
Granting Market Economy Status to China

An analysis of WTO law and of
selected WTO members' policy



IN-DEPTH ANALYSIS

Under Section 15 of the Chinese WTO Accession Protocol, China can be treated as a non-market economy (NME) in anti-dumping proceedings. NME treatment often leads to the determination of higher anti-dumping duties. However, the correct interpretation of Section 15(d) of the Chinese WTO Accession Protocol has come under debate, as well as whether the latter section stipulates automatic granting of Market Economy Status to China after December 2016.

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EXECUTIVE SUMMARY

Under Section 15 of the Chinese WTO Accession Protocol, China can be treated as a non-market economy (NME) in anti-dumping proceedings if Chinese firms cannot prove that they operate under market economy conditions. The main implication of NME status in anti-dumping proceedings is the possibility to use other methodologies to determine the normal value of the good, instead of using domestic prices to compute the dumping margin. In general, NME methodologies to calculate normal value have proven to lead to higher anti-dumping duties.¹ In view of these higher duties, and the fact that China faces the highest number of anti-dumping investigations, obtaining earlier recognition of Market Economy Status (MES) has been one of the country's major foreign policy objectives since 2003. Moreover, China has argued that, according to Section 15(d) of the WTO Accession Protocol, the Section 15 provision allowing for NME methodology expires after 11 December 2016, resulting in a legal obligation to grant MES to China after that date. This interpretation of the section remains highly controversial.

Several countries have granted earlier recognition of MES to China, mainly via the conclusion of provisions within Memoranda of Understanding. Whilst some of these countries have made a political declaration of recognition, they have never legally implemented the decision; this is the case, for example, for Brazil. Among the countries that have implemented the decision to grant MES to China, only Australia and South Africa are among the leading users of anti-dumping proceedings. Most of these countries granted MES as a condition for negotiating free trade agreements (FTA) with China. Australia, as an example, considered the benefit of an FTA with China to be greater than that derived from the use of NME methodology in anti-dumping proceedings against Chinese firms, as some adjustments to the calculation of normal value can also be made under the market economy methodology.

In addition to the EU, the main countries which still consider China an NME are the US, Canada, Japan, Mexico and India. Japan introduced a non-binding deadline to grant MES to China by December 2016, following a 2007 amendment of the Japanese guidelines for procedures relating to anti-dumping. Notwithstanding that, Japan has made no official commitment to automatically grant MES. In 2002, Canada introduced a similar legal deadline, but this was repealed in 2013. Therefore, Canada, the EU, the US, India, Japan and Mexico all hold a legal presumption that China is an NME, and currently maintain legal discretion in determining when this presumption will be lifted. All these countries must follow set criteria in order to grant MES. The EU and US are in constant dialogue with China regarding the country's compliance with their respective domestic criteria for MES. Legal procedures in these jurisdictions (as well as in the WTO) do not prevent authorities from granting MES for political reasons, even when the criteria for MES are not fully met.

¹ See the GAO study undertaken on US anti-dumping duties: United States Government Accountability Office, [US-China Trade – Eliminating Non-Market Economy Methodology would lower Antidumping duties for some companies](#), January 2006.

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List of main acronyms used

AD:	Anti-dumping
FTA:	Free Trade Area
GAO:	Government Accountability Office
GATT:	General Agreement on Tariffs and Trade
JCCT:	US-China Joint Commission on Commerce and Trade
MES:	Market Economy Status
MET:	Market Economy Treatment
MoU:	Memorandum of Understanding
NME:	Non-Market Economy
S&ED:	US China Strategic and Economic Dialogue
SIMA:	Special Import Measures Act
WTO:	World Trade Organization

1. Introduction

Since the fall of the Soviet Bloc and the opening of transition economies to international trade, a distinction between non-market economies (NMEs) and market economies has been established in international trade law,² in particular in the framework of anti-dumping (AD) investigations. The main reason for this distinction lies in the importance of determining domestic prices in the calculation of a normal value, in order to assess the dumping margin. In a NME, domestic prices are considered unreliable in determining the normal value of the good in the country, as prices are distorted by government intervention. Therefore international trade law allows for the use of alternative methodologies for the calculation of normal values in AD investigations against firms located in NMEs. However, transition countries are evolving towards functioning market economies. Some importing countries have therefore granted market economy status to some transitional economies for diplomatic reasons, or via compliance to legal criteria established in domestic law to define a market economy as opposed to a non-market economy.

