adjustment'[76] – which was partly judged unlawful under WTO rules by the panel established in the proceedings between the EU and Argentina concerning Biodiesel at the end of March 2016.[77]

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74 DG Trade, Unit H1, Inception Impact Assessment, January 2016, available at http://ec.europa.eu/smart-regulation/roadmaps/docs/2016_trade_002_dumping_investigations_china_en.pdf (last accessed 2 May 2016).

75 DG Trade, Unit H1, Inception Impact Assessment, January 2016, available at http://ec.europa.eu/smart-regulation/roadmaps/docs/2016_trade_002_dumping_investigations_china_en.pdf (last accessed 2 May 2016).

76 *Barbara Barone*, One year to go: The debate over China's market economy status (MES) heats up, In-Depth Analysis, Policy Department, European Parliament, EXPO/B/PolDep/Note/2015_330, December 2015, available at http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/570453/ EXPO_IDA(2015)570453_EN.pdf (last accessed 2 May 2016).

77 Panel Report, 29 March 2016, WT DS473, European Union — Anti-Dumping Measures on Biodiesel from Argentina; cf. also the summary in WTO, Dispute Settlement: Dispute DS473, European Union – Anti-Dumping Measures on Biodiesel from Argentina, available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds473_e.htm (last accessed 2 May 2016): 'The Panel upheld Argentina's claim that the European Union acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement by failing to calculate the cost of production of biodiesel on the basis of the records kept by the producers/exporter under investigation. The Panel considered that the reason stated by the EU authorities for disregarding producers' costs — i.e. because the prices for the input were artificially lower than international prices due to an alleged distortion — does not constitute a legally sufficient basis under Article 2.2.1.1 for concluding that the producers' records do not reasonably reflect the costs associated with the production and sale of biodiesel. Since the Panel found a violation of Article 2.2.1.1, it found it unnecessary to consider Argentina's claims under Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994. In addition, the Panel upheld Argentina's claim that the European Union acted inconsistently with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 by using a 'cost' that was not the cost prevailing 'in the country of origin', Argentina, in the construction of the normal value. The Panel considered it plain from the EU authorities' reasoning that the cost used was not a cost 'in the country of origin', since it was specifically selected to remove the perceived distortion in the domestic price of soybeans caused by the Argentine export

The comparative country study assesses various approaches in tackling Chinese dumping measures. It includes the US, Canada, Australia, Brazil, Japan, Switzerland, South Africa and Norway.

In view of identifying measures of the various States that are meant to mitigate adverse effects of a possible 'status change' as regards China on the respective national economy, this study brings about three major results that will consequently be addressed in detail:

1) Few States have yet adopted specific, elaborate legal norms and/or methodology designed to deal with the expiration of Article 15(a)(ii) AP by 11 December 2016;
2) Those States having adopted special legislation primarily resort to a specific, detailed 'mix' of methodologies that often includes 'burden shifting';
3) Many States, especially the US, Canada and Australia intend an enhanced imposition of countervailing measures in order to compensate potential constraints under the AD regime due to China's hypothetical MES.

1. Few States provide for elaborate, specific rules and methodology

First of all, one has to ascertain that as of now only few States have introduced elaborate, specific methodology to their legal systems in view of tackling Chinese dumping beyond 11 December 2016. In fact, the deliberation processes in the various legislatures are – or have in the past weeks and months been – vividly on-going.[78] The following section will give an outline of, firstly, those States that have reacted in some sort to Article 15(d), second sentence AP but without introducing specific, elaborate methodology and, secondly, those that have not yet reacted to the expiration of Article 15(a)(ii) AP by adopting measures of any kind.

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tax system. The Panel exercised judicial economy on Argentina's claim that the EU authorities acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement because they included costs not associated with the production and sale of biodiesel in the calculation of the cost of production'.

78 Cf. e.g. for the US, United States-China Economic and Security Review Commission, Hearing on China's Shifting Economic Realities and Implications for the United States, 114 Congress, Second Session, 24 February 2016, available at http://origin.www.uscc.gov/sites/default/files/transcripts/February%2024%2C%202016_Hearing%20Transcript.pdf (last accessed 2 May 2016). Concerning the overall security policy implications cf. *Dan Steinbock*, The EU Division Over China's Market Economy Status, roubini EconoMonitor, 16 March 2016, available at http://www.economonitor.com/blog/2016/03/the-eu-division-over-chinas-market-economy-status/ (last accessed 2 May 2016).

a) Brazil

Brazil recognized China's MES in a 'Memorandum of Understanding on Trade and Investment Cooperation between the People's Republic of China and the Federative Republic of Brazil' on 11 November 2004.[79] Despite this recognition, Brazil continued to impose ADDs against China regularly. In 2013, Brazil initiated ten AD investigations against China, in 2014 even 16.[80]

Until now, Brazil has neither implemented China's new status into national law nor does it respect China's MES in AD proceedings.[81] Some commentators allege that China is not yet 'seriously considered as a market economy on the political level.'[82] Consequently, even Chinese defendants that have spent large sums on legal advice in order to prove market economy conditions in their particular case have failed being heard by the Brazilian authorities. The competent Brazilian Ministry for Development, Industry and External Trade makes use of the vague conditions for market economy

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79 Ministry of Foreign Affairs of the People's Republic of China, Brazil Recognizes China's Market Economy Status in the Memo, 13 November 2004, available at http://www.fmprc.gov.cn/mfa_eng/topics_665678/huvisit_665888/t170382.shtml (last accessed 2 May 2016).

80 *Paul Welitzkin*, Brazil levies antidumping against China, China Daily USA, 5 January 2015, available at http://usa.chinadaily.com.cn/world/2015-01/05/content_19235284.htm (last accessed 2 May 2016).

81 *Vera Kanas and Carolina Müller*, Anti-dumping investigation in Brazil on the imports of non-framed mirrors from China and Mexico, Tozzinifreire International Trade Blog, 27 March 2015, available at http://tozzinifreire.com.br/blog/internationaltrade/2015/03/27/anti-dumping-investigation-in-brazil-on-the-imports-of-non-framed-mirrors-from-china-and-mexico/ (last accessed 2 May 2016); *International Bar Association*, Anti-Dumping Investigations Against China in Latin America, 2010, available at http://ssrn.com/abstract=1555619 (last accessed 2 May 2016); cf. also *Laura Puccio*, Granting Market Economy Status to China, European Parliamentary Research Service, November 2015, available at http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/571325/EPRS_IDA (2015)571325_EN.pdf (last accessed 2 May 2016), p. 11, Fn. 34, with reference to *Müslüm Yilmaz*, Domestic Judicial Review of Trade Remedies: Experiences of the most active WTO members, Cambridge 2013. The Brazilian antidumping regime is based on Legislative Decree No 30 of 15 December 1994, Presidential Decree No 1355 of 30 December 1994 (implemented WTO agreement), Presidential Decree No 1602 of 23 August 1995 (basic law governing anti-dumping practice) and Federal Law 9019 of 30 March 1995 (modified by Art. 53 of the Provisionary Measure No 2113 of 2001), which provides for the imposition of anti-dumping measures. Cf. *Carolina Saldanha-Ures*, Brazil, in: Derk Bienen, Gustav Brink and Dan Ciuriak (eds.): Guide to International Anti-Dumping Practice, Alphen aan den Rijn 2013, pp. 129-172, § 4.01 [C]. For further information on the applicable Brazilian legal texts, cf. US Department of Commerce, Brazilian Trade Remedy Laws, Regulations and Rules, available at http://enforcement.trade.gov/trcs/downloads/documents/brazil/index.html (last accessed 2 May 2016).

82 *International Bar Association*, Anti-Dumping Investigations Against China in Latin America, 2010, available at http://ssrn.com/abstract=1555619 (last accessed 2 May 2016), p. 29.

treatment and exercises its discretion in a way 'that makes it practically impossible for Chinese defendants to obtain market economy treatment.'[83]

However, defendants' efforts may lead to the application of the 'lesser duty' rule, which is 'not mandatory in Brazil, but applied in practically all cases.'[84] Such was the case in an AD complaint brought by the Brazilian National Tyre Association against tyres imported from China. In this case, Brazil applied the 'surrogate country' method, but those Chinese producers that supplied the ministry with information and responded to the questionnaires benefitted from the 'lesser duty' rule.[85] In another case, a Chinese defendant was able to obtain a lower duty since it had 'responded to the questionnaire satisfactorily, and no elements have been identified which allow the conclusion that it is a state enterprise.'[86]

b) Japan

Japan's general AD legislation is based on Article 8 of the Customs and Tariff Law.[87] In general, Japan uses criteria similar to the ones employed by the EU to determine market economy conditions. Its Cabinet Order No. 416 of December 1994, amended by the Cabinet Order No.113 of March 2002 presumes NMES regarding China. Granting China MES would consequently require an amendment of this very act. Thus, despite its trilateral negotiations over an FTA with China and South Korea, Ja-

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83 *International Bar Association*, Anti-Dumping Investigations Against China in Latin America, 2010, available at http://ssrn.com/abstract=1555619 (last accessed 2 May 2016), p. 29.

84 *International Bar Association*, Anti-Dumping Investigations Against China in Latin America, 2010, available at http://ssrn.com/abstract=1555619 (last accessed 2 May 2016), p. 29.

85 Ministério do desenvolvimento, indústria e comércio exterior, Secretaria de comércio exterior, Resolução No 33, 9 June 2009, available at www.desenvolvimento.gov.br/arquivos/dwnl_1245445675.pdf (last accessed 2 May 2016).

86 Ministério do desenvolvimento, indústria e comércio exterior, Secretaria de comércio exterior, Resolução No 53, 17 September 2009, available at http://www.desenvolvimento.gov.br/arquivos/dwnl_1253281964.pdf (last accessed 2 May 2016); cf. *International Bar Association*, Anti-Dumping Investigations Against China in Latin America, 2010, available at http://ssrn.com/abstract=1555619 (last accessed 2 May 2016), p. 29.

87 Law No 54 of 1910; specific details are provided in Ordinance No 416 of 1994 and the guidelines thereunder; see *Hiroshige Nakagawa and Motoyasu Hirose*, Anti-Dumping Laws and Regulations in Japan, Global Competition Review Special Report 2008, The Handbook of Trade Enforcement, pp. 73-74, available at: https://www.amt-law.com/pdf/bulletins8_pdf/080603_1.pdf (last accessed 2 May 2016), at. p. 73.

pan thus far did not recognize China's MES through an official legislative procedure although Beijing had requested early recognition during the negotiation process.[88]

As of now, deliberations concerning a change in the approach towards China seem to be on-going or at least have not yet resulted in material legislative or executive action by Tokyo.[89] Against the backdrop of geopolitical considerations when it comes to security issues, it seems likely that Japan will await actions to be taken by its allies, primarily the EU and the US, in this regard.[90] Since the US currently seems to favour denying China MES – at least denying an automatic change of statuses[91] – it does not seem completely unlikely that Japan will proceed the same way and simply maintain NME treatment.

Nevertheless, as a result of the Chinese request, Japan changed its guidelines concerning procedures relating to countervailing and AD duties and introduced an expiration date for NME treatment of China for December 2016. However, these guidelines are not legally binding and can be modified without any legislative procedure.[92] As *Puccio* points out, Japanese recognition of China's MES is likely not a top priority for Beijing given that Japan currently only has one AD measure in place against China.[93]

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88 *Laura Puccio*, Granting Market Economy Status to China, European Parliamentary Research Service, November 2015, available at http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/571325/EPRS_IDA(2015)571325_EN.pdf (last accessed 2 May 2016), p. 23 et seq.

89 Cf. *Shigeru Seno*, Will China be granted market economy status?, Nikkei Asian Review, 2 February 2016, available at http://asia.nikkei.com/Politics-Economy/International-Relations/Will-China-be-granted-market-economy-status?page=1 (last accessed 2 May 2016).

90 Cf. *Dan Steinbock*, The EU Division Over China's Market Economy Status, roubini EconoMonitor, 16 March 2016, available at http://www.economonitor.com/blog/2016/03/the-eu-division-over-chinas-market-economy-status/ (last accessed 2 May 2016).

91 Cf. section V below; cf. also *Mikko Huotari, Jan Gaspers and Olaf Böhnke*, Asserting European Interests: How Brussels should deal with the question of China`s Market Economy Status, MERICS China Policy Brief, January 2016, available at http://www.merics.org/fileadmin/user_upload/downloads/China_Policy_Brief/China_Policy_Brief_January_2016.pdf (last accessed 2 May 2016), p. 7 et seq.

