New Possibilities for Tackling Non-EU Subsidies: Legal Options for a (China-Targeted) Anti-Subsidies Control Mechanism

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Executive summary

Current discussion identifies the need to address effects of subsidies given to Chinese enterprises that have a detrimental effect on the functioning of the EU internal market. The recent modification of EU anti-dumping law has led to the abandonment of the effective and easy-to-use third country method. Nevertheless, the basic idea of this method can be adopted in EU anti-subsidy law without having to discuss market or non-market economy status or time limits.

The EU might therefore resort to the legal basis in section 15(b) of China's WTO Accession Protocol. This provision may – coupled with the existing WTO rules on subsidies – provide a future defence against the problems created by China's "unique economic model". This provision has multiple advantages in its application compared to the normal calculation rules of Article 14 ASCM: The threshold to rely on this section is low, there are no time limitations on the application of the provision, and the method to actually calculate the benchmark for the "benefit" is totally open. In order to resort to alternative calculation methods, only "special difficulties" need to exist. Within the stage of examination of "special difficulties", a shift of burden of proof test can be implemented. The Commission can argue that whenever a State-Owned Enterprise is involved in the Chinese production chain of a good, special difficulties exist. Whenever an SOE cannot prove that there is no government control or influence, the criterion of "special difficulty" is met. This means that section 15(b) CAP allows for a diametrical change in the burden of proof, which in fact leads to installing a general rebuttable presumption.

Thus, when the section 15(b) CAP door opens because China or Chinese enterprises cannot prove that there are no special difficulties, adjustment of benchmarks or their calculation is permitted. Adjustment could foresee a sector-specific fixed "add on" amount (of 20% for instance) onto the export price of a good – unless the importer can evidence that a lower benchmark for the calculation of countervailing duties should apply. If adjustment is not possible, third country benchmarks for the calculation of benefits could apply, as well as world prices, or a factor-by-factor approach could be used within an alternative calculation method of benchmarks and benefits.

Further possibilities to "sharpen" EU anti-subsidy law exist (SOE chapters in new FTAs, ex officio investigations or anonymous complaints, applying remedies retroactively, new definition of public body, stricter transparency obligations), but they are not connected to section 15(b) CAP. Nevertheless, it can be asked in which way the violation of CAP obligations entered into can be enforced in the future.

These are some key points that can be used in the ongoing discussion on making countervailing duties more effective. Against this backdrop, it may be worthwhile to reconsider these provisions in the

currently ongoing discussions of the industrial policy of the EU and the upcoming White Paper on an Instrument on Foreign Subsidies. WTO members should start conducting well-coordinated countervailing investigations domestically and at the same time initiate "big, bold" cases at the WTO to challenge China's subsidies and state intervention in the market through SOEs to find out where the WTO system sets the limits of applying section 15(b) CAP.

Abbreviations

AB	Appellate Body
AD	Anti-dumping
ADA	Anti-Dumping Agreement (Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994)
ADD(s)	Anti-dumping duty(ies)
ADR	Anti-Dumping Regulation
AS	Anti-subsidy
ASCM	Agreement on Subsidies and Countervailing Measures
ASR	Anti-Subsidy Regulation
CAP	China's Accession Protocol
CD(s)	Countervailing duty(ies)
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
EU	European Union
FTA(s)	Free Trade Agreement(s)
GATT	General Agreement on Tariffs and Trade
IPI	International Procurement Instrument
NME(s)	Non-market economy(ies)
PIT	Private Investor Test
SGA	Safeguards Agreement
SM	Safeguard measures
SOEs	State-Owned Enterprises
TDI(s)	Trade Defence Instrument(s)
TPRM	Trade Policy Review Mechanism
US	United States of America
WTO	World Trade Organization

I. Introduction: The need for a strengthened anti-subsidy tool

The existing policy tools of the European Union (EU) to fight against dumping and foreign subsidies do not cover all potential effects of foreign subsidies or support schemes by third countries on the EU internal market. There is a pressing need to address the distortive effects of state ownership and state financing of foreign companies on the EU internal market.[1] For a new industrial policy strategy, the European Commission has proposed an array of measures to ensure a global level playing field. The EU has so far strengthened its toolbox by establishing a screening mechanism for foreign direct investment, which entered into force on 10 April 2019 and will be fully applied as of 11 October 2020.[2] The EU has also presented guidelines on third country participation in public procurement markets and it is looking into an EU mechanism for an international procurement instrument.[3] The Commission will also propose new rules on competition policy in June 2020, dealing with anti-trust remedies, market definitions, the ongoing merger control evaluation, and a fitness check of various state aid tools.[4] However, a strengthened EU toolbox must also include a focus on the anti-subsidy (AS) instrument.[5] Accordingly, the Commission will present a White Paper on an Instrument on Foreign Subsidies by mid-2020, which will address distortive effects of foreign subsidies within the single market.[6] Furthermore, the EU will also lead a strengthening and reform of the global rules on industrial subsidies at the World Trade Organisation (WTO).

The current anti-subsidy framework can be applied when imports are coming from market economies.[7] Nevertheless, the application is problematic when addressing subsidised State-Owned Enterprises (SOEs), which can be create particularly harmful effects. When SOEs are involved or when states

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1 EU-China – A Strategic Outlook, Joint Communication to the European Parliament and the Council, 12 March 2019, JOIN(2019) 5 final, Action 8. See also Mission Letter of President-elect of the European Commission Ursula von der Leyen to Commissioner-designate for Trade Phil Hogan, 10 September 2019.

2 Regulation (EU) 2019/4552 of the European Parliament and of the Council of 19 March 2019 establishing a legal framework for the screening of foreign direct investments into the Union, [2019] OJ L79/1.

3 European Commission, Guidance on the participation of third country bidders and goods in the EU procurement market, C(2019) 5459 final, 24 July 2019.

4 EU-China – A Strategic Outlook, Joint Communication to the European Parliament and the Council, 12 March 2019, JOIN(2019) 5 final.

5 The Commission has published a database containing all subsidies currently part of an anti-subsidy investigation. Among other things, the country of origin of the subsidies and beneficiaries are included. The database aims to contribute to increased transparency and is regularly updated. For the latest overview, see https://trade.ec.europa.eu/doclib/cfm/doclib_section.cfm?sec=204&langId=EN (last accessed 23 May 2020).

6 European Commission, Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, A New Industrial Strategy for Europe, COM(2020) 102 final, 10 March 2020.

7 China is not considered a market economy. See European Parliament resolution of 12 May 2016 on China's market economy status (2016/2667(RSP)), P8_TA(2016)02232, available at http://www.europarl.europa.eu/doceo/document/TA-8-2016-0223_EN.pdf (last accessed 23 May 2020).

influence and distort markets, the current AS rules cannot tackle all harmful consequences on the single market. As outlined above, the Commission has pledged to take action to restore the level playing field for the distortive effects of such subsidies. In addition, a need for a limitation of industrial subsidies has also been addressed in the trilateral agreement between the United Sates, the EU and Japan,[8] as well as by associations such as the *German Industrial Federation* in its strategic position paper "Partner and Systemic Competitor – How Do We Deal with China's State-Controlled Economy?" from January 2019[9] and by *Business Europe* in its China strategy paper "The EU and China – Addressing the systemic challenge" from January 2020.[10]

An effective and balanced EU Trade Defence Instruments (TDI) policy with a strengthened anti-subsidy tool is a necessary instrument to ensure a level playing field. This paper thus addresses AS, particularly the unique possibility of Section 15(b) of the Chinese Accession Protocol (CAP). The central question will be whether a more effective instrument can be created within the limits of WTO law. It is suggested that the EU should review China's accession commitments to implement WTO-compatible new and enforceable rules that especially address economic distortions arising from SOEs.[11] In particular, attention must be given to the text allowing for an alternative calculation methodology of countervailing duties in section 15(b) CAP. This provision may – coupled with the existing WTO rules on subsidies – provide a future defence against Chinese imports.