The status of China as a non-market economy in transition is enshrined in section 15 of its accession protocol to the WTO. Unless Chinese firms can prove that they operate under market economy conditions, alternative methodologies can be used to assess the Chinese normal value. Using NME alternative methodologies to calculate the normal value can lead to higher anti-dumping duties.³ In view of these higher duties,

² The distinction between NME and market economy was introduced via the second paragraph to the [addendum to article VI of GATT](#), which suggests the need for a different methodology to calculate normal value in the case of countries having '*a complete or substantially complete monopoly of trade and where prices are fixed by the State*', which was added in 1955. The distinction was then developed in domestic legal frameworks. See: Van Bael and Bellis, *EU anti-dumping and other trade defence instruments*, Wolters Kluwer, 2011.

³ See the GAO study undertaken on US anti-dumping duties: United States Government Accountability Office, [US-China Trade - Eliminating Non-Market Economy Methodology would lower Antidumping duties for some companies](#), January 2006.

China has used foreign policy (as well as legal)⁴ instruments to ensure that market economy treatment is granted to its firms in the case of anti-dumping investigations. Several WTO members have agreed to recognise Market Economy Status (MES) for China earlier, for several political reasons, including the conclusion of trade, investment or loan agreements with China. The main exceptions are the EU, the US, Canada, Japan, Mexico and India, who still refuse to grant MES. Argentina and Brazil, although recognising China's MES politically, have not implemented that political decision and still consider China as an NME for AD purposes. The NME status of China under EU AD law continues to be one of the major issues in Chinese-EU trade relations. China advocates that WTO Contracting Parties are under a legal obligation to recognise China's MES at the end of 2016, following section 15 of the Chinese protocol of accession to the WTO. This interpretation of section 15 remains highly controversial (the EU in particular advocates against automatically granting MES to China in 2016). China is, however, ready to defend its interpretation of the clause before the WTO dispute settlement body.

2. Chinese Market Economy Status under WTO law

2.1. China's Non-Market Economy Status under WTO law

The WTO did not distinguish between non-market economy and market economies before 1955,⁵ when the second paragraph of the addendum to article VI of the General Agreement on Tariffs and Trade (GATT), referred to hereafter as the addendum) was introduced (see box 1).⁶ The addendum acknowledges that non-market economy policies can introduce price distortions. These distortions can render price comparability between the normal value, determined as the domestic price of a certain good in the export country, and the export price of that same good applied by the exporters of that same country, impossible. The accurate comparability of these two values is fundamental for calculating the dumping margin and determining applicable dumping duties. The addendum therefore allows importing countries to take into account alternative methodologies if comparing of domestic prices of the exporting country is inappropriate.

The addendum's alternative approach can be used by any importing country that can prove the exporting country complies with the definition of a Non-Market Economy under the addendum. However, the addendum definition of NME is restrictive, requiring that the importing country proves '*complete or substantially complete State monopoly of trade and prices fixed by the State*'. Most transitional economies have developed in a way that proving compliance with the addendum definition is difficult. Perhaps due to this difficulty, specific clauses were negotiated in the protocol of accessions during some countries' WTO accession negotiations, in particular, that of China (section 15 of the Chinese accession protocol to the WTO).⁷

⁴ Even if China is considered an NME under WTO protocol, Chinese firms are entitled to claim market economy treatment if they can prove that they operate under market economy conditions. China has brought cases in front of the WTO dispute settlement body which contest the way in which non-market economy treatment was granted to its firms, in particular the [EC-Fasteners case](#).