92 *Laura Puccio*, Granting Market Economy Status to China, European Parliamentary Research Service, November 2015, available at http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/571325/EPRS_IDA(2015)571325_EN.pdf (last accessed 2 May 2016), p. 23.

93 *Laura Puccio*, Granting Market Economy Status to China, European Parliamentary Research Service, November 2015, available at http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/571325/EPRS_IDA(2015)571325_EN.pdf (last accessed 2 May 2016), p. 24, with reference to Trade Policy Review Body Report, 19 January 2015, WT/TPR/S/310, Japan. However, on 25 March 2016, the Japanese authorities determined preliminarily that there was an incident of dumping concerning potassium hydroxide originating in Korea and China respectively, cf. Ministry

It is, furthermore, probable that Japan and China will agree on a resolution of this issue as part of its proposed FTA; the Joint Study Report[94] evaluating the FTA undertaking also contained a section on the use of trade remedy measures between the three potential State parties.[95] The FTA negotiation process is currently on-going.

c) Switzerland

Switzerland does not dispose of specific AD legislation. As of yet, the Swiss Federation has never before introduced antidumping measures. Switzerland has recognized China's MES on 8 July 2007 by means of a 'Joint Declaration'.[96] MES recognition was meant to be a decisive step towards a Swiss-Sino FTA, which was signed on 6 July 2013 and entered into force on 1 July 2014.[97] Since Switzerland generally does not impose ADDs, there is no information available on specific Swiss methodology in this respect.

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of Economy, Trade and Industry, Preliminary Determination Made based on the Results of the Anti-Dumping Duty Investigation on Potassium Hydroxide Originating in the Republic of Korea and the People's Republic of China, Joint Press Release with the Ministry of Finance, 25 March 2016, available at http://www.meti.go.jp/english/press/2016/0325_01.html (last accessed 2 May 2016).

94 Joint study committee, Joint Study Report for an FTA among China, Japan and Korea, 16 December 2011, available at http://www.mofa.go.jp/mofaj/press/release/24/3/ pdfs/0330_10_01.pdf (last accessed 2 May 2016).

95 *Laura Puccio*, Granting Market Economy Status to China, European Parliamentary Research Service, November 2015, available at http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/ 571325/EPRS_IDA(2015)571325_EN.pdf (last accessed 2 May 2016), p. 24.

96 State Secretariat for Economic Affairs SECO, Information on countries: China, available at https://www.seco.admin.ch/dam/seco/de/dokumente/Aussenwirtschaft/Wirtschaftsbeziehungen/L%C3%A4nderinformationen/Asien_Ozeanien/China.pdf.download.pdf/China.pdf (last accessed 2 May 2016). The 'Joint declaration on economic co-operation between the Ministry of Economy of the Swiss Confederation and the Ministry of Commerce of the People's Republic of China' of 8 July 2007 is not publicly available on the Swiss government's website, cf. https://www.eda.admin.ch/eda/de/home/aussenpolitik/voelkerrecht/internationale-vertraege/datenbank-staatsvertraege/detailansicht-staatsvertrag.ggst0_946.contract99993272.html?_charset_=UTF-8 (last accessed 2 May 2016).

97 State Secretariat for Economic Affairs SECO, Information on countries: China, available at https://www.seco.admin.ch/dam/seco/de/dokumente/Aussenwirtschaft/Wirtschaftsbeziehungen/L%C3%A4nderinformationen/Asien_Ozeanien/China.pdf.download.pdf/China.pdf (last accessed 2 May 2016); *André Brunschweiler and Alexander Troller*, Insight into the Swiss-Sino Free Trade Agreement – a path to new business opportunities, Jusletter, 16 June 2014, available at http://www.lalive.ch/data/publications/Swiss-Sino_Free_Trade_Agreement.pdf (last accessed 2 May 2016).

d) South Africa

South Africa has granted China MES through a Record of Understanding.[98] The country numbers among the largest users of AD measures,[99] disposes of an AD regime[100] that had been established as early as 1914 and is equally concerned about Chinese dumping in the steel sector as the US and the EU.[101] AD investigations are conducted by the International Trade Administration Commission of South Africa (ITAC). Whereas South Africa, like most of the other countries analysed, also applies 'special methodology', it generally does not seem to take into account any sort of ME assessment.[102] In fact, the South African Supreme Court of Appeal held in 2011 that there is no need for ITAC to consider any information concerning China's MES in AD proceedings; according to its judgment, ITAC is free to simply disregard this as-

98 *Francisco Urdinez and Gilmar Masiero*, China and the WTO: Will the Market Economy Status Make Any Difference after 2016?, The Chinese Economy 48 (2) (2015), pp. 155-172, at p. 156; *Laura Puccio*, Granting Market Economy Status to China, European Parliamentary Research Service, November 2015, available at http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/571325/EPRS_IDA(2015)571325_EN.pdf (last accessed 2 May 2016), p. 10, Fn. 25.

99 *Niel Joubert*, The Reform of South Africa's Anti-Dumping Regime, in: Peter Gallagher, Patrick Low and Andrew L. Stoler (eds.): Managing the Challenges of WTO Participation – 45 Case Studies, Geneva 2005, available at https://www.wto.org/english/res_e/booksp_e/casestudies_e/case38_e.htm (last accessed 2 May 2016).

100 Anti-dumping investigations are regulated by domestic legislation, namely the International Trade Administration Act (Act No. 71 of 2002 (the ITA Act)) and the anti-dumping regulations promulgated thereunder in 2003 (the Anti-Dumping Regulations); See ITAC, Trade Remedies, available at http://www.itac.org.za/pages/services/trade-remedies (last accessed 2 May 2016).

101 *Niel Joubert*, The Reform of South Africa's Anti-Dumping Regime, in: Peter Gallagher, Patrick Low and Andrew L. Stoler (eds.): Managing the Challenges of WTO Participation – 45 Case Studies, Geneva 2005, available at https://www.wto.org/english/res_e/booksp_e/casestudies_e/case38_e.htm (last accessed 2 May 2016); *Alec Hogg*, Steel Crisis, Chinese dumping accelerates as ArcelorMittal teeters on brink, BizNews, 15 July 2015, available at http://www.biznews.com/sa-investing/2015/07/15/steel-crisis-chinese-dumping-accelerates-as-arcelormittal-teeters-on-brink/ (last accessed 2 May 2016); cf. also *Gustav Brink*, Antidumping in South Africa, tralac working paper No. D12WP07/2012, July 2012, available at http://www.tralac.org/files/2012/07/D12WP072012-Brink-Anti-Dumping-in-SA-20120725final.pdf (last accessed 2 May 2016), p. 1.

102 Cf. the rather cursory outline of dumping margin calculations provided by ITAC; the document does not mention NME treatment or any specific rules with regard to the AP, cf. ITAC, Dumping Margin Calculations, available at http://www.itac.org.za/upload/Dumping%20Margins%20Calculations.pdf (last accessed 2 May 2016); cf. also ITAC, Trade Remedies, available at http://www.itac.org.za/upload/Trade_Remedies.pdf (last accessed 2 May 2016). South Africa, according to the ITAC's 2014/2015 Annual Report, has two on-going antidumping investigations against Chinese exporters – concerning wheelbarrows and stainless steel sinks respectively. There was no information available as to whether the ITAC will specifically consider potential distortions in the respective Chinese sectors in these investigations, cf. ITAC, Annual Report 2014-2015, available at http://www.itac.org.za/upload/2014-2015%20Annual%20Report.pdf (last accessed 2 May 2016).

pect.[103] Consequently, South African methodology does not seem to provide much guidance when it comes to finding a 'third way' in dealing with Chinese dumping.[104]

e) Norway

Oslo recognized China's MES through a Memorandum of Understanding in 2007.[105] Trade remedies are regulated by Art. 10 of the Customs Duty and Movement of Goods Act; the Ministry of Finance is the competent authority. According to the Global Antidumping Database, Norway does currently not have any AD measures in place.[106] In fact, between the inception of the WTO and 2012 Norway had not introduced one single ADD.[107]

2. Paradigms of legal responses towards Chinese dumping

After the examination of States that have not yet reacted by adopting or introducing specific, elaborate legal norms and methodology, the subsequent section will outline the responses of those legal systems that provide more sophisticated approaches and methodology when it comes to tackling Chinese dumping.

a) USA

Perhaps the most elaborate AD rules exist within the legal system of the United States.[108] Accordingly, the US Department of Commerce determines whether the dumping or subsidizing exists and, if so, the margin of dumping or amount of the subsidy; the US International Trade Commission (USITC) determines whether there is material injury or threat of material injury to the domestic industry by reason of the

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103 Supreme Court of Appeal of South Africa, 23 September 2011, Case No 738/2010, International Trade Administration Commission v SA Tyre Manufacturers Conference, ZASCA 137, available at http://www.justice.gov.za/sca/judgments/sca_2011/sca2011-137.pdf (last accessed 2 May 2016). *Gustav Brink*, Antidumping in South Africa, tralac working paper No. D12WP07/2012, July 2012, available at http://www.tralac.org/files/2012/07/D12WP072012-Brink-Anti-Dumping-in-SA-20120725final.pdf (last accessed 2 May 2016), p. 52 et seq. criticizes this finding as unconstitutional; cf. also *Gustav Brink*, No need to investigate China's market economy status in antidumping investigations, tralac Trade Brief 2011, S11TB08/2011.

104 As far as 'special methodology' is concerned, the sections below addressing the US, Canadian and Australian practice (IV.2.) shall be instructive. Given that the application of 'special methodology' is generally subject to imitations under WTO law, States' approaches necessarily resemble one another to a considerable extent.

105 Cf. Ministry of Commerce, Norway Recognizes China's Full Market Economy Status, available at http://english.mofcom.gov.cn/aarticle/newsrelease/significantnews/200703/20070304506002.html (last accessed 2 May 2016).

106 *Chad P. Bown*, Global Antidumping Database, 2015, available at http://econ.worldbank.org/ttbd/gad/ (last accessed 2 May 2016).

107 Trade Policy Review Body Report, 21 August 2012, WT/TPR/S/269, Norway, p. 41.

108 Antidumping procedure is mainly based on sections 731 et seq. of the Tariff Act of 1930, 19 U.S.C. §§ 1673-1673i and §§ 1677-1677n.

dumped or subsidized imports. The US has not yet made a decision whether or not to accord MES to China. Instead, substantial discussions on Washington's future stance in this issue are currently on-going.[109]

Historically speaking, the US had introduced in its Trade Act of 1988 a specific test in order to assess whether or not a State economy was subject to market economy conditions.[110] This 'NME test' is still in place today and already was at the time of Chinese accession in 2001.[111] Once a country is determined to be an NME under this test, this qualification remains valid until Commerce revokes it, e.g. pursuant to a request from the foreign producers or the respective foreign government during an AD proceeding.[112] The criteria applied in the 'NME test' confer a huge margin of discretion onto Commerce as the competent authority. Especially criterion six (see footnote 110) allows Commerce to take into account factors such as IP laws, industrial policy in particular sectors, trade liberalization and anti-corruption policy.[113]

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109 United States-China Economic and Security Review Commission, Hearing on China's Shifting Economic Realities and Implications for the United States, 114 Congress, Second Session, 24 February 2016, available at http://origin.www.uscc.gov/sites/default/files/transcripts/February%2024%2C%202016_Hearing%20Transcript.pdf (last accessed 2 May 2016).

110 In this test, Commerce pursuant to 19 U.S.C. § 1677(18) assesses the following six factors:

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.

111 On the corresponding interpretation of Art. 15 AP in the light of US AD methodology see section II. above.

112 *K. William Watson*, Will Nonmarket Economy Methodology Go Quietly into the Night, Cato Institute Policy Analysis No 763, October 2014, available at http://object.cato.org/sites/cato.org/files/pubs/pdf/ pa763.pdf (last accessed 2 May 2016), p. 5.

113 *K. William Watson*, Will Nonmarket Economy Methodology Go Quietly into the Night, Cato Institute Policy Analysis No 763, October 2014, available at http://object.cato.org/sites/cato.org/files/pubs/pdf/ pa763.pdf (last accessed 2 May 2016), p. 6 and 8. Another element that constitutes a major issue as regards China's MES is the great control Chinese authorities exercise over the banking sector. China is consequently accused of favouring its SOEs through preferential credits and loans. Cf. Import Administration, 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"), A-570-901, 30 August 2006, available at http://enforcement.trade.gov/download/prc-nme-status/prc-lined-paper-memo-08302006.pdf (last accessed 2 May 2016), p. 77.