This paper highlights firstly the CAP as part of the applicable legal framework for AS investigations against Chinese imports to deal with the particularities of the Chinese market (**II**), before addressing the current use of AS investigations by the EU against China (**III**). The Commission, as the investigating authority in the EU, encounters various practical difficulties in applying anti-subsidy investigations against Chinese imports, which renders the current AS rules ineffective in relation to China (**IV**). However, there exist legal options for new or alternative approaches to imports from China into the EU, based on section 15(b) of China's WTO accession commitments, and beyond (**V**). This paper concludes by considering these first ideas for a strengthened AS instrument (**VI**).

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8 See, most recently, Joint Statement of the Trilateral Meeting of the Trade Ministers of Japan, the United States and the European Union, Washington, D.C., 14 January 2020, available at https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158567.pdf (last accessed 23 May 2020).

9 *Bundesverband der Deutschen Industrie*, Partner and Systemic Competitor – How Do We Deal with China's State-Controlled Economy?, BDI Policy Papers China, January 2019.

10 *Business Europe*, The EU and China – Addressing the Systematic Challenge. A comprehensive EU strategy to rebalance the relationship with China, January 2020, available at https://www.businesseurope.eu/sites/buseur/files/media/reports_and_studies/the_eu_and_china_full_february_2020_version_for_screen.pdf (last accessed 23 May 2020).

11 See similarly *Chad P. Bown*, Testimony before the U.S.-China Economic and Security Review Commission, 8 June 2018.

II. Background for a new anti-subsidy approach

China was one of the original signatories to General Agreement on Tariffs and Trade (GATT 1947), but withdrew already in 1950. In 1986, China resumed its status as a GATT Contracting Party again. Negotiations between China and the GATT/WTO Contracting Parties lasted 15 years before China was accepted as a WTO Member. In 2001, China was regarded as being in a transition phase towards becoming a market economy but not yet as a veritable market economy. In November 2001, China has accepted the Protocol of Accession[12] and has been a member of the WTO as of 11 December 2001. China was regarded as being in a transition phase towards becoming a market economy but not yet as a veritable market economy. During the accession negotiations, the head of the Chinese delegation emphasised that the Chines economy was no longer a centrally controlled economy, but one that integrates planning with market mechanisms, after decades of reform since 1947.[13]

Therefore, China's accession is based on the CAP, which contains provisions that have already been the subject of lengthy WTO-disputes.[14] China committed in the CAP to special rules, which WTO Members can resort to when applying the disciplines of the Agreement on Subsidies, and Countervailing Measures (ASCM) against Chinese imports. These rules address the identification and measurement of Chinese subsidies and also govern the actionability of subsidies provided to SOEs in China. The CAP could be the basis for more favourable legal conditions for the introduction of Countervailing Duties (CDs) against imports produced especially by Chinese SOEs. Therefore, it has to be examined whether the AS system can be developed into a more efficient and more effective means against subsidy-induced market distortions related to Chinese imports. However, some argue that AS measures are just not suited to counter Chinese threats.[15]

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[12] Protocol on the Accession of the People's Republic of China, WT/L/432, 10 November 2001 and Report of the Working Party on the Accession of China, WT/CC/CHN/49, 1 October 2001, para. 150-151.

[13] *Weihuan Zhou and Delei Peng*, *EU – Price Comparison Methodologies* (DS516): Challenging the Non-Market Economy Methodology in Light of the Negotiating History of Article 15 of China's WTO Accession Protocol, Journal of World Trade 52(3) (2018), pp. 505-533, at 521, with reference to GATT, Working Party on China's Status as A Contracting Party: Communication from China, Spec(88), 11 July 1988, at 2.

[14] See most notably, Appellate Body report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, adopted 15 July 2011.

[15] *Aegis Europe*, A Pragmatic Approach To China MES: Wait for the WTO to Decide. Why "mitigation options" don't work, the risks of a unilateral interpretation of the Protocol and the key pillars of an effective anti-dumping system, available at https://static1.squarespace.com/static/5537b2fbe4b0e49a1e30c01c/t/56950ffca12f44b2eb0fc7b2/1452609533236/A+PRAGMATIC+APPROACH+TO+CHINA+MES.pdf (last accessed 23 May 2020): *"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

Section 15(b) CAP allows for alternative (NME) methodologies to be used regarding the identification and calculation of CDs.

> **15. Price Comparability in Determining Subsidies and Dumping**[16]
> 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) […]
> (b) In proceedings under Parts II, III and V of the SCM Agreement, when addressing subsidies described in Articles 14(a), 14(b), 14(c) and 14(d), relevant provisions of the SCM Agreement shall apply; however, if there are special difficulties in that application, the importing WTO Member may then use methodologies for identifying and measuring the subsidy benefit which take into account the possibility that prevailing terms and conditions in China may not always be available as appropriate benchmarks. In applying such methodologies, where practicable, the importing WTO Member should adjust such prevailing terms and conditions before considering the use of terms and conditions prevailing outside China.
> (c) […]
> (d) […]

Section 15(b) CAP is not yet been used and list discussed, even though this provision might open up new ways in the field of trade defence instruments. Section 15(b) CAP appears to loosely follow the pattern of the *Ad* Note to Article VI:1 GATT, which recognises 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."* As such, section 15(b) CAP extends the logic of the *Ad* Note to WTO subsidy disciplines. It is the only WTO provision that explicitly authorises the use of alternative benchmarks in calculating the amount of a subsidy granted by the Chinese state.

Contrary to the paragraphs on anti-dumping (AD), time limits for the application or expiry dates are not provided for. Some argue that this is an editorial mistake and section 15(b) CAP is also to expire,[17] but thus far from a plain reading of the text of section 15(b) CAP, this is not the case. The drafters had no intention to let this section expire. In addition, the negotiating history shows that this is not an

subsidy whereas under the AD Agreement, it is an unfair market distortion which is addressed by making reference to the full costs of production."

16 Section 15(b) of the CAP. Vietnam and Tajikistan accepted the same commitment upon accession. See Report of the Working Party on the Accession of Viet Nam, 27 October 2006, WT/ACC/VNM/48, para. 255, Report of the Working Party on the Accession of Tajikistan, 6 November 2012, WT/ACC/TJK/30, para. 164.

17 *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 892.

editorial error but a deliberate choice.[18] Therefore, investigating authorities such as the Commission can rely upon it at any time.

This provision applies to all Chinese subsidies. In practical terms, this provision allows for all Chinese subsidies, regardless the type or maybe even subsidy-granting body, to disregard domestic prices and make adjustments or use other out-of-country prices. Arguably, this could give the Commission a strong legal basis for also addressing Chinese SOE subsidies with harmful effects on the EU internal market.