⁵ Van Bael and Bellis, EU anti-dumping and other defence instruments, Wolters Kluwer, 2011.

⁶ Full text of the [addendum](#) to article VI of GATT contained in Annex I to the 1947 GATT can be found on the WTO website.

⁷ For the full accession protocol, see the [WTO website](#).

Box 1: Addendum to article VI GATT

*'Paragraph 1(2) of the Addendum to Article VI of GATT: It is recognised that, in the case of imports from a country which has a **complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State**, special difficulties may exist in determining price comparability for the purposes of paragraph 1, and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate.'*

The introduction of the specific rules in the accession protocol has two fundamental consequences for the non-market economy status of China. Firstly, the protocol creates a presumption that NME status can be applied to China. Contrary to the addendum, the burden of proving market economy characteristics falls on China or Chinese firms. Secondly, under section 15(d) the protocol sets the procedure for granting China economy-wide market economy status and the subsequent lifting of the NME presumption, following the importing country's legal definition of non-market economy, instead of using the more restrictive NME definition contained in the Addendum.

Interpretation of section 15 is a subject of debate among lawyers. China, as well as other countries, considers that this section imposes a 2016 deadline for applications of NME status to China, whereas other advocate that Chinese upgrade to MES can only be granted on the basis of the importing country's domestic law.

2.2. WTO legal obligations with respect to granting Market Economy Status to China

Section 15 introduces specific rules for granting China/Chinese firms market economy treatment, and for the application of the NME methodology. Section 15(a) introduces a presumption of NME status according to which, unless Chinese firms can prove that they operate under market economy conditions, the importing country is entitled to use alternative methods for the definition of the normal value, instead of using Chinese domestic prices (see box 2).

Section 15(d) then provides for the conditions under which section 15(a) becomes inapplicable and market economy status must be granted to China (see box 3).

Box 2: Section 15(a) of the Chinese accession protocol to the WTO:

*'15.(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.'

Section 15(d) can be divided into three parts for interpretation purposes. The first and the third sentences present two situations in which the special treatment of China under section 15(a) can be lifted. The first sentence presents the conditions for achieving economy-wide market economy status, making section 15(a) inapplicable for

the whole Chinese economy, while the third sentence makes section 15(a) inapplicable only for a precise industry or sector. For the inapplicability of section 15(a), these two sentences require that China is established as a market economy **in accordance with the domestic law of the importing WTO Member**.

Box 3: Section 15(d) of the Chinese accession protocol to the WTO:

*'15(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.'*

However, the second sentence of section 15(d) complicates matters, appearing to constrain the situation foreseen in the first sentence.

In particular the second phrase has been interpreted by some as establishing a deadline to the applicability of NME treatment for China.⁸ This interpretation derives from section 15(d)'s provision for repeal of subparagraph (a)(ii) of section 15 in December 2016. This latter provision was interpreted as allowing for the use of alternative (NME) methodologies in the determination of the normal value.⁹ This interpretation therefore considers that MES must be granted to China after December 2016, as NME status can be imposed only if the importing country can prove that the conditions of the addendum are applicable to China - which would be difficult for a transitional economy.

In the widely cited 'Vox' column,¹⁰ O'Connor suggests that this interpretation is incorrect for two reasons. Firstly, full granting of MES as foreseen by the first sentence of section 15(d) provides for the inapplicability of the whole section 15(a), while the second sentence of section 15(d) only sets an expiry date for paragraph (a)(ii). Indeed the possibility for NME treatment is to be found not only in paragraph (a)(ii), but also in the *chapeau* (introduction) to section 15(a) (see box 2), the latter remaining unaltered by the 2016 deadline. Moreover, the second sentence of section 15(d) has no legal effect on the applicability of the rest of section 15(d), including the procedure to grant economy-wide or industry-wide MES, which still requires China to comply with

⁸ The WTO Appellate Body also appears to suggest this interpretation in paragraph 289 of [EC-Fasteners case \(WT/DS397/AB/R\)](#). However, O'Connor suggests there are several problems with the WTO Body's analysis. The EC-Fasteners case interpretation is not binding on future WTO panels and appellate bodies, so it is uncertain whether the EC-Fasteners approach would be maintained by a panel in a future case.