Given that the determination of a status is a mere executive act, which is conducted by Commerce, the latter is also competent for the act to the contrary, the revocation of an NMES. This procedure is thus quite in contrast with the one required under EU law, which necessitates an ordinary legislative procedure amending Art. 2(7) of the EU ADR.[114]

Furthermore, US AD law includes another test to be conducted by Commerce. Introduced in 1992 the basic idea of the so-called 'market-oriented industry' (MOI) test is granting the respondent exporter the opportunity to obtain market economy treatment, if he proves successfully that the sector in which he operates is not subjected to government control.[115] This test, which is not codified in any act or regulation has been applied by Commerce in a quite restrictive manner. Thus far the US authorities have not recognized one single Chinese industry as independent from government control.[116] This may be the case especially due to the fact that it will regularly be impossible for foreign producers to demonstrate that they pay market-determined prices for all significant inputs; such is generally not even the case in the 'developed' Western world, where e.g. electricity and labour markets are usually subject to regulation.[117]

Another test Commerce applies is the so-called 'separate rates test.' The US generally assigns the same dumping margin to all NME producers. In order to prevent this

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114 Cf. section III. above. Equally noteworthy and – for the respondent State likely – problematic is the fact that the determination made by Commerce under the NME test according to 19 U.S.C. § 1677(18)(D) cannot be reviewed by a court.

115 As part of this test, Commerce applies three criteria that an MOI has to meet:
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.
See *K. William Watson*, Will Nonmarket Economy Methodology Go Quietly into the Night, Cato Institute Policy Analysis No 763, October 2014, available at http://object.cato.org/sites/ cato.org/files/pubs/pdf/ pa763.pdf (last accessed 2 May 2016), p. 6 with reference to US Department of Commerce, 24 April 1992, 57 Fed. Reg. 15,052, Chrome-Plated Lug Nuts from the People's Republic of China; cf. also with more detail US Department of Commerce, 2015 Antidumping Manual, 2015, available at http://ia.ita.doc.gov/admanual/ (last accessed 2 May 2016), Chapter 10, p. 30 et seq.

116 *K. William Watson*, Will Nonmarket Economy Methodology Go Quietly into the Night, Cato Institute Policy Analysis No 763, October 2014, available at http://object.cato.org/sites/cato.org/files/ pubs/pdf/ pa763.pdf (last accessed 2 May 2016), p. 6, who voices the critique of the MOI test not being 'fairly administered'; US Department of Commerce, 2015 Antidumping Manual, 2015, available at http://ia.ita.doc.gov/admanual/ (last accessed 2 May 2016), Chapter 10, p. 31.

117 Cf. *K. William Watson*, Will Nonmarket Economy Methodology Go Quietly into the Night, Cato Institute Policy Analysis No 763, October 2014, available at http://object.cato.org/sites/cato.org/files/ pubs/pdf/ pa763.pdf (last accessed 2 May 2016), p. 6.

consequence, respondents under the separate rates test have the opportunity to demonstrate that they are not under government control.[118] Those exporters that are unable to demonstrate that they are independent of government control are being subjected to the NME rate.[119]

Currently, it seems likely that the US will simply continue treating China as an NME in accordance with the corresponding determination made by Commerce[120], which was last confirmed in September 2006[121] and is still in force today.[122] According to our understanding of the Accession Protocol portrayed in section II. above, the US 'NME test' is in conformity with WTO law. Pursuant to Section 15(d), first sentence AP also the burden of proof still falls with China in this respect; if and as long as Article 15(a)(ii) AP is applied (the part of the AP which expires on 11 December 2016) the burden of proof for market conditions prevailing lies with the producers.

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118 US Department of Commerce, 2015 Antidumping Manual, 2015, available at http://ia.ita.doc.gov/admanual/ (last accessed 2 May 2016), Chapter 10, p. 3 et seq.; According to Commerce, '[e]vidence supporting, though not requiring, a finding of *de jure* absence of government control over export activities includes:

i. an absence of restrictive stipulations associated with an individual exporter's business and export licenses;
ii. any legislative enactments decentralizing control of companies; and
iii. any other formal measures by the central and/or local government decentralizing control of companies'.

119 US Department of Commerce, 2015 Antidumping Manual, 2015, available at http://ia.ita.doc.gov/admanual/ (last accessed 2 May 2016), Chapter 10, p. 4. On the methodology of elaborating the NME rate cf. ibid., p. 7. Eventually, the determination whether or not a State is considered as an NME leads to the binary choice which of its 'margin calculation programs' Commerce applies. The respective analyst will apply either the formula designed for MEs or the one for NMEs to the particular foreign producer under investigation, cf. US Department of Commerce, Antidumping Margin Calculation Programs, available at http://enforcement.trade.gov/sas/programs/amcp.html (last accessed 2 May 2016). The details hidden in this data assessment potentially allow for dumping margins against NMEs that far exceed the ones introduced in view of MEs, cf. e.g. the 266 % antidumping tax the US imposes on Chinese cold-rolled steel products, *Aditya Kondalamahanty*, US To Tax Chinese Steel Imports 266 % Citing Unfair Government Subsidies, IBT, 3 February 2016, available at http://www.ibtimes.com/us-tax-chinese-steel-imports-266-citing-unfair-government-subsidies-2328641 (last accessed 2 May 2016).

120 First determination made in 1981, cf. US Department of Commerce, 1 May 1981, 46 Fed. Reg. 24,614, Final Determination at Less Than Fair Value: Natural Menthol from the People's Republic of China.

121 Cf. US Department of Commerce, 15 May 2006, Memorandum, The People's Republic of China: Status as Non-Market Economy; cf. also Hong Kong Trade Development Council, China to Remain Non-Market Economy for AD Purposes, available at http://info.hktdc.com/alert/us0619.htm (last accessed 2 May 2016).

122 Cf. also *Mikko Huotari, Jan Gaspers and Olaf Böhnke*, Asserting European Interests: How Brussels should deal with the question of China`s Market Economy Status, MERICS China Policy Brief, January 2016, available at http://www.merics.org/fileadmin/user_upload/downloads/China_Policy_Brief/China_Policy_Brief_January_2016.pdf (last accessed 2 May 2016), p. 7 et seq.

Maintaining China's NMES would entail the benefit for the US that the burden to demonstrate market conditions would still fall with China. Commerce would be free to use 'external benchmarks', i.e. prices for certain factors of production set by the World Bank or other public institutions instead of Chinese prices and costs[123] as long as China has not fulfilled its 'burden of proof.'

Changing that status is – as already stated above and in line with Art. 15(d) AP, first sentence – a completely discretionary decision for the US authorities to make. Absent a legal obligation to do so, conferring MES upon China will likely be a purely political decision of the US government.[124] Should the US – at a later stage[125] – formally recognize China's MES and base its AD margin calculations on 'constructed value' methodology[126], it would assess whether a 'particular market situation' exists i.e. whether 'there is government control over pricing to such an extent that home market prices cannot be considered to be competitively set.'[127] However, WTO law limits the application of 'special methodology' according to Article 2.2 ADA to two different methods – to use sales prices (of the particular – Chinese – product) in a third country market or constructed value based on the cost of production. Insofar, leeway for achieving high ADDs would be somewhat limited.[128]

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123 *Gary Clyde Hufbauer and Cathleen Cimino*, Looming US-China Trade Battles?: Market Economy Status (Part II), Peterson Institute for International Economics, Trade and Investment Policy Watch, 9 March 2015, available at http://blogs.piie.com/trade/?p=145 (last accessed 2 May 2016).

124 Cf. *K. William Watson*, Will Nonmarket Economy Methodology Go Quietly into the Night, Cato Institute Policy Analysis No 763, October 2014, available at http://object.cato.org/sites/cato.org/files/ pubs/pdf/ pa763.pdf (last accessed 2 May 2016), p. 11.

125 The US is possibly awaiting the outcome of a 'critical AD case', cf. *Mikko Huotari, Jan Gaspers and Olaf Böhnke*, Asserting European Interests: How Brussels should deal with the question of China`s Market Economy Status, MERICS China Policy Brief, January 2016, available at http://www.merics.org/fileadmin/user_upload/downloads/China_Policy_Brief/China_Policy_Brief_January_2016.pdf (last accessed 2 May 2016), p. 9.

126 According to 19 U.S.C. § 1677b(a)(I)(C)(iii) such is permissible if 'the particular market situation in the exporting country does not permit a proper comparison with the export price or constructed export price.'

127 Statement of Administrative Action accompanying H.R. 5110 (H.R. Doc. No. 316, 103rd Cong., 2nd sess.), 194, at 822; *K. William Watson*, Will Nonmarket Economy Methodology Go Quietly into the Night, Cato Institute Policy Analysis No 763, October 2014, available at http://object.cato.org/sites/cato.org/ files/pubs/pdf/pa763.pdf (last accessed 2 May 2016), p. 12, criticizes the stance of Commerce, which seems to suggest 'that once they had permission under the law to use something other than domestic prices, they then had limitless discretion to adopt a new methodology.'

128 Cf. *K. William Watson*, Will Nonmarket Economy Methodology Go Quietly into the Night, Cato Institute Policy Analysis No 763, October 2014, available at http://object.cato.org/sites/cato.org/files/ pubs/pdf/ pa763.pdf (last accessed 2 May 2016), p. 12, who also points out that this was the stance the US eventually took towards Russia after it gradu-

Against the backdrop that – in our view – ending NME treatment of China overall is a merely discretionary decision to be made by the US, this very option, although vigorously advocated by some commentators[129] seems unlikely to materialize in the near future. Even under such a scenario, however, the US would not be without remedies to tackle Chinese dumping. It could notably resort to 'special methodology' ('constructed value') in conformity with Article 2.2. ADA and to CDs in order to address market distortions in China. As argued by some, CDs can potentially provide the same standard of protection against dumping and come with the additional advantage of being in line with market economy treatment.[130]

b) Canada

The Canadian system provides for the application of NME methodology on a case-by-case basis. Canadian AD responses are governed by the 'Special Import Measures Act' (SIMA) and administered by the Canada Border Services Agency (CBSA). The SIMA i.a. allows for responses to situations where an investigation is initiated concerning goods produced in or exported from a country where domestic prices are substantially determined by the government and where there is sufficient reason to believe that they are not substantially the same as they would be if they

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ated from NME status, cf. Import Administration, Inquiry into the Status of the Russian Federation as a Non-Market Economy Country under the U.S. Antidumping Law, A-821-816, 6 June 2002, available at http://ia.ita.doc.gov/download/russia-nme-status/russia-nme-decision-final.htm (last accessed 2 May 2016); Import Administration, Magnesium Metal from the Russian Federation: Final Determination of Sales at Less-than-Fair Value, Issues and Decision Memorandum, 70 Fed. Reg. 9041, 24 February 2005, available at http://enforcement.trade.gov/frn/summary/russia/E5-765-1.pdf. (last accessed 2 May 2016). What is moreover noteworthy is that, although the 'constructed value' method is quite commonly used in market economy AD cases when domestic prices are unusable, there might be a certain trend within the WTO of intensifying judicial review regarding the application of such methodology – see this very recently being reflected in a panel report ruling an EU calculation method concerning AD duties imposed on Biodiesel from Argentina unlawful, Panel Report, 29 March 2016, WT DS473, European Union — Anti-Dumping Measures on Biodiesel from Argentina.

129 Cf. *K. William Watson*, It's Time to Dump Nonmarket Economy Treatment, Cato Institute free Trade Bulletin No 65, 9 March 2016, available at http://www.cato.org/publications/free-trade-bulletin/its-time-dump-nonmarket-economy-treatment (last accessed 2 May 2016).

130 Cf. *K. William Watson*, Will Nonmarket Economy Methodology Go Quietly into the Night, Cato Institute Policy Analysis No 763, October 2014, available at http://object.cato.org/sites/cato.org/files/ pubs/pdf/ pa763.pdf (last accessed 2 May 2016), p. 8; *Sophia Mueller*, The Prospects of EU Trade Defence against Chinese Imports after 2016 – Taming the Dragon through Countervailing Duties?, 2015, available at http://ssrn.com/abstract=2665960 (last accessed 2 May 2016). Cf. elaborately on this issue section IV.2.c. below.

were determined in a competitive market.[131] The CBSA in such scenarios has the possibility to start an inquiry under Section 20 of the SIMA.[132]

Under Section 17.1 of the Special Import Measures Regulations (SOR/84-927), China is defined as 'prescribed country' within the meaning of Section 20.1.a SIMA. The

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131 Cf. *Bennett Jones*, Canadian Anti-Dumping and Countervailing Duty Measures, International Trade & Investment Practice, 1 March 2011, available at https://www.bennettjones.com/uploadedFiles/ Publications/Guides/Canadian%20Anti%20Dumping%20Guide.pdf (last accessed 2 May 2016).