Furthermore, according to section 10(2) CAP, subsidies provided to Chinese SOEs are automatically considered to be 'specific' – one of the legal requirements for the imposition of CDs under the ASCM (**III.4**). Then, China also committed to notify specific subsidies by the time of its accession in an explicit confirmation of Article 25 ASCM (section 10.1 CAP), and to eliminate all export subsidies and import substitution subsidies (section 10.3 CAP).

> **10. Subsidies**[19]
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> 1. China shall notify the WTO of any subsidy within the meaning of Article 1 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"), granted or maintained in its territory, organized by specific product, including those subsidies defined in Article 3 of the SCM Agreement. The information provided should be as specific as possible, following the requirements of the questionnaire on subsidies as noted in Article 25 of the SCM Agreement.
> 2. For purposes of applying Articles 1.2 and 2 of the SCM Agreement, subsidies provided to state-owned enterprises will be viewed as specific if, inter alia, state-owned enterprises are the predominant recipients of such subsidies or state-owned enterprises receive disproportionately large amounts of such subsidies.
> 3. China shall eliminate all subsidy programmes falling within the scope of Article 3 of the SCM Agreement upon accession.

Finally, the CAP contains general commitments including the topics of transparency (section 2C), state trading (section 6), price controls (section 9) and agricultural subsidies (section 12). This sheds light on the general rationale of the CAP.

[18] *Wolfgang Müller*, The EU's Trade Defence Instruments: Recent Judicial and Policy Developments, in: Marc Bungenberg *et al.* (eds.), European Yearbook of International Economic Law 2017, Springer (2018), pp. 205-225, at 219. See https://archive.org/stream/AgreementOnMarketAccess/Us-chinaBilateralAgreementProtocols#page/n3/mode/2up (last accessed 23 May 2020).

[19] Section 10 of the CAP.

III. EU anti-subsidy investigations against China

1. General overview of EU Trade Defence Instruments

The EU uses a particular system of TDIs. These include Anti-Dumping Duties (ADD) against dumping, Countervailing Duties (CDs) against subsidies, and Safeguard Measures (SM) against dramatic shifts in trade flows. These instruments find their basis in WTO law: The international legal background for their use is Article VI, XVI and XIX GATT 1947, the WTO Anti-Dumping Agreement (ADA), the Agreement on Subsidies and Countervailing Measures (ASCM), and the Safeguards Agreement (SGA).[20] In relation to trade with China, the specific provisions of the CAP also form part of the applicable legal framework. Finally, it is worth noting that the *Ad* Note to Article VI:1 GATT foresees that in anti-dumping matters, domestic prices can be disregarded in *"a country which has a complete or substantially complete monopoly of its trade and where domestic prices are fixed by the State"* to such extent that *"a strict comparison with domestic prices in such a country may not always be appropriate."*

In the EU, these WTO rules are transformed into EU law via Regulations. These EU Regulations – especially the Anti-Dumping Regulation[21] (ADR) and the Anti-Subsidy Regulation[22] (ASR) – allow the EU to defend its producers against distortions of international competition that result from dumped or subsidised imports. To that extent, the aim of especially ADDs and CDs is thus *inter alia* to counter the artificial advantages, which products from third countries may enjoy in international trade through state-induced or privately organised distortions. Furthermore, the EU can react by adopting safeguard measures based on the Import Regulation.[23]

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[20] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, LT/UR/A-1A/3, 15 April 1994; Agreement on Subsidies and Countervailing Measures, LT/UR/A-1A/9, 15 April 1994; and Agreement on Safeguards, LT/UR/A-1A/8, 15 April 1994.

[21] Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union, [2016] OJ L 176/21, codified version available at https://eur-lex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:02016R1036-20180608&from=EN (last accessed 23 May 2020).

[22] Regulation (EU) 2016/1037 of the European Parliament and of the Council on protection against subsidised imports from countries not members of the European Union, [2016] OJ L 176/55, codified version available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02016R1037-20180608&from=EN (last accessed 23 May 2020).

[23] Regulation (EU) 2015/478 of the European Parliament and of the Council of 11 March 2015 on common rules for imports, [2015] OJ L 83/16.

2. Trade Defence Instruments and state-distorted markets

Today, China is the second most important trading partner of the EU after the United States (US), with imports of almost US$ 400 billion in 2018. However, the permanent danger of massive imports from China into the EU is feared by EU industries including for instance the glass-fibre industry, solar panel industry and the steel sector. TDIs may remedy unfair influence of state-sponsored goods imported into the EU. Particularly, 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.

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. The majority of all TDI investigations – most of them AD investigations as the prevailing instrument of EU trade defence – focus on goods imported from China.[24]

In 2017, the EU has modified the ADR pertaining to imports from state distorted markets by implementing new calculation methods of the normal value of goods.[25] It will be necessary to show that "significant distortions" exist in the economy of the exporting country as a result of state interference.[26] To do this, the Commission will examine all the evidence presented in the course of an investigation, including by the EU industry. In this context, the Commission may also prepare reports describing the economies of certain countries or sectors.[27] After giving up the "traditional" third country normal value calculation method, lower dumping margins against imports from China are expected – this as a result of more difficult and time intensive investigations (**IV**). Therefore, it is argued that the modification of EU anti-dumping law rendered the EU's TDIs less effective, which negatively

[24] For an overview of TDI activity in 2019, see *European Commission*, Anti-dumping, Anti-subsidy, Safeguard. Statistics covering 2019, December 2019, available at https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158564.pdf (last accessed 23 May 2020). For an overview of all ongoing investigations, see https://trade.ec.europa.eu/tdi/ (last accessed 23 May 2020).

[25] See Regulation (EU) 2017/2321 of the European Parliament and of the Council of 12 December 2017 amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union and Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union, [2017] OJ L 338/1.

[26] See new Article 2(6a) ADR.

[27] Commission Staff Working Report on significant distortions in the economy of the People's Republic of China for the purposed of trade defence investigations, 20 December 2017, SWD(2017) 483 final/2. The Commission announced already that the next report will address significant distortions in Russia, but such report has not been published so far.

affects the EU industry.[28] A possible remedy to counter this effect with a view to maintaining a high threshold of trade defence could lie in the increased application of countervailing duties.

3. Successful anti-subsidy investigations against China

Existing EU law allows for anti-subsidy investigations that offer protection to EU industries against subsidised imports from China.[29] The issue of state-distorted markets has found a lot of attention during the reform of the AD Regulation, but only very little when recently modifying the AS Regulation. In the EU context, the question arises whether the ASR provides adequate protection against subsidisation of enterprises in third countries that have a distortive effect for the European industries in general or for specific sectors respectively.

In the past decade, anti-subsidy investigations are more frequently used in most western industrialised countries, especially in the EU as well as in the US, Canada and Australia.[30] Practice shows that the adoption of AS measures has constantly increased. Until 2006, the US had refrained from conducting AS cases against NMEs,[31] but in 2007 arrived at the conclusion that China's economy was henceforth sufficiently liberalised and that therefore the use of anti-subsidy measures would be permitted.[32] Other countries, including the EU, soon followed this approach. The first EU investigations against Chinese imports started as late (or early) as 2010.[33]

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28 *European Commission*, Open public consultation regarding the possible change in the methodology to establish dumping/subsidization in trade defence investigations concerning the People's Republic of China, available at http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154258.pdf (last accessed 23 May 2020), at 2; for more information on the consultations, see http://trade.ec.europa.eu/consultations/index.cfm?consul_id=191 (last accessed 23 May 2020). The online consultation was closed on 20 April 2016.