132 Section 20 SIMA states:

'(1) Where goods sold to an importer in Canada are shipped directly to Canada

(a) 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, or

(b) from any other country where, in the opinion of the President,

(i) the government of that country has a monopoly or substantial monopoly of its export trade, and

(ii) 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,

the normal value of the goods is

(c) where like goods are sold by producers in any country other than Canada designated by the President for use in that country,

(i) the price of the like goods at the time of the sale of the goods to the importer in Canada, adjusted in the prescribed manner and circumstances to reflect the differences in terms and conditions of sale, in taxation and other differences relating to price comparability between the goods sold to the importer in Canada and the like goods sold by producers in the country other than Canada designated by the President for use in that country, or

(ii) the aggregate of

(A) the cost of production of the like goods,

(B) a reasonable amount for administrative, selling and all other costs, and

(C) a reasonable amount for profits,

whichever of the price or aggregate the President designates for any case or class of cases; or

(d) where, in the opinion of the President, sufficient information has not been furnished or is not available to enable the normal value of the goods to be determined as provided in paragraph (c), the price of like goods

(i) produced in any country designated by the President, other than Canada or the country from which the goods were shipped directly to Canada, and

(ii) imported into Canada and sold by the importer thereof in the condition in which they were imported to a person with whom, at the time of the sale, the importer was not associated,

such price to be adjusted in the prescribed manner and circumstances to reflect the differences in terms and conditions of sale, in taxation and other differences relating to price comparability between the goods sold to the importer and the imported like goods in relation to their sale by the importer thereof.

(2) The President may not designate a country under paragraph (1)(d) if

(a) the like goods of that country are also the subject of investigation under this Act, unless the President is of the opinion that those goods are not dumped goods; or

(b) in the opinion of the President, the price of the like goods imported into Canada has been significantly influenced by a country described in paragraphs (1)(a) and (b)'.

status of being a 'prescribed country' entails the legal presumption that normal market conditions *might* not exist in certain industries. The burden of proof in this respect however still rests upon the domestic Canadian industry and the CBSA respectively, which have to demonstrate that the Chinese sector does not operate under market economy conditions.[133] Therefore, each sector or product under investigation has to be treated as subject to market economy conditions unless there is evidence to the contrary.

The procedure is as follows: first, the Canadian complainant submits evidence[134] it has gathered independently. Second, the CBSA analyses the information obtained, possibly conducts own research and finally decides whether the evidence is sufficient to warrant the initiation of an inquiry. Should such be the case, the CBSA, as a third step, officially initiates a section 20 inquiry.[135] It is typically not clear whether and to what extent the CBSA's own analysis went beyond the complainants' submission.[136]

In assessing whether the 'quality' of the evidence either submitted by Canadian producers or gathered by the CBSA itself allows for the *initiation* of a section 20 inquiry, the CBSA examines

i. whether 'the evidence presented, either by the complainant or the CBSA, in support of an allegation regarding the applicability of section 20 [is] relevant and reasonably reliable' and

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133 On the procedure attached to a section 20 inquiry, cf. in detail CBSA, SIMA Handbook, 114-04, available at http://canhbaosom.vn/sites/default/files/lib/SIMA%20Handbook-e%20(w%20TOC)_0.doc (last accessed 2 May 2016), p. 120 et seq.; cf. also *Laura Puccio*, Granting Market Economy Status to China, European Parliamentary Research Service, November 2015, available at http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/571325/EPRS_IDA(2015)571325_EN.pdf (last accessed 2 May 2016).

134 The evidence submitted (or, alternatively, the one collected by CBSA itself) shall indicate whether domestic prices are substantially determined by the government of that country. It can consist of 'studies and reports by international institutions such as the World Trade Organization or banks or other financial institutions, academic studies, newspaper or Internet articles, business or market intelligence reports, publications of the government under consideration and other relevant reports and analyses undertaken by Canadian and other national governments; furthermore, the evidence shall be timely, accurate and reputable, cf. CBSA, SIMA Handbook, 114-04, available at http://canhbaosom.vn/sites/default/files/lib/SIMA%20Handbook-e%20(w%20TOC)_0.doc (last accessed 2 May 2016), p. 124 et seq.

135 CBSA, Statement of Reasons, Certain Oil Country Tubular Goods, 4214-43, AD/1404, 4218-40, CD/139, 5 August 2014, available at http://www.cbsa-asfc.gc.ca/sima-lmsi/i-e/ad1404/ad1404-i14-de-eng.html (last accessed 2 May 2016), paras. 142-148.

136 *Dan Curiak*, Trade Defence Practice in Canada, Canada Country Report for the Evaluation of the European Union's Trade Defence Instruments, CC Working Paper, February 2012, available at: http://ssrn.com/abstract=2086602 (last accessed 2 May 2016).

ii. 'if so, [whether] this evidence, if properly verified, [would] be capable of reasonably supporting a positive determination as to the applicability of section 20...'[137]

As regards China, the *SIMA handbook* allows to make reference to the list contained in Annex 4 of the AP. In this list, China has listed the goods and services that may be subject to price controls and to guidance pricing. Should the goods be listed in the AP or in the Chinese 'official journal' as being subject to state pricing controls, 'this will serve as sufficient evidence to initiate a section 20 inquiry.'[138]

The official section 20 inquiry includes the sending out of so-called Requests for Information (RFIs) to the government and exporters concerned.[139] It is on this basis that the President (of the CBSA) will form his opinion whether or not the requirements of section 20 SIMA are met. He will make a positive decision if he is of the opinion pursuant to section 20.1.a SIMA that domestic prices in the sector under investigation are

i. substantially determined by the government and

ii. there is sufficient reason to believe that the domestic prices are not substantially the same as they would be if they were determined in a competitive market.[140]

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137 CBSA, SIMA Handbook, 114-04, available at http://canhbaosom.vn/sites/default/files/lib/SIMA%20Handbook-e%20(w%20TOC)_0.doc (last accessed 2 May 2016), p. 123 et seq.

138 Yet, 'it will still be necessary to obtain information from the government of China in order to confirm that the goods under investigation are still subject to state pricing and the President is still required to form an opinion that the pricing which results from such controls is not the same as that which would exist had the goods been subject to pricing in a competitive market', cf. CBSA, SIMA Handbook, 114-04, available at http://canhbaosom.vn/sites/default/files/lib/SIMA%20Handbook-e%20(w%20TOC)_0.doc (last accessed 2 May 2016), p. 132.

139 CBSA, Statement of Reasons, Certain Oil Country Tubular Goods, 4214-43, AD/1404, 4218-40, CD/139, 5 August 2014, available at http://www.cbsa-asfc.gc.ca/sima-lmsi/i-e/ad1404/ad1404-i14-de-eng.html (last accessed 2 May 2016), para. 149. According to the SIMA handbook, the CBSA shall, '[i]n order to ensure that we fulfill these obligations, […] ensure that the section 20 questionnaires sent to producers and exporters in China include an invitation to provide any other information or evidence they wish to provide to the President in order to demonstrate that their industry is not operating under the conditions outlined in section 20 of the Act', CBSA, SIMA Handbook, 114-04, available at http://canhbaosom.vn/sites/default/files/lib/SIMA%20Handbook-e%20(w%20TOC)_0.doc (last accessed 2 May 2016), p. 131.

140 CBSA, Statement of Reasons, Certain Oil Country Tubular Goods, 4214-43, AD/1404, 4218-40, CD/139, 5 August 2014, available at http://www.cbsa-asfc.gc.ca/sima-lmsi/i-e/ad1404/ad1404-i14-de-eng.html (last accessed 2 May 2016), para. 149 et seq.

In contrast to other countries, China's status as a 'prescribed country' in accordance with section 20.1.a SIMA has the effect that the condition relating to the government having a monopoly or substantial monopoly of its export trade is not applicable in respect of goods originating in China;[141] only the factor relating to price determination needs to be met.[142] There is thus a lower threshold for the President to form the opinion that the conditions of section 20 SIMA are met.

The official 'statement of practice' emphasizes that non-market determination is made in respect of the sector producing the subject goods, not of the country as a whole; that each determination is made on its own merits; and that the application of non-market treatment to a particular sector in a country is of no relevance in the normal course for determinations being made in respect of other sectors in that same country.[143]

The *SIMA handbook* contains a detailed list of illustrative factors that may assist the President in determining whether or not the conditions of section 20.1 SIMA exist or not. Insofar, it is important to note that the President forms a mere *opinion*[144] and thus 'is not required to prove that the conditions of section 20 exist or to have a body of evidence that leaves almost no doubt whatsoever regarding the existence of these conditions.' Instead, it is sufficient that his opinion is 'based on information and evidence which establishes a relatively clear and well-supported case.'[145]

In forming his opinion, the President also assesses whether there is *sufficient evidence* to form an *opinion* under section 20 SIMA.[146] As such, he considers two elements – 'scope' and 'materiality.' There is sufficient 'scope' where the evidence be-

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141 CBSA, SIMA Handbook, 114-04, available at http://canhbaosom.vn/sites/default/files/lib/SIMA%20Handbook-e%20(w%20TOC)_0.doc (last accessed 2 May 2016).

142 CBSA, SIMA Handbook, 114-04, available at http://canhbaosom.vn/sites/default/files/lib/SIMA%20Handbook-e%20(w%20TOC)_0.doc (last accessed 2 May 2016), p. 132.

143 *Dan Curiak*, Trade Defence Practice in Canada, Canada Country Report for the Evaluation of the European Union's Trade Defence Instruments, CC Working Paper, February 2012, available at: http://ssrn.com/abstract=2086602 (last accessed 2 May 2016).

144 An opinion for this purpose is defined, in accordance with the Concise Oxford Dictionary as a 'judgment or belief based on grounds short of proof, provisional conviction, view held as probable', cf. CBSA, SIMA Handbook, 114-04, available at http://canhbaosom.vn/sites/default/files/lib/SIMA%20Handbook-e%20(w%20TOC)_0.doc (last accessed 2 May 2016), p. 125.

145 CBSA, SIMA Handbook, 114-04, available at http://canhbaosom.vn/sites/default/files/lib/ SIMA%20Handbook-e%20(w%20TOC)_0.doc (last accessed 2 May 2016), p. 126; for the illustrative list see p. 126 et seq.

146 CBSA, SIMA Handbook, 114-04, available at http://canhbaosom.vn/sites/default/files/lib/ SIMA%20Handbook-e%20(w%20TOC)_0.doc (last accessed 2 May 2016), p. 129. This test is thus separate from the one conducted by CBSA whether or not to *initiate* a section 20 inquiry.

fore the President 'provides an adequate factual basis' for forming an opinion; it might be insufficient where no evidence or information whatsoever is available concerning one decisive factor for the overall assessment of the degree of government control in the sector under investigation. 'Materiality' concerns the question whether the information that has *not* been provided or is *not* otherwise available to the President might be so critical as to possibly require the President to reverse his decision. In this context, the President examines whether 'the missing information could have the result of reversing the opinion that would be formed on the basis of all of the other information and evidence.'[147]

Should the President determine that the evidence provided is insufficient, he might suggest to proceed with the determination of normal values according to sections 15 or 19 SIMA, thus leaving section 20 aside.[148]

A positive decision by the President, on the other hand, will have the effect that 'the normal values of the goods under investigation will be determined, where such information is available, on the basis of the domestic price or cost of the like goods sold by producers in any country designated by the President and adjusted for price comparability; or the selling price in Canada of like goods imported from a designated country and adjusted for price comparability.'[149] Subsequently the CBSA may designate a surrogate/analogue country.[150] If producers in the chosen analogue countries do not respond, the normal value is set by Ministerial Specification via a constructed normal value based on publicly available information.[151]

Although Canada has not formally recognized China's MES and despite the continued qualification of China as a 'prescribed country', the fact that the burden of proof falls with the Canadian industry and CBSA respectively and not with Chinese pro-

147 CBSA, SIMA Handbook, 114-04, available at http://canhbaosom.vn/sites/default/files/lib/ SIMA%20Handbook-e%20(w%20TOC)_0.doc (last accessed 2 May 2016), p. 129.

148 CBSA, SIMA Handbook, 114-04, available at http://canhbaosom.vn/sites/default/files/lib/ SIMA%20Handbook-e%20(w%20TOC)_0.doc (last accessed 2 May 2016), p. 130.

149 CBSA, Statement of Reasons, Certain Oil Country Tubular Goods, 4214-43, AD/1404, 4218-40, CD/139, 5 August 2014, available at http://www.cbsa-asfc.gc.ca/sima-lmsi/i-e/ad1404/ad1404-i14-de-eng.html (last accessed 2 May 2016), para. 150.

150 CBSA, Statement of Reasons, Certain Oil Country Tubular Goods, 4214-43, AD/1404, 4218-40, CD/139, 5 August 2014, available at http://www.cbsa-asfc.gc.ca/sima-lmsi/i-e/ad1404/ad1404-i14-de-eng.html (last accessed 2 May 2016), para. 151.

151 *Dan Curiak*, Trade Defence Practice in Canada, Canada Country Report for the Evaluation of the European Union's Trade Defence Instruments, CC Working Paper, February 2012, available at: http://ssrn.com/abstract=2086602 (last accessed 2 May 2016).

ducers seems to comply in any case with the expiration of Article 15(a)(ii) AP. As portrayed above, the 'prescription' of China has the mere effect that the CBSA during a section 20 inquiry does not have to demonstrate a monopoly/substantial monopoly of the Chinese government over their export trade; this is without prejudice to the requirement that first there needs to be substantial evidence (either in the complaint itself or resulting from the CBSA's own research) for NME structures in the particular sector.

Consequently, Canada, despite the 'prescription' of China factually employs a legal presumption in favour of Chinese MES. In the words of the *SIMA handbook*, there is an 'implied presumption (…) that (…) [NME] conditions do not exist in the sector under investigation and that section 20 of SIMA requires the President to form an opinion that they exist.'[152]

It might thus well be against the backdrop of the functioning of the Canadian section 20 inquiry just demonstrated – and its compatibility with the AP beyond doubt respectively – that Canada, in 2013, repealed the requirement to cease the application of section 20 SIMA to China in December 2016; this requirement had previously been incorporated in 2002.[153]

c) Australia

Australia granted China MES in 2005 prior to the commencement of negotiations over an FTA between the two countries; it henceforth does not base any of its actions on the provisions of the AP.[154] It thus relinquished the option to apply the NME or economy-in-transition provisions enshrined in its domestic AD law.[155]

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152 CBSA, SIMA Handbook, 114-04, available at http://canhbaosom.vn/sites/default/files/lib/ SIMA%20Handbook-e%20(w%20TOC)_0.doc (last accessed 2 May 2016), p. 126. Emphasis added.

153 Canada had enacted Bill C-50, An Act to amend certain Acts as a result of the accession of the People's Republic of China to the Agreement Establishing the World Trade Organization. The Bill came into force on 30 September 2002 and was repealed through act SOR/2013-81, cf. *Laura Puccio*, Granting Market Economy Status to China, European Parliamentary Research Service, November 2015, available at http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/571325/EPRS_IDA(2015)571325_EN.pdf (last accessed 2 May 2016), p. 23.

154 Cf. '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', available at http://dfat.gov.au/trade/agreements/chafta/Documents/mou_aust-china_fta.pdf (last accessed 2 May 2016). The China-Australia FTA entered into force on 20 December 2015, cf. Australian Government, China-Australia Free Trade Agreement (ChAFTA), available at

Given that China's MES has been recognized, the competent AD Commission must generally base its normal value determinations on domestic sales prices in China. However, under certain conditions the Minister can decide that Chinese domestic sales cannot be relied upon in the determination of normal value.[156] In these scenarios, the Australian example provides information on how the EU could proceed as regards the application of 'special methodology'[157] should it decide to grant China MES.

Since Articles 15 and 16 of the AP no longer apply between Australia and China[158], the applicable provision under WTO law when it comes to the admissibility of 'special methodology' is Article 2.2 ADA. Australia applies Article 2.2 ADA, which is enshrined in section 269TAC(2)(a)(ii), by performing a 'particular market situation (PMS) test.' Australian legislation does not define any criteria on how the AD Commission should assess whether a PMS is given; consequently, the latter disposes of a wide margin of discretion. Typically, Australian authorities apply a two-step test:

1) They identify 'the situation in the market that makes sales in that market unsuitable for normal values' and
2) they determine whether 'the market situation has rendered domestic selling prices unsuitable for normal values.'[159]

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https://www.austrade.gov.au/Australian/Export/Free-Trade-Agreements/chafta (last accessed 2 May 2016).

155 The legal basis of Australia's anti-dumping and countervailing system consists of the Customs Act 1901 and implementing regulation Customs Regulations 1926; furthermore, the Customs Tariff (Anti-Dumping) Act 1975 (Dumping Duty Act) and the implementing regulation Customs Tariff (Anti-Dumping) Regulation 2013 (Dumping Duty Regulation). Established in 2012, the Anti-Dumping Commission (AD Commission) is the competent authority to administer Australia's anti-dumping measures. It constitutes an independent agency and reports to the Minister for Industry and Science with recommendations on whether an anti-dumping measure should be imposed. Cf. in detail *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 49 (6) (2015), pp. 978-1010.

156 These conditions are set out in sec. 269TAC(2)(a)(ii).

157 Under Australian terminology: 'constructed method'.

158 Cf. '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', available at http://dfat.gov.au/trade/agreements/chafta/Documents/mou_aust-china_fta.pdf (last accessed 2 May 2016), para. 2.

159 *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 49 (6) (2015), pp. 978-1010, at p. 981.

As *Zhou* points out, one of the major issues in Australia's practice of applying the 'PMS test' concerns the necessary evidentiary standard. Typically, every economic system experiences government interventions launched for various policy reasons. Under the Australian practice, a PMS is being assumed whenever a certain *degree* of government intervention has been reached. However, it is unclear what threshold the AD Commission applies; much rather, the Commission seems to conduct a case-by-case analysis, what evidently makes it difficult for China to anticipate whether one of its market sectors might be considered as being subject to a PMS. Furthermore, the question arises whether also legitimate policy objectives (e.g. environmental protection) and their corresponding government interventions should allow for the assumption of a PMS and thus the application of 'special methodology' given that this will likely be perceived from the Chinese side as an unfair assessment of its internal policies.[160]

Once a PMS has been established, Australia uses several techniques in order to reach the highest dumping margins possible. In the following we shall briefly portray three techniques Australia applies, notably:

i. Usage of external benchmarks,

ii. Denial of individual dumping margins, and

iii. Sampling.

Australia frequently uses 'external benchmarks', e.g. world market prices to uplift actual costs of raw materials in China. This leads to the calculation of a higher domestic sales price of the particular final product under investigation and consequently to a higher dumping margin. Yet, such practice always risks being incompatible with WTO law, more particularly with Article 2.2.1.1 ADA.[161] Moreover, the 'fair comparison' rule, envisaged in Article 2.4 ADA might necessitate adjustments between the constructed normal value and the export price.

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160 *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 49 (6) (2015), pp. 978-1010, at. p. 984 et seq. The 'PMS test's' compatibility with WTO law is debated. *Zhou* argues that Australia would rather have to use a 'suitability' test in order to meet the requirements set out in Art. 2.2 ADA.

161 Especially given the latest panel report in the *EU – Biodiesel* proceedings, see Panel Report, 29 March 2016, WT DS473, European Union — Anti-Dumping Measures on Biodiesel from Argentina.

Furthermore, Australia at times 'denies individual dumping margins' to Chinese exporters. In general, Australian AD law differentiates between three types of exporters, effectively according to their willingness to cooperate.[162] In the *Power Transformers* case, the AD Commission applied dumping rates calculated for certain groups of exporters instead of granting individual exporters – despite their willingness to cooperate – individual dumping rates, which are usually lower.[163] This practice, however, could be problematic in view of Article 6.10 ADA.[164]

Lastly, another technique employed by Australia, which is known in AD mechanisms of various legislations including the EU's[165], is so-called 'sampling.' In this process, AD authorities select a number of exporters from a country being investigated to become part of the investigation. Article 6.10 ADA generally allows for this approach 'where the number of exporters, producers, importers or types of products involved is so large as to make [the] determination [of an individual dumping margin] impracticable.'

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162 'First type exporters' are those who are selected or sampled by the Australian investigating authorities to participate in an investigation (on 'sampling' see the subsequent paragraph). For such exporters having been selected/sampled, the investigating authorities calculate an individual dumping margin for each one of them as long as their degree of cooperation satisfies the authorities. 'Second type exporters' are those who were not sampled but are showing their willingness to participate in the investigation. For this group, also known as 'residual exporters' the investigating authorities calculate a 'residual dumping rate' that is based on the margins of the sampled exporters. Lastly, 'third type exporters' are all uncooperative exporters. Their dumping margin is calculated based on best information available. Cf. *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 49 (6) (2015), pp. 978-1010, at p. 995.

163 Anti-Dumping Commission, Investigation into Alleged Dumping of Power Transformers Exported from the People's Republic of China, the Republic of Indonesia, the Republic of Korea, Taiwan, Thailand and the Socialist Republic of Vietnam, Submission by TBEA Shenyang Transformer Group Co. Ltd, 12 May 2014, available at http://www.adcommission.gov.au/cases/Documents/100-140513TBEAPublic.pdf (last accessed 2 May 2016); Anti-Dumping Commission, Investigation into Alleged Dumping of Power Transformers Exported from the People's Republic of China, the Republic of Indonesia, the Republic of Korea, Taiwan, Thailand and the Socialist Republic of Vietnam, Submission by TBEA Shenyang Transformer Group Co. Ltd, 10 June 2014, available at http://www.adcommission.gov.au/cases/Documents/114-Submission-Exporter-HuntandHuntLawyersonbehalfofTBEAShenyangTransformerGroupCoLtd.pdf (last accessed 2 May 2016); cf. *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 49 (6) (2015), pp. 978-1010, at p. 996.

164 Cf. Appellate Body Report, 15 July 2011, WT/DS397/AB/R, European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China, adopted 28 July 2011. The Appellate Body held that Article 6.10 of the Anti-Dumping Agreement generally requires an investigating authority to calculate individual dumping margins for each foreign exporter or producer.

165 *Ivo Van Bael and Jean-François Bellis*, EU Anti-Dumping and other Trade Defence Instruments, 5th ed., Alphen aan den Rijn 2011, p. 491.

According to the Australian 'Dumping and Subsidy Manual', the AD Commission may follow two alternative approaches: It may either launch a Preliminary Information Request[166] (PIR) or use known data concerning export volumes.[167] Again, depending on the degree of cooperation or on whether the individual exporter was selected in the 'sampling' process respectively, the AD Commission generally applies an individual dumping rate for each selected, cooperative exporter, a 'residual dumping rate' for all un-selected, but cooperative exporters and an overall rate for uncooperative exporters. As *Zhou* criticizes, Australia at times deviates from this practice and consequently only ascribes individual dumping margins to a portion of the exporters that had previously been approached with a request to fill in the PIR questionnaire beforehand and were cooperative. This practice, however, seems to be in line with WTO law.[168]

3. Countervailing duties as an alternative means for tackling Chinese dumping

As portrayed in the study by *Urdinez* and *Masiero*, granting China MES typically leads to a decrease in the number of AD investigations against Chinese exporters.[169] A possible remedy to counter this effect with view to maintaining a high level of trade defence could lie in the increased application of countervailing duties. Such application, however, does not come without challenges. The following section identifies some major issues and notably portrays US and Canadian practice of introducing CDs against China.

The US Department of Commerce for quite some time held the view that the imposition of CDs onto exporters from NMEs was not admissible since the high degree of state control in such economies would make discerning individual subsidies and thus

166 'Under the PIR, the AD Commission provides a brief exporter questionnaire to all identified exporters and invite them to respond to some preliminary questions contemplated in the questionnaire. These preliminary questions normally relate to basic information about the exporters, their businesses, production and export of subject goods, their upstream suppliers, etc. The information provided by the exporters is then used for sampling.' *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 49 (6) (2015), pp. 978-1010, at p. 1001.

167 Cf. Anti-Dumping Commission, Dumping and Subsidy Manual, November 2015, available at http://www.adcommission.gov.au/accessadsystem/Documents/Dumping%20and%20Subsidy%20Manual%20-%20November%202015_20%20Nov%202015%20-%20final%20on%20website.pdf (last accessed 2 May 2016), p. 118 et seq.

168 *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 49 (6) (2015), pp. 978-1010, at p. 1002.

169 *Francisco Urdinez and Gilmar Masiero*, China and the WTO: Will the Market Economy Status Make Any Difference after 2016?, The Chinese Economy 48 (2) (2015), pp. 155-172; For detailed information cf. *Chad P. Bown*, Global Antidumping Database, 2015, available at http://econ.worldbank.org/ttbd/gad/ (last accessed 2 May 2016).

establishing effective benchmarks impossible. However, in March 2007 as part of the *Coated Free Sheet Paper* investigation Commerce changed its point of view.[170] It determined that China's economy had changed substantially; henceforth it would be possible to discern specific benefits the Chinese government bestows upon individual producers.[171] The US Court of International Trade had subsequently ruled that this practice was in accordance with US law.[172]

The AP creates quite favourable legal conditions for the introduction of CDs. According to Article 10(2) AP subsidies against Chinese SOEs are automatically considered to be 'specific' – one of the legal requirements for the imposition of CDs under the ASCM.[173] Furthermore, Article 15(b) AP even allows for NME methodologies to be used regarding the identification and calculation of CDs.