29 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.

30 See *Ting-Wei Chiang*, Chinese State-owned Enterprises and WTO's Anti-subsidy Regime, Georgetown Journal of International Law 46 (2018), pp. 845-886, at 853 et seqq.

31 A policy maintained since the *Georgetown Steel* case of 1986. See Georgetown Steel Corporation, et al. v. United States, 801 F.2d 1308, 8 ITRD 1161, 4 Fed. Cir. (T) 143, 18 September 1986.

32 *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 (last accessed 23 May 2020). The investigation concluded without the imposition of definitive CDs, due to the absence of material injury. See US International Trade Commission, Coated Free Sheet Paper From China, Indonesia, and Korea, 13 December 2007, 72 Fed. Reg. 70,892, Investigation No. 701-TA-444-446 (Final) and 731-TA-1107-1109 (Final).

33 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, [2011] OJ L 128/18.

Irrespective of the WTO AS instrument as well as the EU ASR being difficult to apply (**IV**), findings against China already imposed CDs of 35,9% on hot rolled flat steel products from China or 51,08% on tyres from China.[34] The EU, so far, has initiated twelve AS proceedings against China, of which eight led to the imposition of a definitive countervailing duty, and two are still pending.[35] These cases involved subsidies concerning raw materials, land use rights, water and electricity as well as preferential tax policies.[36] Sectors concerned include wood and paper, iron and steel, electronics, bicycles and renewable energy products.[37] In comparison, the US has developed a broad practice of strict enforcement of its CD laws to discourage unfair trade behaviour through Chinese subsidies. It imposed more than 50 AS measures against China (until the end of 2019),[38] in a wide variety of sectors.[39]

4. General conduct of EU anti-subsidy investigations

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[40] (Article 3(1) ASR),
- a benefit is thereby conferred (Article 3(2) ASR),
- this 'subsidy' is specific to an enterprise or industry or to a group of enterprises or industries (Article 4 ASR),
- there is injury suffered by the EU industry (Article 8 ASR),
- there is a causal link between the injury and the subsidised imports, (Article 8 ASR), and
- the imposition of measures is not against the Community interest (Article 31 ASR).

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34 *European Commission*, 37th Annual Report from the Commission to the Council and the European Parliament on the EU's Anti-Dumping, Anti-Subsidy and Safeguard activities and the Use of trade defence instruments by Third Countries targeting the EU in 2018, 27 March 2019, COM(2019) 158 final, p. 9.

35 See Annex 1.

36 See, for instance, 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, [2013] OJ L 73,/16.

37 Based on *European Commission*, Anti-subsidies investigations database, 30 January 2019, available at https://trade.ec.europa.eu/doclib/html/157607.htm (last accessed 23 May 2020). See also https://enforcement.trade.gov/frn/summary/prc/prc-fr.htm (last accessed 23 May 2020).

38 The very first successful CD against Chinese imports (after coated fine paper) included already a CD of more than 600%. See US International Trade Administration, Circular Welded Carbon Quality Steel Pipe from the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Determination of Critical Circumstances, 5 June 2007, 73 Fed. Reg. 31966, Investigation Nos. 701-TA-447 and 731-TA-1116 (Final).

39 See *United States Trade Representative*, 2018 Report to Congress On China's WTO Compliance, February 2019, p. 79, available at https://ustr.gov/sites/default/files/2018-USTR-Report-to-Congress-on-China%27s-WTO-Compliance.pdf (last accessed 23 May 2020).

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

If all these conditions are fulfilled, the Commission may impose countervailing measures.

The procedure of investigation starts by an official complaint (Article 10 ASR). Already at this stage, the complainant has to present sufficient *prima facie* evidence of subsidies, which benefit imports of a product in question. After the opening of the case, the Commission will send questionnaires to all interested parties (Article 11 ASR), including the government of the exporting country, the exporters of the product in question and the EU producers. Parties who do not reply to the questionnaire are considered not to be cooperating with the investigation. The Commission will continue the investigation and may use other information available (Article 29 ASR). The duty imposed on a non-cooperating exporter is likely to be higher than if it had cooperated.

The main steps of the EU's anti-subsidy investigation procedure are guided by strict timelines.[41] A Notice of Initiation is published within 45 days after the lodging of an approved complaint. Within nine months following the notice of initiations, if the European Commission finds preliminary evidence of subsidisation, which causes injury, provisional measures may be imposed, which have a maximum duration of four months (Article 12 ASR). Definitive countervailing duties must be in place within 13 months of the initiation (Article 15 ASR).

IV. Challenges in current anti-subsidy investigations against China

The traditional anti-subsidy investigation is confronted with multiple practical problems throughout the investigation. Particularly, in relation to subsidies in China where SOEs are involved, problems arise with regard to lack of transparency on the functioning of SOEs, the subsidy schemes they enjoy, whether these Chinese SOEs can be categorised as a public body in the sense of falling under the scope of application of the ASCM, as well as applying a functioning and effective calculation method that allows disregarding domestic Chinese prices.

Lack of transparency

The SCM Agreement requires WTO Members under Article 25.2 ASCM to notify specific subsidies granted or maintained within their territories. Many countries have ignored this obligation entirely or have been delinquent in providing the required notifications of their subsidies.[42] 78 WTO members

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[41] See Annex 1.

[42] *Chad P. Bown and Jennifer A. Hillman,* WTO'ing a Resolution to the China Subsidy Problem, Journal of International Economic Law 22(4) (2019), pp. 557-578, at 570.

(48%) had not yet made subsidy notifications that were due in 2017, 63 members (38%) had not made notifications due in 2015, and 56 members (34%) had yet to deliver their notifications due in 2013.[43] China did some incomplete notifications, since 2006, and only limitedly added subsidies provided by local authorities and State-Owned Banks. Any Member may bring questions to the attention of the SCM Committee, in a so-called counter-notification (Article 25.10 ASCM). However, other than that, there are no consequences foreseen for failure to notify subsidies and subsidy schemes, neither have disputes been initiated for this breach of the SCM Agreement.

Apart from the general issue of non-notified subsidies, the lack of transparency also affects the possibilities of the Commission to complete an analysis of *inter alia* the notion of public bodies, arguing that the subsidy under investigation causes material injury, or proving that any such adverse effects were caused by the subsidies rather than by other factors.

Unworkable public body definition

The Appellate Body (AB) narrowed down the term "public body" to encompass only those entities that exercise governmental functions.[44] Consequently, most SOEs escape the scope of application of Article 1.1(a)(1)(iv) ASCM.[45] As such, the role of SOEs as subsidy-granting entities is not sufficiently regulated in the ASCM. In addition, it is not easy for an investigating authority to present concrete and comprehensive evidence of government control over an SOE.[46] *Bown and Hillman* point out difficulties in that sense *"with respect to (i) demonstrating governmental control over an entity as part of proving that the entity may be a "giver" of a subsidy, (ii) showing that actions by a private entity were done at the "direction" of the government […]."*[47] This is particularly true when the subsidies are provided in non-transparent economies, such as China, where factual documentation on government actions on SOEs is not part of the public domain. As a consequence, the Commission must rely on the facts available, on the basis of which affirmative or negative determinations may be made, when the investigated country refuses to access to or does not provide necessary information, or significantly

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43 WTO Committee on Subsidies and Countervailing Measures, Minutes of the regular meeting held on 23 October 2018, G/SCM/M/107.