In 2011, the US was the heaviest user of CDs against China, followed by Canada and Australia;[174] the EU in the meantime has enacted nine corresponding investigations against China, whereas five have resulted in actual CDs that are still in force today.[175] Against the backdrop that the AP is already in force since 2001, it is quite

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170 Import Administration, Countervailing Duty Investigation of Coated Free Sheet Paper from the People's Republic of China – Whether the Analytical Elements of the *Georgetown Steel* Opinion are Applicable to China's Present-Day Economy, Memorandum, 29 March 2007, available at http://ia.ita.doc.gov/download/prc-cfsp/CFS%20China.Georgetown%20applicability.pdf (last accessed 2 May 2016); cf. *Thomas J. Prusa and Edwin Vermulst*, United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China: Passing the Buck on Pass-Through, World Trade Review 12 (S2) (2013), pp. 197-234, at p. 198; cf. *Dukgeun Ahn and Jieun Lee*, Countervailing Duty Against China: Opening Pandora's Box in the WTO System?, Journal of International Economic Law 14(2) (2011), pp. 329-368.

171 Import Administration, Countervailing Duty Investigation of Coated Free Sheet Paper from the People's Republic of China – Whether the Analytical Elements of the *Georgetown Steel* Opinion are Applicable to China's Present-Day Economy, Memorandum, 29 March 2007, available at http://ia.ita.doc.gov/download/prc-cfsp/CFS%20China.Georgetown%20applicability.pdf (last accessed 2 May 2016); cf. *Dukgeun Ahn and Jieun Lee*, Countervailing Duty Against China: Opening Pandora's Box in the WTO System?, Journal of International Economic Law 14(2) (2011), pp. 329-368.

172 US Court of International Trade, 29 March 2007, 483 F. Supp. 2d 1282, Government of the People's Republic of China v United States.

173 To be more precise under Art. 14(a) ASCM.

174 *Dukgeun Ahn and Jieun Lee*, Countervailing Duty Against China: Opening Pandora's Box in the WTO System?, Journal of International Economic Law 14(2) (2011), pp. 329-368, at p. 344.

175 Three CDs have already expired, cf. European Commission, Investigation Search, available at http://trade.ec.europa.eu/tdi/completed.cfm (last accessed 2 May 2016); statistics since 2003. Also India has launched respective investigations, but apparently without concrete outcome, cf. Department of Commerce, Countervailing Duty Investigation, available at http://commerce.nic.in/traderemedies/Countervailing%20Duty%20Investigation%20CVD.asp?id=17 (last accessed 2 May 2016). The same seems to hold true for South Africa, cf. ITAC, Definitive Duties in Force as of December 2015, available at http://www.itac.org.za/upload/DEFINITIVE%20DUTIES%20IN%20FORCE%20AS%20OF%2031%20DECEMBER%202015.pdf (last accessed 2 May 2016); ITAC, Annual Report 2014-2015, available at http://www.itac.org.za/upload/2014-2015%20Annual%20Report.pdf (last accessed 2

remarkable that it was only rather recently that States have started the increased utilization of CDs (e.g. Canada in 2004, the US in 2006 and the EU in 2010). This could well be taken as a sign that the respective authorities determined CDs to be an effective alternative to AD measures, especially given that the latter are governed by highly contentious rules under the AP.[176]

What is remarkable when it comes to the CDs introduced by the US are their high duties, which can, in exceptional cases, even amount to over 600 %.[177] US CDs are being calculated in accordance with section 705(c)(1)(B)(i)(I) of the Tariff Act of 1930. A reason for the high outcomes of US CD investigations might be the discretionary room left for some variation in the final stage of CD actions despite the requirements set out in Article 19.3 ASCM. What is meant by that is that the US generally applies a retrospective system for 'levying' (rather than 'imposing') CDs. Consequently, the actual CDs levied might differ significantly from those originally imposed – depending on the outcome of administrative review decisions.[178]

According to section 705(b)(4)(A)(ii) of the Tariff Act of 1930, in this late stage of investigations named 'final determinations', the US authorities 'shall consider' during their 'additional findings' i.a.

> '(I) the timing and the volume of the imports,
>
> (II) any rapid increase in inventories of the imports, and

May 2016), p. 22 et seq.; cf. also *Dukgeun Ahn and Jieun Lee*, Countervailing Duty Against China: Opening Pandora's Box in the WTO System?, Journal of International Economic Law 14 (2) (2011), pp. 329-368, p. 344 et seq.

176 Cf. section II above.

177 Cf. the 620.08 % duty upheld against producer 'Tianjin Shuangjie' in a 'sunset review' concerning CDs on Circular Welded Carbon Quality Steel Pipe from China conducted 25 September 2013, US Department of Commerce, Issues and Decision Memorandum for the Final Results of the Expedited Sunset Review of the Countervailing Duty Order on Circular Welded Carbon Quality Steel Pipe from the People's Republic of China, Memorandum, C-570-911, 25 September 2013, available at http://enforcement.trade.gov/frn/summary/prc/2013-24129-1.pdf (last accessed 2 May 2016); the original CD imposed 22 July 2008 amounted to 616.83 %, cf. *Bernard O'Connor*, CVD Actions against China – The US Approach, Global Trade and Customs Journal 4 (11/12) (2009), pp. 359–379, at p. 366; cf. also *Dukgeun Ahn and Jieun Lee*, Countervailing Duty Against China: Opening Pandora's Box in the WTO System?, Journal of International Economic Law 14 (2) (2011), pp. 329-368, at p. 348. The re-determination of the CD against 'Tianjin Shuangjie' resulted from a so-called 'section 129 (Uruguay Round Agreements Act) determination', which serves to bring US CDs in conformity with WTO law.

178 Cf. *Dukgeun Ahn and Jieun Lee*, Countervailing Duty Against China: Opening Pandora's Box in the WTO System?, Journal of International Economic Law 14 (2) (2011), pp. 329-368, at p. 362. This contention can be supported by the fact that, according to Article 19.4 ASCM, Fn. 51, levying 'shall mean the definitive or final legal assessment or collection of a duty or tax.' If one follows this reading of Article 19 ASCM, the retroactive levying of duties higher than the ones calculated at an earlier stage of the particular AS investigation may be in line with WTO law.

(III) any other circumstances indicating that the remedial effect of the countervailing duty order will be seriously undermined.'

These criteria seemingly confer wide margins of discretion on the investigating authority, which may allow to uplift the CDs that had previously, at an earlier stage of the investigation, been set at lower rates. Compared to the Canadian practice, which requires the President of the CBSA in its final determination to use 'the same period of investigation examined at the preliminary determination' the US approach seems more flexible; section 705(b)(4)(A)(ii)(II) of the Tariff Act of 1930 can be read as allowing the US authorities to also take into account facts that arose in between the initiation of the investigation and the final determination.[179]

Canadian CDs, are – just like AD measures – governed by the SIMA.[180] Canada, unlike the US, had never excluded to impose CDs also against NMEs. However, as stated above, Canada only started this practice in 2004. The reasons therefore might lie in the fact that CD investigations can potentially cause considerably higher legal fees and other costs for domestic producers to bear than it is the case in AD investigations.[181] What is noteworthy is that Canada applied CDs mainly to protect its steel industry; however with an average rate of 33% and thus typically with lower CDs than

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179 This fact alone, however, cannot serve to explain the – compared to the duties levied by other States – remarkably high US CDs. Much rather, it may only indicate *when* this considerably higher determination is made under US practice. What calculation methods exactly are responsible for these high duties, requires further profound and detailed assessment of the US AS methodology applied.

180 Cf. section IV.2.b) above.

181 *Lawrence L. Herman*, The China Factor: Canada's Trade Remedy Response to China's Economic Challenge, Canada-US Law Journal 33 (2) (2007), available at http://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1119&context=cuslj (last accessed 2 May 2016), p. 35. As *Herman* implies in the subsequent descriptions of individual investigations this might be due to the requirement to prove 'specific benefits' being conferred upon the respective Chinese producer by a particular subsidy. Such might typically be more difficult than demonstrating overall market distortions (e.g. price determinations) in the respective sector (as e.g. required in a section 20 SIMA inquiry under Canadian law, cf. section IV.2.b) above). On the challenge of 'specificity' in the US practice cf. *Bernard O'Connor*, CVD Actions against China – The US Approach, Global Trade and Customs Journal 4 (11/12) (2009), pp. 359–379, at p. 369 et seq.

the US.[182] Generally speaking, an analysis of Canadian CDs demonstrates that they are usually being introduced together with AD duties.[183]

This latter practice of imposing CDs and ADs simultaneously – referred to as applying 'double remedies'[184] – needs to be handled restrictively due to the parameters set under WTO law.[185] According to Art. VI:5 GATT the same product may not be subject to CDs and ADs simultaneously in order 'to compensate for the same situation of dumping or export subsidization.' In *US – Definitive Antidumping and Countervailing Duties on Certain Products from China*, the Appellate Body ruled that the double remedies imposed by the US violated Article 19.3 ASCM.[186] In its view, it would not be 'appropriate' within the meaning of Art. 19.3 ASCM to offset the same subsidiza-

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182 Cf. *Dukgeun Ahn and Jieun Lee*, Countervailing Duty Against China: Opening Pandora's Box in the WTO System?, Journal of International Economic Law 14 (2) (2011), pp. 329-368, at p. 351, who claim that the CBSA made use of CDs as a tool to 'punish' companies that did not fully cooperate throughout AS or AD investigations. Cf. their reference to corresponding 'ministerial specifications' according to Article 29(1) SIMA.

183 Cf. the overview of CDs in place at CBSA, Goods subject to anti-dumping or countervailing duties, available at http://www.cbsa-asfc.gc.ca/sima-lmsi/mif-mev-eng.html (last accessed 2 May 2016); cf. also the assessment by *Dukgeun Ahn and Jieun Lee*, Countervailing Duty Against China: Opening Pandora's Box in the WTO System?, Journal of International Economic Law 14 (2) (2011), pp. 329-368, at p. 351.

184 Elaborately, with suggestions for specific calculation methods in line with WTO law, *Brian D. Kelly*, The Offsetting Duty Norm and the Simultaneous Application of Countervailing and Anti-dumping Duties, Global Economy Journal 11 (2) (Article 2) (2011), pp. 1-31.

185 More precisely on the two terms of 'double remedies' and 'double counting': ' 'Double remedies' may arise when both countervailing duties and anti-dumping duties are imposed on the same imported products. The term 'double remedies' does not, however, refer simply to the fact that both an anti-dumping and a countervailing duty are imposed on the same product. Rather, 'double remedies', also referred to as 'double counting', refers to circumstances in which the simultaneous application of anti-dumping and countervailing duties on the same imported products results, at least to some extent, in the offsetting of the same subsidization twice. 'Double remedies' are 'likely' to occur in cases where an NME methodology is used to calculate the margin of dumping because, under such a methodology, prices or costs in a surrogate country, rather than domestic prices, are used to calculate normal value.*'* Cf. Appellate Body Report, 11 March 2011, WT/DS379/AB/R, United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China.

186 Appellate Body Report, 11 March 2011, WT/DS379/AB/R, United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China. Cf. *Thomas J. Prusa and Edwin Vermulst*, United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China: Passing the Buck on Pass-Through, World Trade Review 12 (S2) (2013), pp. 197-234, p. 198 et seq., who discuss, on p. 204 et seq., the additional issue of what constitutes a 'public body' within the meaning Article 1.1(a)(1) ASCM and whether Chinese SOEs and state-owned commercial banks qualify as such. The Appellate Body also ruled on several other issues related to US AS methodology and i.a. decided that US Commerce had acted in compliance with Article 14(d) ASCM when it used external benchmarks for calculating the amount of the benefit – given that due to market distortions in China, caused by the government's predominant role therein, it could legitimately reject in-country private prices for that purpose, cf. Appellate Body Report, 11 March 2011, WT/DS379/AB/R, United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China.

tion twice by way of simultaneously imposing ADDs based on an NME methodology and CDs.[187]

Another method related to the imposition of CDs applied notably by Australia and also known in US law[188] is 'less than adequate remuneration (LTAR).' A situation in which LTAR applies, arises if a producer of a certain material that is required for a final product does not receive an 'adequate recompense or reward for the costs' (including work costs) that incurred to it during production.[189] As a consequence of an LTAR, the Australian AD Commission will use external benchmarks to determine 'adequate remuneration' and introduce a respectively higher CD.

As *Ahn* and *Lee* argue, general challenges in levying CDs could arise due to an overall lack of transparency when it comes to China's subsidy regime. As a result, the US had to increase its administrative efforts significantly in order to be able to monitor and investigate Chinese subsidization programs.[190]

V. Inferences for EU trade policy towards China

After the assessments made above, the question remains whether there are methodologies in other countries that can be used as examples or guidance for the EU on how to deal with Chinese dumping beyond 11 December 2016. In general, in order to implement new 'approaches' to trade defence as reflected in the legal systems of other countries, current legislation would have to be modified through an ordinary

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187 Appellate Body Report, 11 March 2011, WT/DS379/AB/R, United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China. Elaborately on the issue of 'double counting' and its perception before US courts *Lauren W. Clarke*, The Market-Oriented Enterprise Approach: The Best Response to the Questionable United States Trade Practices Scrutinized in GPX International Tire Corp. v United States, Catholic University Law Review 60 (3) (2011), pp. 809-840, available at http://scholarship.law.edu/cgi/viewcontent.cgi?article=3250&context= lawreview (last accessed 2 May 2016); *Elliot J. Feldman and John J. Burke*, Testing the Limits of Trade Law Rationality: The GPX case and Subsidies in Non-Market Economies, American University Law Review 62 (4) (2013), pp. 787-825, available at http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1876&context=aulr (last accessed 2 May 2016); Cf. also *Brian D. Kelly*, Market Economies and Concurrent Antidumping and Countervailing Duty Remedies, Journal of International Economic Law 17 (1) (2014), pp. 105-123, who discusses the 2012 statutory change of US law.

188 19 CFR 351.511 – Provisions of goods or services.

189 Decision of the Trade Measures Review Officer, Hollow Structural Sections, Review of Decisions to Publish a Dumping Duty Notice and A Countervailing Duty Notice, 14 Dec. 2012, available at http://www.adreviewpanel.gov.au/PastReviews/Documents/HollowStructuralSections-Report.pdf (last accessed 2 May 2016), para. 273; cf. *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 49 (6) (2015), pp. 978-1010, at. p. 992.

190 *Dukgeun Ahn and Jieun Lee*, Countervailing Duty Against China: Opening Pandora's Box in the WTO System?, Journal of International Economic Law 14 (2) (2011), pp. 329-368, p. 352.

legislative procedure – thus by the Council and the European Parliament, after a respective proposal by the Commission.

The Commission has already pointed out different options. This paper does not intend to comment on the Commission paper but aims to contribute supplementary ideas especially stemming from its comparative approach. Moreover, in developing new options in this regard, one needs to be aware of the 'backdrop' of WTO AD law and the AP. It is also noteworthy that the current US as well as Canadian approaches do not seem to include treating China as a market economy after 11 December; instead they provide, at least partly, for a continued application of 'special methodology', including the 'surrogate/analogue country' method, which in our view can legally only be based on a continued application of the remaining parts of Article 15(a) and (d) AP.

When discussing different approaches to a reform of TDIs especially in regard to China, it has to be remembered that not only WTO AD law has been shaped mainly under the ascendancies of US approaches,[191] but also that the US seems to have exerted major influence on the wording of the AP. The US is currently taking the position that it does not have to grant MES automatically. Instead, it assesses whether China meets the statutory criteria for ME treatment in the context of individual AD cases. Under US law, no direct legislative or regulatory modification is necessary in order to treat China as a market economy in some cases, and as an NME in others – also beyond 11 December 2016. This position, however, is quite a unique one. It appears that the US was able to influence the wording of the AP (Article 15(d) in particular) with the consequence that it may continue NME treatment unless China proves its MES; therefore its 'starting conditions' in the post 11 December 2016 scenario are different to those at least of the EU. Yet, the comparative third country study has brought about some results, which might enrich the EU's deliberations on how to implement its TDIs towards China in the future. These results will be discussed in the subsequent section.

In how far the experiences from other countries can be transposed into EU law strongly depends on what decision one takes concerning China's MES. The aspects

[191] *Francis Snyder*, The Origins of the 'Nonmarket Economy': Ideas, Pluralism and Power in EC Anti-Dumping Law about China, European Law Journal 7 (4) (2001), pp. 369-434, at p. 379 with further references.

outlined in the following intend to summarize some of the options the EU has from a legal perspective, partly under the assumption that China is not granted a total MES all at once as of 11 December 2016. Independently thereof, it would have to be discussed and weighed which economic and political consequences each decision would entail individually.

Should the EU decide to grant China MES, Article 2(7) ADR would have to be amended, which requires an ordinary legislative procedure. Once this action is taken, further possibilities for the Commission to react to dumped or subsidized products could be implemented.

1. Conferring more discretionary powers upon the Commission in determining NMES/MES?

a) As illustrated above, in US practice, the determination/revocation of a MES/NMES is a mere executive act, which is conducted by Commerce and cannot be reviewed by a court. In contrast, under EU law an ordinary legislative procedure in order to amend Article 2(7) EU antidumping regulation is required, as aforementioned.[192] Transposing such an approach into EU law would necessitate a substantive modification of the EU ADR. At the same time, such an approach would mean that the EU would reveal its position not to grant China automatically and that, consequently, parts of Article 15(a) AP remain applicable.

This approach, if implemented in EU law, would confer more discretion upon the Commission to decide on a case-by-case basis when to resort to either NME or ME treatment and to be generally more flexible in negotiations with China. Evidently, this would entail quite a substantial shift of competences towards the Commission. The official recognition of China's MES currently requires a positive decision by the Council of Ministers and the European Parliament, after a legislative proposal by the Commission.

In order to grant the Commission more flexibility, a 'NME test' could be implemented into the ADR. The US 'MOI test' of 1992, which grants the respondent exporter the opportunity to obtain market economy treatment, is already provided for in EU Law. A comparable test is laid down in Article 2(7)(c) ADR; any decision by EU authorities

[192] Cf. section III. above. Equally noteworthy and for the respondent State likely problematic is the fact that the determination is made by Commerce under the NME test according to 19 U.S.C. § 1677(18)(D).

regarding a claim for being treated as a producer operating under market economy conditions can be reviewed in the EU Court system. Keeping this test applicable after 11 December 2016 would equally reveal that the EU takes the position that MES is not granted to China automatically, but that parts of Article 15 (a) AP remain applicable. Another test Commerce applies is the so-called 'separate rates test'.[193] A similar test is already incorporated in the EU ADR in its Article 9(5).

As a consequence of this approach, the Commission could continue to use the 'analogue/surrogate country' method, which would allow putting 'pressure' on China. At the same time, the approach entails a certain flexibility which also leaves possibilities to enter into a dialogue with China, e.g. on a case-by-case or sector-by-sector basis.

Most ADDs and CDs in regard to imports from China concern specific sectors, especially the steel sector. Therefore, it might be worthwhile exploring the possibilities not only of an 'all-or-nothing' approach, as it is the case under the US-NME-test, but exploring the possibilities of sector- or industry-related market economy tests. Such approaches could also signal China the EU's continued interest to cooperate irrespective of not granting MES at this stage – once China proves that significant reforms in specific sectors or industries are under way, it could possibly obtain ME treatment at least in these sectors or industries. In this context, it can be argued that the Accession Protocol explicitly allows a sector-based approach in AD investigations in Article 15(d), third sentence AP, under the condition that the EU takes the position that Article 15(a), introductory part AP remains applicable beyond 11 December 2016. According to Article 15(d), third sentence AP China still has to demonstrate that a specific sector functions under ME conditions. As long as China has not delivered sufficient proof according to EU law in this respect, the EU could fulfil its burden of proof in individual proceedings by simply pointing to this fact.

Clearly, this non-acceptance of a full MES could also – as pointed out above – lead to political tensions in the bilateral relationship with China and notably WTO DS proceedings.

b) Under Canadian practice, if the CBSA wishes to apply a China-specific (NME) methodology for the determination of the normal value in AD investigations it first has to demonstrate that the Chinese sector does not operate under market economy

[193] See above section IV.

conditions or obtain corresponding evidence from the Canadian domestic industries respectively.[194] Although Canada has not formally recognized China's MES, the fact that the burden of proof falls with the Canadian industry and CBSA respectively and not with Chinese producers seems to comply in any case with the expiration of Article 15(a)(ii) AP. Consequently, Canada factually employs a legal presumption in favour of Chinese MES.[195]

Again, transposing elements of the Canadian approach into EU law would first of all mean not to grant China full MES immediately, and furthermore extending the competences of the Commission. The EU would need to argue that at least parts of Article 15(a) AP remain applicable. This technique of 'burden shifting' could well be an option for the future EU approach since it complies with the AP, but still allows for the application of 'special methodology' including 'surrogate/analogue country' methods wherever EU producers and/or authorities are able to demonstrate NME structures in a certain Chinese sector. Yet, such approach would necessitate in-depth assessments of the particular sectors and would thus likely be cost-intensive. At the same time, such an 'open approach' could demonstrate the EU's will to a 'political compromise' with China on the AD issue and therefore help to further improve trade relations with Beijing.[196]

All in all, this approach would entail the general presumption of China's MES. Each sector or product under investigation would be treated as subject to market economy conditions unless there is evidence to the contrary.

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194 On the procedure attached to a section 20 inquiry, cf. in detail CBSA, SIMA Handbook, 114-04, available at http://canhbaosom.vn/sites/default/files/lib/SIMA%20Handbook-e%20(w%20TOC)_0.doc (last accessed 2 May 2016), p. 120 et seq.; cf. also *Laura Puccio*, Granting Market Economy Status to China, European Parliamentary Research Service, November 2015, available at http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/571325/EPRS_IDA(2015)571325_EN.pdf (last accessed 2 May 2016).

195 In the words of the *SIMA handbook*, there is an 'implied presumption […] that […] [NME] conditions do not exist in the sector under investigation and that section 20 of SIMA requires the President to form an opinion that they exist. CBSA, SIMA Handbook, 114-04, available at http://canhbaosom.vn/sites/default/files/lib/SIMA%20Handbook-e%20(w%20TOC)_0.doc (last accessed 2 May 2016), p. 126.

196 *Mikko Huotari, Jan Gaspers and Olaf Böhnke*, Asserting European Interests: How Brussels should deal with the question of China`s Market Economy Status, MERICS China Policy Brief, January 2016, available at http://www.merics.org/fileadmin/user_upload/downloads/China_Policy_Brief/ China_Policy_Brief_January_2016.pdf (last accessed 2 May 2016). This fact should especially be considered against the backdrop that CV duties might be able to fill the 'gap' left by lower AD duties as a consequence of a change of the EU's practice, cf. section IV.2.c. below.

2. Making full use of all other means if MES should be granted

a) Elimination of the lesser duty rule

The current EU ADR provides in its Articles 7(2) and 9(4) that the amount of ADDs should be less than the dumping margin 'if such lesser duty would be adequate to remove the injury to the Community industry'. As regards this 'lesser duty rule' that is generally applied in EU AD proceedings[197], one can ascertain that only few States apply such a mechanism. Accordingly, dumping margins are being limited to the effective injury for the economy to be protected ('injury margins') instead of applying the full dumping margin (difference between normal/calculated value and the export price).

This lesser duty rule (LDR) therefore serves to limit AD or AS duties to the amount strictly necessary to prevent injury to EU industry. A failure to do so will result in the annulment of the measure, as the Court of Justice stressed.[198] The LDR is not mandatory under WTO law and is applied by neither Canada nor the United States.[199] According to Article 9 ADA, the investigating State can make a discretionary decision whether or not to apply the 'full' dumping margin. The abolition of the LDR would thus also be in conformity with WTO law. Without the 'lesser duty rule' in place, the Commission could adopt higher AD or AS duties.

b) Calculation of Duties and the "particular market situation"

Also other provisions allow for addressing significant market distortions in China beyond 11 December 2016. The 'calculated value' approach is also used regarding countries that have graduated from NMES to MES, a situation analogous to what China might face in 2016. Even if the EU accepts China as a market economy, it can, if home prices or costs are distorted by state intervention, use a 'constructed value' and/or 'cost adjustment' method.

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197 *Ivo Van Bael and Jean-François Bellis*, EU Anti-Dumping and other Trade Defence Instruments, 2011, 5th ed., Alphen aan den Rijn 2011, p. 208.