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

45 EU concept paper on WTO reform, July 2018, available at http://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf (last accessed 23 May 2020).

46 *C.Y. Cyrus Chu and Po-Ching Lee*, Three Changes Not Foreseen by WTO Rules Framers Twenty-Five Years Ago, Journal of World Trade 53(6) (2019), pp. 895-922, at 917-918.

47 *Chad P. Bown and Jennifer A. Hillman*, WTO'ing a Resolution to the China Subsidy Problem, Journal of International Economic Law 22(4) (2019), pp. 557-578, at 569.

impedes the investigations.[48] Nonetheless, the Commission has qualified state-owned steel producers, state-owned banks and state-owned insurance companies as public bodies.[49]

Lack of an effective calculation method

It is difficult to define the circumstances in which domestic prices can be rejected and how a proper benchmark can be established, including the use of prices outside the market of the subsidising member.[50] The amount of the countervailable subsidies is calculated in terms of the benefit conferred on the recipient during the investigation period (Article 14 ASCM and Article 6 ASR). Article 6(d) ASR allows to resort 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
- be replaced by terms and conditions 'prevailing in the market of another country or on the world market'.[51]

Thereby, authorities generally use three different methods: Adjustments of existing in-country price to market conditions, construction of alternative price based on average data, or usage of prices on a third market.[52] The WTO Appellate Body in *Softwood Lumber IV* already accepted the possibility of deviation from domestic prices.[53] 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 loans from state-owned banks.[54] Although the AB already hinted in the direction that similar reasoning may

48 Art. 12.7 ASCM and Art. 28(1) ASR.

49 *Van Bael & Bellis*, EU Anti-Dumping and Other Trade Defence Instruments, Kluwer Law International (2019), pp. 631 et seq.

50 Joint Statement of the Trilateral Meeting of the Trade Ministers of Japan, the United States and the European Union, Washington, D.C., 14 January 2020, available at https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158567.pdf (last accessed 23 May 2020), para. 5.

51 Art. 6(d) ASR.

52 *Brian D. Kelly*, The Offsetting Duty Norm and the Simultaneous Application of Countervailing and Antidumping Duties, Global Economy Journal 11(2) (2011), pp. 1-31, at 11 et seq.; *Victor Crochet and Vineet Hegde*, China's 'Going Global' Policy: Transnational Subsidies under the WTO SCM Agreement, Leuven Centre for Global Governance Studies Working Paper No. 220, February 2020.

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

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

apply to the other paragraphs of Article 14 ASCM,[55] no definitive decisions on the other paragraphs have been delivered. In the EU, no subsequent amendment of Article 6(b) ASR was carried out to include this jurisprudence of the AB.

Also for the calculation methods, a lack of transparency influences the possibility for the investigating authority to prove the benchmark to be employed when investigating whether a benefit is conferred through a financial contribution by providing funds or resources at below-market prices.

Other (general) problems for AS investigations

Furthermore, as a more general problem of the current anti-subsidy regime, remedies are seen as inadequate. CDs are available only if the subsidised goods are being imported into a country that has a domestic industry that produces similar products and can demonstrate that it is being injured by the subsidised imports. Unfair competition by subsidised products on third country markets are not covered.[56] In addition, CDs may just lead to more (unfair) competition on third markets. CDs require an extensive, thus often too long investigation, especially to collect the data and investigate the subsidies. It can take a complainant several years to bring and win a subsidies challenge and achieve compliance. The current EU rules also fail to capture the most trade-distortive types of subsidies that contribute to overcapacity and thereby heavily distort international trade.[57] In addition, "other" government policies that create the effect of a subsidy – such as the differential application of export taxes and differential rebate of value-added taxes for inputs and outputs in an industry's supply chain – do not fit the current legal definition of a subsidy.[58] For EU enterprises, a "disadvantage" is that EU state aid law is applicable only to EU state support measures from the EU Member States and has no reach to subsidies from third states.

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55 See Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, 11 March 2011, para. 10.122.

56 *Chad P. Bown and Jennifer A. Hillman*, WTO'ing a Resolution to the China Subsidy Problem, Journal of International Economic Law 22(4) (2019), pp. 557-578, at 571.

57 *European Commission*, 37th Annual Report from the Commission to the Council and the European Parliament on the EU's Anti-Dumping, Anti-Subsidy and Safeguard activities and the Use of trade defence instruments by Third Countries targeting the EU in 2018, 27 March 2019, COM(2019) 158 final, p. 8. See also *Raj Bhala and Nathan Deuckjoo DJ Kim*, The WTO's Under-Capacity to Deal with Global Over-Capacity, Asian Journal of WTO & International Health Law and Policy 14(1) (2019), pp. 1-32.

58 *Chad P. Bown and Jennifer A. Hillman*, WTO'ing a Resolution to the China Subsidy Problem, Journal of International Economic Law 22(4) (2019), pp. 557-578, at 558.

V. Legal options for a China-targeted anti-subsidy control mechanism

The Anti-Subsidy and Countervailing Duty regime could be extended in the future as far as Chinese imports are concerned. Section 15(b) CAP can be taken into account. This is where options arise for the Commission to develop new AS approach directed especially against Chinese imports and to elaborate a China-specific methodology in determining countervailable benefits (**V.1**). Short of using section 15(b) CAP, other proposals that might not be covered by the legal basis in the CAP per se, but would nonetheless influence positively the course of AS investigations against China will be addressed (**V.2**).

1. Applying Section 15(b) of China's WTO Accession Protocol

Section 15(b) CAP reads:

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

Thus, section 15(b) CAP authorises the use of alternative benchmarks in calculating the amount of a subsidy granted by the Chinese state, if investigating authorities encounter "special difficulties" in the application of the sub-paragraphs of Article 14 ASCM. Section 15(b) CAP 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. It does not seem that this option has been used in the past.

In order to make use of this provision, the following elements must be considered. Section 15(b) CAP contains a condition (encountering "special difficulties"), granting the possibility of adjustments and an alternative benchmark (using out of country benchmarks). This proposal combines these elements with a shift in burden of proof, whereby it is up to China to provide proof of market conditions in order for the alternative benchmarks not to be applied. Thereby, it links the possibilities of section 15(b) CAP to solving or at least addressing some of the most pressing practical difficulties in the current AS investigations as outlined above (**IV**), including the lack of transparency and the problems in proving the existence of a public body.

a) <u>The condition: "Special difficulties"</u>

When investigating imports from China, the EU may rely on "special difficulties" in applying the proceedings under Article 14 ASCM to refer to section 15(b) CAP. These special difficulties have not been defined up to now.[59] Until there is an AB report on this issue, the definition of this consideration depends on the investigating authorities.[60] What is clear is that the threshold should be lower than the threshold for application of Article 14 ASCM, which contains carefully crafted conditions interpreted by the AB.[61]

The Commission can argue that these special difficulties exist in case of state-distorted markets in China. This is a concept borrowed from the anti-dumping legal framework of the new Article 2(6a) ADR (**III.2**). The Commission has laid down at length the facts why the Chinese market is severely "state distorted".[62] Chinese exporters must then provide that they do not benefit from state subsidies if they want to do business in the EU.[63] It could also be left to the Chinese government to establish a transparent system of state subsidies, also in a sector-specific approach, to disprove that the condition of special difficulties is fulfilled. Alternatively, the presence of (many) SOEs on the market or economic sector, or even in the production chain of an imported good under investigation, can be a defining element in the existence of special difficulties. Chinese exporters must then provide information about the absence of government influence in SOEs. Information on Chinese subsidies is often lacking, insufficient, or otherwise difficult to obtain. The special difficulties threshold could be defined as encapsulating situations where there is an apparent lack of information or where the collection of information is difficult.[64] Section 15(b) CAP can therefore be applied, until full transparency on subsidy schemes is realised and China cooperates in a sufficient manner to the AS investigation.

The strength of this interpretation of "special difficulties" is that the conditionality element of section 15(b) CAP can be linked to other concerns. It can be argued that section 15(b) CAP allows investigating authorities of the importing countries to use alternative methodologies for identifying and measuring

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59 *Sophia Müller*, The Use of Alternative Benchmarks in Anti-Subsidy Law. A Study on the WTO, the EU and China, EYIEL Monographs, Springer (2018), pp. 77 et seqq.

60 *Sophia Müller*, Anti-Subsidy Investigations Against China: The „Great Leap Forward" in Reforming EU Trade Defence?, in: Marc Bungenberg *et al.* (eds.), The future of Trade Defence Instruments, Global Policy Trends and Legal Challenges, EYIEL Special Issue, Springer (2018), pp. 125-155, at 133.

61 *Weihuan Zhou, Henry Goa and Xue Bai*, Building A Market Economy Through WTO-Inspired Reform of State-Owned Enterprises in China, International and Comparative Law Quarterly 68 (2019), pp. 977-1022, at 1014-1017.

62 Commission Staff Working Report on significant distortions in the economy of the People's Republic of China for the purposed of trade defence investigations, 20 December 2017, SWD(2017) 483 final/2.

63 *Politico*, Europe vows to finally deliver on its unloved industrial strategy, 27 January 2020.

64 *Weihuan Zhou, Henry Goa and Xue Bai*, Building A Market Economy Through WTO-Inspired Reform of State-Owned Enterprises in China, International and Comparative Law Quarterly 68 (2019), pp. 977-1022, at 1014-1017.

subsidy benefits until China addresses certain difficulties, or at least provides proof that in the specific case these difficulties are not applicable. Therefore, section 15(b) CAP offers more possibilities than Article 14 ASCM or Article 6 ASR, by providing opportunities to tackle other problems surrounding AS investigations against imports from China.

b) Adjustments

When the Commission determined special difficulties exist in the application of Article 14 ASCM, and China has not been able to prove otherwise, section 15(b) CAP allows the importing WTO Member to adjust the Chinese "prevailing terms and conditions". Such an adjustment could be the application of an automatic (for example) 20%-benefit-rule. Under this option, the EU could argue that per se, every good produced in a state distorted market is subsidised, and the benefit is at as an example 20% – or any other fixed amount – of the value of the imported good. A different percentage can be defined, reflecting a relevant level of benefit based on the level of state distortion. Such percentage can be determined either on country-level, or differentiated for various sectors in China.

This adjustment method is inspired on developments in the field of public procurement, where the EU discusses the International Procurement Instrument (IPI) since 2012.[65] The Commission presented a revised proposal on 29 January 2016 containing the following methodology.[66] In cases of alleged discrimination by a third country of EU companies in foreign procurement markets, the Commission would initiate a public investigation. Upon finding of discriminatory restrictions *vis-à-vis* EU goods, services and/or suppliers, the Commission would invite the country concerned to consult on the opening of its procurement market. Finally, the Commission could apply, after consultation with Member States, a price penalty to bids from the targeted country with a total value of at least EUR 5 million of which at least 50% consists of goods and services originating from the targeted country. Bids from that country would be considered to offer a higher price of up to 20% of the actual price put forward. The Commission proposal is currently being re-negotiated in the Council and the Parliament.

65 Proposal for a Regulation of the European Parliament and of the Council on the access of third-country goods and services to the Union's internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries, COM(2012) 124 final.

66 Regulation of the European Parliament and of the Council on the access of third-country goods and services to the Union's internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries, COM(2016) 34 final.

c) The alternative benchmark: Out-of-country prices

Another option is to rely on terms and conditions outside China. Both the AB[67] and the Commission[68] have considered that normal or classical modes of adjustments are not practicable and therefore not preferred. Using out-of-country prices is therefore the recommended method. Within the boundaries of section 15(b) CAP, these alternative benchmarks can be applied in different manners – depending on the definition and how to give shape to the application of alternative benchmarks outside China – and can be linked to a conditionality of elimination by China of certain concerns or difficulties the Commission has carrying out successful AS investigations.

The possible manners of defining the use of alterative benchmarks can be designed in the following ways:

- Application of third country prices: The current practice under Article 6(d)(ii) ASR of resorting to comparable third country prices can be expanded applying section 15(b) CAP to any type of subsidies. The AB has already approved this mechanism in its jurisprudence and extended it to subsidies in the form of provision of goods or services or purchase of goods by a government, and has expanded the possibility of using out-of-country benchmarks also to loans. The Commission generally uses terms and conditions prevailing in the markets of Taiwan or Hong Kong as appropriate third countries. These are available for the Commission as an out of-country benchmark for the Commission when conducting AS investigations relating to Chinese imports. Whereas further expansion to the other types of subsidies under Article 6 ASR or Article 14 ASCM is dependent on interpretation of the Appellate Body, under section 15(b) CAP, all types of subsidies from Chinese origin are captured.
- Application of world prices: World prices are also allowed under Article 6(d)(ii) ASR as out-of-country benchmarks, but thus far, the Commission has not opted to use world prices in cases relating to subsidised Chinese imports. These world prices then would have to contain all countries that contribute to global price building; prices that originate in distorted markets should be excluded from such a price building.[69]

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[67] See 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, [2011] OJ L 128/18, 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, [2013] OJ L 73/16, para. 81 and 120.

[68] See Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, 19 January 2004.

[69] *Sophia Müller*, The Use of Alternative Benchmarks in Anti-Subsidy Law. A Study on the WTO, the EU and China, EYIEL Monographs, Springer (2018), p. 210.

- Use of third country price factors: The benchmark can also be constructed by using surrogate values/prices on a factor-by-factor basis for each input which are then totalled ("surrogate constructed value"); this method is found in US anti-dumping law.[70] This method can obviously lead to very high benchmarks and thus also to enormous CDs.
- Prices based on a Private Investor Test (PIT): Calculation of the amount of subsidy in terms of the benefit conferred by the state can be set at the level of subsidy a private investor would have been willing to grant. This private investor test or commercial reasonableness test is based on the EU's state aid market investor principle. This approach can be useful in markets where state intervention reaches such a high level that they cannot be defined any market benchmark.[71] The EU has argued on the basis of this test in *EC – DRAMs*, where the Panel upheld the EU's position,[72] and this has not been overruled in the following *Japan – DRAMs* Panel report addressing the same argument.[73]

2. Additional options not covered by the Accession Protocol

While addressing the practical difficulties for completing China AS investigation procedures, other proposals, which might not necessarily be covered by the CAP or section 15(b) CAP specifically, may be listed. First, they relate to the public body definition, second to the lack of transparency, and third to the general course of the investigation.