198 ECJ, 23 May 1985, Case 53/83 (Allied Corporation and Others v Council), ECLI:EU:C:1985:227, at para. 18; see also ECJ, 7 May 1987, Case 256/84 (Koyo Seiko Co. v Council), ECLI:EU:C:1987:204, at para. 33.

199 *Tibor Scharf*, Article 7 ADR, in: Horst Günter Krenzler, Christoph Herrmann and Marian Niestedt (eds.): EU-Außenwirtschafts- und Zollrecht, 6th ed., München 2015, para. 10; cf. also *Nicola Theron*, Anti-Dumping Procedures: Lessons for Developing Countries with special Emphasis on the South African Experience, in: Bibek Debroy and Debashis Chakraborty (eds.): Anti-dumping: Global Abuse of a Trade Policy Instrument, New Dehli 2007, pp. 67-84, at p. 76.

This particular 'special methodology' is provided for under WTO law in Article 2.2 ADA. It was generally based on the statutory provisions regarding home market sales not being made 'in the ordinary course of trade' or 'not reasonably reflect[ing] the costs associated with the production and sale of the subject merchandise.' Using the 'constructed value' method would allow – as e.g. reflected in US practice – calculating a higher 'normal value' of the product and to thus also adopt higher ADDs. When it comes to Russia for instance, Commerce utilizes prices and costs within Russia for the determination of normal value when appropriate and disregards them when they are not. Russia was granted MES by Commerce in 2002, but nevertheless Commerce asserted authority to selectively reject the foreign producer's home market prices and costs due to state influence.[200]

Consequently, Chinese producers' normal value prices and costs could still be disregarded under the 'reasonable costs' and 'ordinary course of trade' rationales if significant market distortions are found. Also Australia applies Article 2.2 ADA, by performing a 'particular market situation (PMS) test'. Australian legislation does not define any criteria on how the AD Commission should assess whether a PMS is given; consequently, the latter disposes of a wide margin of discretion. Once a PMS has been established, Australia uses several techniques in order to reach the highest dumping margins possible.

The approach is also known within the EU, which has resorted to it especially in respect of products originating in Russia. As it therefore appears, the EU ADR provisions concerning 'particular market situation' are perceived within the EU as a functioning instrument – an instrument that could also be practical in dealing with hidden subsidies or discounts in certain sectors of former state trading countries.[201] Nevertheless, the methodology should be elaborated further in order for the 'calculated value' approach to stay fit to react to new Challenges, i.e. a potential status change

[200] *Kenneth J. Pierce and Matthew R. Nicely*, Transitioning to China's Market Economy Antidumping Treatment in 2016, available at http://apps.americanbar.org/intlaw/spring09/materials/ Transitioning%20to%20China's%20Market%20Economy%20Antidumping%20Treatment%20in%202016.pdf (last accessed 2 May 2016).

[201] *Helena Detlof and Hilda Fridh*, The EU Treatment of Non-Market Economy Countries in Anti-Dumping Proceedings, Global Trade and Customs Journal 2 (7/8) (2007), pp. 265-281; see also in this regard *Jors Cornils*, 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 2 (2) (2007), pp. 105-115.

for China. Notably the Australian example could provide guidance for such elaboration.

The fact that the approach of 'calculating' values can be quite effective is e.g. demonstrated by examples from Canada, where failure to provide complete and reliable answers during individual AD investigations lead to the application of the constructed/calculated value method (thus leaving the 'analogue/surrogate country' method aside) and consequently to the imposition of ADDs of an average of more than 60 %.[202]

c) Grandfathering

Furthermore, there is every reason to expect that the Commission will continue to deny revocation of AD measures in a contested review involving China. The idea of 'grandfathering', which refers to the concept of maintaining ADDs already in place does not seem to have a counterpart in other legal orders. The EU in adopting such measures in view of the Chinese AP would have the role of a global standard setter. Therefore, it is difficult to predict the compatibility of 'grandfathering' with WTO law; the issue would require further legal assessments.

d) 'Full' double remedies

Should the EU continue its trade defence against Chinese imports with all possible means, an increase in simultaneous AD/AS investigations can be expected. As has been ruled by the WTO Appellate Body, a WTO member state may not apply concurrent duties arising, for one, out of an AD investigation in which it uses the analogue country method (because of an NMES) for calculating normal value and, for the other, out of a parallel AS investigation.[203] In case China should be treated as a ME, the Appellate Body's decision might be read as no longer placing a bar on concurrent duties in such scenario.[204]

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202 *Silke Melanie Trommer*, Special Market Economy, Undermining the Principles of the WTO?, Chinese Journal of International Law 6 (3) (2007), pp. 565-599, at p. 593; *Karen Halverson*, China`s WTO Accession: Economic, Legal, and Political Implications, Boston College International and Comparative Law Review 27 (2) (2004), pp. 319-337; see also in this regard *Jors Cornils*, 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 2 (2) (2007), pp. 105-115.

203 Appellate Body Report, 11 March 2011, WT/DS379/AB/R, United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China.

204 *Edwin Vermulst and Brian Gatta*, Concurrent Trade Defence Investigations in the EU, the EU's new anti-subsidy practice against China, and the Future of Both, World Trade Review 11 (3)

e) New Approach towards Anti-Subsidies and Countervailing Measures

Existing EU law allows for AS investigations that offer protection to EU industries against Chinese subsidized imports.[205] Particularly significant in this context is the more frequent use of AS investigations in the US as well as in Canada and Australia. Until 2006, the US had refrained from conducting AS cases against NMEs,[206] but quite suddenly in 2007 arrived at the conclusion that China's economy was henceforth sufficiently liberalized and that therefore the use of AS measures would be permitted.

Thus, graduating from an NME evidently opens the door for CD investigations. Especially trade distortions caused by preferential financing for state-owned enterprises can be better dealt with through AS investigations than by means of ADDs, when there is no real command economy,[207] but a transition economy.

Consequently, in the EU context the question arises whether the ASR provides adequate protection against subsidization of enterprises in third countries that have a distortive effect for the European industries in general or for specific sectors respectively. Should this question be answered in the negative, the EU could resort to WTO law, which gives WTO member states further options in the introduction of AS measures against Chinese imports.

As was already mentioned when discussing the AP, granting China MES does not have any effect on the admissibility of CDs that result from AS investigations. On the contrary, adopting CDs against a country with an accepted MES will be regarded as more 'legitimate' than directing these measures against a country 'in transition'. The CD regime could in the future even be extended as far as Chinese imports are concerned. Article 15(b) AP authorizes the use of alternative benchmarks in calculating

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(2012), pp. 527-553. But see on this issue also *Brian D. Kelly*, The Offsetting Duty Norm and the Simultaneous Application of Countervailing and Antidumping Duties, Global Economy Journal 11 (2) (Article 2) (2011), pp. 1-31; *Brian D. Kelly*, Market Economies and Concurrent Antidumping and Countervailing Duty Remedies, Journal of International Economic Law 17 (1) (2014), pp. 105-123.

205 See on this for example *Edwin Vermulst and Brian Gatta*, Concurrent Trade Defence Investigations in the EU, the EU's new anti-subsidy practice against China, and the Future of Both, World Trade Review 11 (3) (2012), pp. 527-553.

206 *Edwin Vermulst and Brian Gatta*, Concurrent Trade Defence Investigations in the EU, the EU's new anti-subsidy practice against China, and the Future of Both, World Trade Review 11 (3) (2012), pp. 527-553, at p. 532.

207 See *K. William Watson*, Will Nonmarket Economy Methodology Go Quietly into the Night, Cato Institute Policy Analysis No 763, October 2014, available at http://object.cato.org/sites/cato.org/files/pubs/pdf/pa763.pdf (last accessed 2 May 2016), p. 8 et seq.

the amount of a subsidy granted by the Chinese state. It does not seem that this option has been made use of in the past.

Thus, when modifying the EU ASR, apart from Article 14 WTO ASCM also Article 15(b) AP has to be taken into account. Article 15(b) AP enables an importing member to use alternative benchmarks in the case of a Chinese subsidy without having to comply with the requirements of Article 14 ASCM as interpreted under existing WTO jurisprudence. Article 15(b) AP appears to loosely follow the pattern of GATT Ad Article VI, which recognizes that in certain circumstances the importing member 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.'[208]

Therefore, the AP extends the logic of Ad Article VI GATT to WTO subsidy disciplines. Article 15(b) AP is the only WTO provision that authorizes explicitly the use of alternative benchmarks in calculating the amount of a subsidy granted by the Chinese state. Again, this section does not provide for any time limits or expiry dates. Furthermore, this provision applies to all Chinese subsidies including those granted to SOEs.[209] Nevertheless, Article 15(b) AP gives priority to the adjustment of in-country prices before China-external data is used.[210] Yet, it has to be noted that this prioritisation stands under the limitation of practicability.[211]

This is where options arise for the Commission to develop new AS instruments directed especially against Chinese imports and to elaborate a China-specific methodology in determining countervailable benefits. What requires further examinations – e.g. by means of a comparative study – is the issue how the reach of AS investigations could be expanded in order for them to cover all subsidy schemes discovered in the course of an on-going investigation, instead of being limited to those specifically identified in the respective complaint. Other problems that need to be addressed re-

208 *Julia Ya Quin*, WTO Regulation of Subsidies to State-Owned Enterprises (SOEs) – A Critical Appraisal of the China Accession Protocol, Journal of International Economic Law 7 (4) (2004), pp. 863-919, at p. 892.

209 *Julia Ya Quin*, WTO Regulation of Subsidies to State-Owned Enterprises (SOEs) – A Critical Appraisal of the China Accession Protocol, Journal of International Economic Law 7 (4) (2004), pp. 863-919, at p. 892.

210 See *Sophia Mueller*, The Prospects of EU Trade Defence against Chinese Imports after 2016 – Taming the Dragon through Countervailing Duties?, 2015, available at http://ssrn.com/abstract=2665960 (last accessed 2 May 2016), p. 7.

211 *Sophia Mueller*, The Prospects of EU Trade Defence against Chinese Imports after 2016 – Taming the Dragon through Countervailing Duties?, 2015, available at http://ssrn.com/abstract=2665960 (last accessed 2 May 2016), p. 7.

late to the fact that China often does not cooperate in AS investigations which adds to the issue of Chinese subsidy programmes generally lacking transparency. As a result thus far the average CDs imposed on China have been comparatively low.

3. Extending Trade Defence Instruments – Carbon Tariffs?

In the past years it was regularly suggested that the EU should introduce 'carbon tariffs' on imports into the EU. This approach would entail imposing tariffs on products originating from countries where industries are not subject to CO_2 emission limits. The original idea, which was introduced in 2008, was abandoned due to concerns that the approach could trigger a 'trade war' with China. Nevertheless, the proposal keeps on being discussed. Further studies would be required in order to assess its WTO conformity.[212]

4. Using Other Fora to Foster Chinese Internal Reforms

As is well known, the EU and China are currently negotiating a Bilateral Investment Agreement. In the course of this negotiation, the EU is also discussing issues with its counterparts in Beijing revolving around the business activities of Chinese state-owned enterprises, subsidies as well as transparency. Tackling some of these questions by providing respective clauses in a future EU-China-BIT – such as, for instance, the Santiago Principles as urged by the European Parliament in a Resolution of 13 October 2013 – might also lead to more information being available concerning state-owned enterprises that could be used in AD as well as in AS investigations.

Naturally, the negotiation of specific clauses concerning ADDs and CDs as well as bilateral safeguard measures would also be possible under the framework of a potential EU-China FTA. However, this topic does currently not (yet) seem to be on the Commission's agenda.

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[212] On this see for example *Steven Nathaniel Zane*, Leveling the Playing Field: The International Legality of Carbon Tariffs in the EU, Boston College International and Comparative Law 34 (1) (2011), pp. 199-225; *Roland Ismer*, Mitigating Climate Change through Price Instruments: An Overview of the Legal Issues in a World of Unequal Carbon Prices, in: Christoph Herrmann/Jörg Philipp Terhechte (eds.), European Yearbook of International Economic Law 1 (2010), Berlin/Heidelberg, pp. 205-227, p. 207 et seq.; *Roland Ismer*, Border Tax Adjustment: A feasible way to support stringent emission trading, European Journal of Law and Economics 24 (2) (2007), pp. 137-164; *Tim Wilson and Caitlin Brown*, Costly, ineffectual and protectionist carbon tariffs, Institute of Public Affairs, 2010; *Steven Nathaniel Zane*, Leveling the Playing Field: The International Legality of Carbon Tariffs in the EU, Boston College International and Comparative Law 34 (1) (2011), pp. 199-225.

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