The WTO Appellate Body gave a narrow interpretation of what constitutes a "public body" under the SCM Agreement. The WTO AB interpretation is seen very critical and makes it difficult to apply Countervailing Duties against measures originating from SOEs.[74] Even though China now assigns key

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70 Section 773, Tariff Act of 1930, 19 U.S.C. § 1677b.

71 *Leonardo S. Borlini and Fransesco Montanaro*, Climate change and trade: challenges and lingering questions on the relationship between renewable energy subsidies and WTO disciplines, China-EU Law Journal 6 (2018), pp. 81-101, at 94; *Eugenia Constanza Laurenza and Bruno G. Simões*, How Canada-Renewable energy supports the use of the 'commercial reasonableness' standard in future free-in-tariff disputes, Global Trade and Customs Journal 9 (2014), pp. 104-122, at 115.

72 Panel Report, *European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea*, WT/DS299/R, 17 June 2005, para. 7.205.

73 Panel Report, *Japan – Countervailing Measures on Dynamic Random Access Memory Chips from Korea*, WT/DS336/R, 13 July 2007, para. 7.275.

74 See *Mark Wu*, The "China, Inc." Challenge to Global Trade Governance, Harvard International Law Journal 57(2) (2016), pp. 261-342, at 301-305; *Ru Ding*, 'Public Body' or Not: Chinese State-Owned Enterprise, Journal of World Trade 48(1) (2014), pp. 167-190, at 188; *Raj Bhala and Nathan Deuckjoo DJ Kim*, The WTO's Under-Capacity to Deal with Global Over-Capacity, Asian Journal of WTO & International Health Law and Policy 14(1) (2019), pp. 1-32, at 19-20. Others see sufficient clarity and capacity for capturing SOEs: *Weihuan Zhou, Henry Goa and Xue Bai*, Building A Market Economy Through WTO-Inspired Reform of State-Owned Enterprises in China, International and Comparative Law Quarterly 68 (2019), pp. 977-1022, at 1017-1019; *Ting-Wei Chiang*, Chinese State-owned Enterprises and WTO's Anti-subsidy Regime, Georgetown Journal of International Law 46 (2018), pp. 845-886, at 873.

governmental functions to, as well as installs Party Committees, in many SOEs – thus making it easier to argue that these entities are to be seen as public bodies exercising government authority and control –, it should be a possibility to define that SOEs as well as Sovereign Wealth Funds are in the case of China public bodies, unless these entities proof that they are not exercising any public authority (shift in the burden of proof). This conception found support in the literature,[75] but was not followed by the AB.[76] Whether this approach can nonetheless be argued under the CAP umbrella is questionable, and therefore remains to be seen if it would be accepted by WTO jurisprudence. More generally, broadening the definition of "government or public body" will make the use of trade remedies easier, at least in those cases when the product is directly imported from China.[77]

The EU has proposed to include a rebuttable presumption that all non-notified subsidies are presumed actionable, or at least after an unfruitful Article 25.10 ASCM procedure.[78] Also, it has put forth a gradual system with 'punishments' after years of non-notification ranging from obligation to answer questions after two years to qualification as 'inactive member' in the SCM Committee with limited speaking rights after three years.[79] The WTO Secretariat could include such bad track record in the reports of the Trade Policy Review Mechanism (TPRM).[80] These proposals do not suffice. What is necessary to improve transparency of Chinese subsidy schemes is foreseeing mandatory timelines and penalties for failure to declare those subsidy schemes at the ASCM Committee.

Furthermore, the following considerations must be taken into account when dealing with the future of anti-subsidy investigations against Chinese imports:

- Apply remedies retroactively: A further option might be to require recipients of a subsidy to pay back the entire amount of a subsidy.[81] This is current practice in EU state aid law, but it is questionable whether such a practice could be covered by applying Section 15(b) CAP.

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75 *Michel Cartland, Gérard Deparye and Jan Woznowski*, Is Something Going Wrong in the WTO Dispute Settlement?, Journal of World Trade 46(5) (2012), pp. 979-1016, at 1011.

76 Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, 11 March 2011, para. 352.

77 *Ru Ding*, 'Public Body' or Not: Chinese State-Owned Enterprise, Journal of World Trade 48(1) (2014), pp. 167-190, at 183.

78 EU concept paper on WTO reform, July 2018, available at http://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf (last accessed 23 May 2020). See also *Weinian Hu*, China as a WTO developing member, is it a problem?, CEPS Policy Insights No. 2019/16, November 2019, pp. 19-20.

79 EU concept paper on WTO reform, July 2018, available at http://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf (last accessed 23 May 2020).

80 *Jun Kazeki*, The "Middle Pillar": Transparency and Surveillance of Subsidies in the SCM Committee – Reflections after the global Economic Crisis, Global Trade and Customs Journal 5(5) (2010), pp. 191-198.

81 See Panel report, *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather*, Recourse to Article 21.5 of the DSU by the United States, WT/DS126/RW, 21 January 2000, para. 6.39 et seqq.

- *Ex officio* investigations or anonymous complaints: Many complainants fear extra-WTO retribution from China when contesting state subsidies. Allowing *ex officio* investigations initiated by the Commission, or anonymous complaints procedures could take away that fear from industry organisations wanting to initiate investigations.
- SOE chapters and a new plurilateral AS/CD-Agreement: Some argue that a new AS/CD with a widened and clarified scope of application including specific rules on SOEs is needed.[82] *Bown* argues for enforceable rules that address any economic distortions arising from SOEs: On the one hand, it should foresee an enforceable agreement on SOE rules, on the other hand and in exchange, China would be allowed to keep its SOEs.[83] In addition, SOE chapters may remedy shortcomings of the ASCM and AB jurisprudence, but their potential is not yet completely exhausted.[84] For instance, the new Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) includes a chapter on State-Owned Enterprises and Designated Monopolies (Chapter 17), and also the EU introduces SOE chapters into its Free Trade Agreements (FTAs).

VI. Conclusions

Giving up the third country method in anti-dumping investigations does not exclude possibilities to develop similar methods that proved to be successful in the field of subsidisation of production in China and a reformed EU ASR. Countervailing measures might be an option, but thus far, the discussions on granting China a Market Economy Status or how to calculate ADDs have been centre-stage. Section 15(b) of China's WTO Accession Protocol, coupled with the existing WTO rules on subsidies, may provide a future defence against the problems created by China's "unique economic model". However, at present, the EU still has started only few anti-subsidy investigations against China.

WTO members should start conducting well-coordinated countervailing investigations domestically and parallel initiate "big, bold" cases at the WTO to challenge China's subsidies and state intervention in the market through SOEs,[85] to find out where the WTO system sets the limits of applying section

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[82] *Chad P. Bown*, Testimony before the U.S.-China Economic and Security Review Commission, 8 June 2018.

[83] *Ibid*.

[84] See *Jaemin Lee*, Trade Agreements' New Frontier – Regulation of State-Owned Enterprises and Outstanding Systemic Challenges, Asian Journal of WTO & International Health Law and Policy 14(1) (2019), pp. 33-72; *Ines Willemyns*, Disciplines on State-Owned Enterprises in International Economic Law: Are We Moving in the Right Direction?, Journal of International Economic Law 19(3) (2016), pp. 657-680; *Mitsuo Matsushita*, State-Owned Enterprises in the TPP Agreement, in: Julien Chaisse et al. (eds.), Paradigm Shift in International Economic Rule-making: TPP as a New Model for Trade Agreements?, Springer (2017), pp. 187-203.

[85] *Jennifer Hillman*, Testimony before the U.S.-China Economic and Security Review Commission, 8 June 2018.

15(b) CAP. This provision has multiple advantages in its application compared to the normal calculation rules of Article 14 ASCM and the anti-dumping rules of section 15(a) CAP: The threshold to rely on this section is low, there are no time limitations on the application of the provision, and the method to actually calculate the benchmark for the "benefit" is totally open.

Furthermore, we are suggesting alternatives for benchmark adjustment and calculation:

- Whenever an SOE cannot prove that there is no government control or influence, the criterion of "special difficulty" as the entry door to alternative benchmark calculation is open. This means that section 15(b) CAP allows for a diametrical change in the burden of proof, which in fact leads to installing a general rebuttable presumption. When the section 15(b) CAP door opens because China or Chinese enterprises cannot prove that there are no special difficulties, adjustment of benchmarks or their calculation is permitted.
- Adjustment could foresee a sector-specific fixed "add on" amount onto the export price of a good could take place – unless the importer can evidence that a lower benchmark for the calculation of countervailing duties should apply.
- If adjustment is not possible, third country benchmarks for the calculation of benefits could apply, as well as world prices, or a factor-by-factor approach could be used within an alternative calculation method of benchmarks and benefits.

If the use of Section 15(b) CAP proves successful, its application may be expanded to tackle two other practical hurdles identified for the conduct of AS investigations, for instance the difficult public body definition and the general lack of transparency about the Chinese economy. These are some key points that can be used in the ongoing discussion on making countervailing duties more effective – particularly as part of the Industrial Policy and the upcoming White Paper on an Instrument on Foreign Subsidies – that seem worthwhile being discussed.

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Annexes

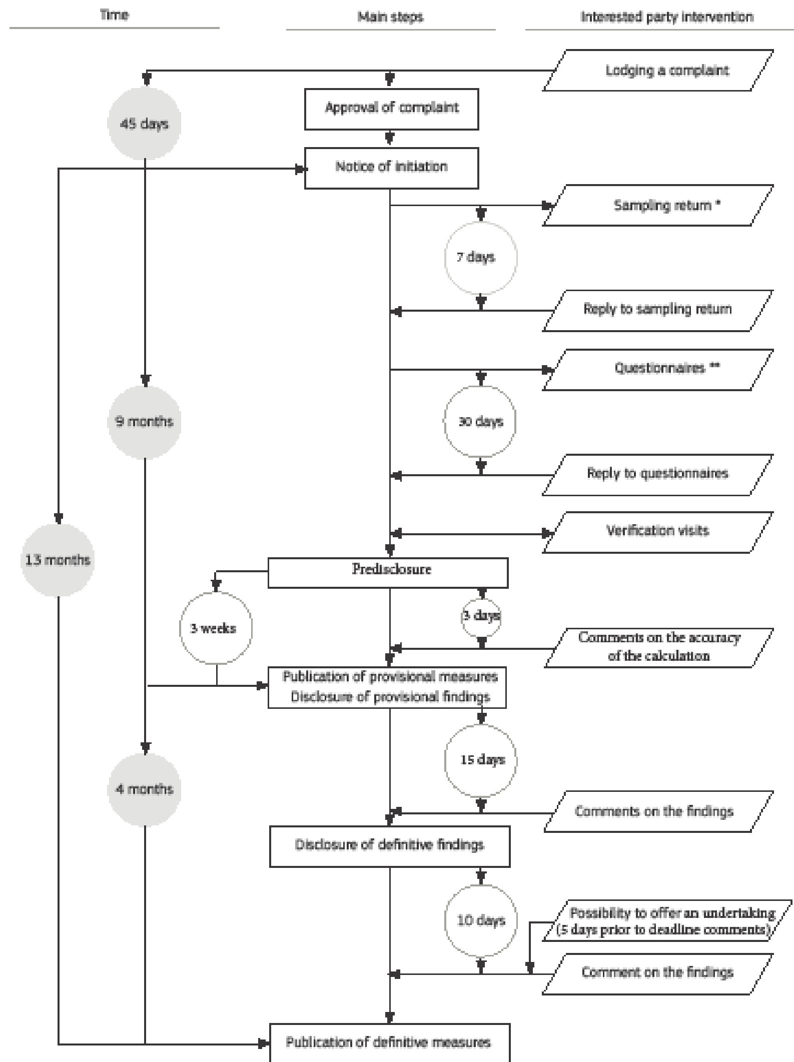
1. Annex 1: Overview of EU anti-subsidy investigations against China[86]

Number	Product under investigation	Country	Definitive countervailing duty Regulation	Publication
AS557	Coated fine paper	China	Council Implementing Regulation (EU) No 452/2011 of 6 May 2011	OJ L 128, p. 18 (14.5.2011)
AS564	Wireless wide area networking modems	China	[Terminated]	OJ L 58, p. 36 (3.3.2011)
AS587	Organic coated steel products	China	Council Implementing Regulation (EU) No 215/2013 of 11 March 2013	OJ L 73, p. 16 (15.3.2013)
AS589	Bicycles	China	[Terminated]	OJ L 136, p. 15 (23.5.2013)
AS594	Solar panels	China	Council Implementing Regulation (EU) No 1239/2013 of 2 December 2013	OJ L 325, p. 66 (5.12.2013)
AS599	Solar glass	China	Commission Implementing Regulation (EU) No 471/2014 of 13 May 2014	OJ L 142, p. 23 (14.5.2014)
AS603	Filament glass fibre products	China	Commission Implementing Regulation (EU) No 1379/2014 of 16 December 2014	OJ L 367, p. 22 (23.12.2014)
AS634	Hot rolled flat products	China	Commission Implementing Regulation (EU) 2017/969 of 8 June 2017	OJ L 146, p. 17 (9.6.2017)
AS641	Tyres for buses or lorries	China	Commission Implementing Regulation (EU) 2018/1690 of 9 November 2018	OJ 283, p. 1 (12.11.2018)
AS646	Electric bicycles	China	Commission Implementing Regulation (EU) 2019/72 of 17 January 2019	OJ L 16, p. 5 (18.1.2019)
AS656	Glass fibre fabrics	Egypt, China	[Pending]	
AS660	Stainless steel hot-rolled flat products	Indonesia, China	[Pending]	

[86] Based on *European Commission*, Anti-subsidies investigations database, 30 January 2019, available at https://trade.ec.europa.eu/doclib/html/157607.htm (last accessed 23 May 2020).

2. Annex 2: Anti-subsidy Article 10 Investigation[87]

Anti-subsidy Article 10 Investigation



* Sampling may be applied where the number of EU producers, exporters and importers is large in order to limit the investigation to a reasonable number of parties.

** Questionnaires to exporters, EU producers, importers and EU users are made available on the DG TRADE website on the day of initiation. Deadline for reply is minimum 30 days.

87 Source: *European Commission*, Flowchart of the anti-subsidy investigation process, 12 September 2019, available at https://trade.ec.europa.eu/doclib/docs/2013/april/tradoc_151025.pdf (last accessed 23 May 2019).