⁹ Interpreting the expiry of paragraph (a)(ii) of section 15 as de facto leading to the expiry of paragraph (a) as a whole, can be found in: Rao Weijia, China's Market Economy Status under WTO Antidumping Laws after 2016, *Tsinghua China Law Review* vol. 5, 2013; J. Cornelis, China's Quest for Market Economy and its impact on the Use of Trade Remedies by the European Communities and the United States, *Global Trade and Customs Journal* vol. 105(2), 2007; H. Detlof & H. Fridh, The EU Treatment of Non-Market Economy Countries in Antidumping Proceedings, *Global Trade and Customs Journal* vol. 265(2), 2007; refer also to: Y. Yu, Rethinking China's Market Economy Status in Trade Remedy Disputes after 2016: Concerns and challenges, *Asian Journal of WTO and International Health Law and Policy* vol. 8, 2013.

¹⁰ Bernard O'Connor, [Market-economy status for China is not automatic](#), Vox (CEPR policy portal), 27 November 2011; [full interpretation](#).

domestic law requirements in order to obtain MES. Therefore, according to this interpretation, the 2016 expiry of section 15(a)(ii) does not entail automatic granting of MES status to China.

O'Connor considers that with respect to the legal implications of the expiry of section 15(a)(ii), the only effect would be that the domestic authorities of the importing country may choose which methodology to use should Chinese firms fail to prove market conditions prevail in their market.¹¹ In reality, such a choice already existed, as section 15 did not oblige the importing country to apply NME methodology. Therefore, O'Connor sees no impact from the expiry of paragraph (a)(ii).

Another possible interpretation of the legal implications of a 2016 section 15(a)(ii) expiry is that it would implicate a change in the burden of proof. Before expiry, if Chinese firms couldn't prove market economy treatment, they were presumed to operate under non-market economy conditions; with the expiry of section 15(a)(ii) this presumption also falls. After 2016, the importing country must prove the Chinese firms still operate under non-market economy conditions.

Which rules then have to be followed in order to prove non-market economy conditions? Two possible interpretations are: non-market conditions should be proved following (1) the rules of the addendum,¹² or (2) the domestic law of the importing country imposing the AD measure. The second interpretation would flow from the fact that market economy conditions under section 15(d) are defined following domestic law, and this section remains unchanged after 2016. Consequently, China's country-wide market economy status would still need to be assessed on **the basis of domestic law** within the importing country (in accordance with the rule under the first sentence of section 15(d)). It would therefore be inconsistent, if, following the first interpretation, section 15(a) (and therefore application of market economy treatment to specific anti-dumping investigations) would follow the stricter definition of NME in the *addendum*, while country-wide and industry-wide MES under section 15(d) would only be granted following the criteria set in domestic law. Indeed, if, following the first interpretation, the stricter *addendum* definition of NME is applied to the granting of market economy treatment in specific anti-dumping investigations foreseen in section 15(a), this would *de facto* allow a circumvention of the requirement under section 15(d) to obtain country-wide market economy status following the importing country's domestic law, thus making section 15(d) meaningless.

China challenges that interpretation, and has threatened to bring the case before the WTO dispute settlement body if importing countries still object to MES for China after 2016.

In this respect, the position of those countries which still impose NME treatment on China, is divided: some consider section 15(d) sets a deadline on China's NME status (such as Japan); others (e.g., the EU, the US, Mexico and India) remain in doubt over the interpretation to follow and maintain legal discretion to decide, whilst they consider their political options.

¹¹ B. O'Connor, [The Myth of China and Market Economy Status in 2016](#), NCTM, 2015.

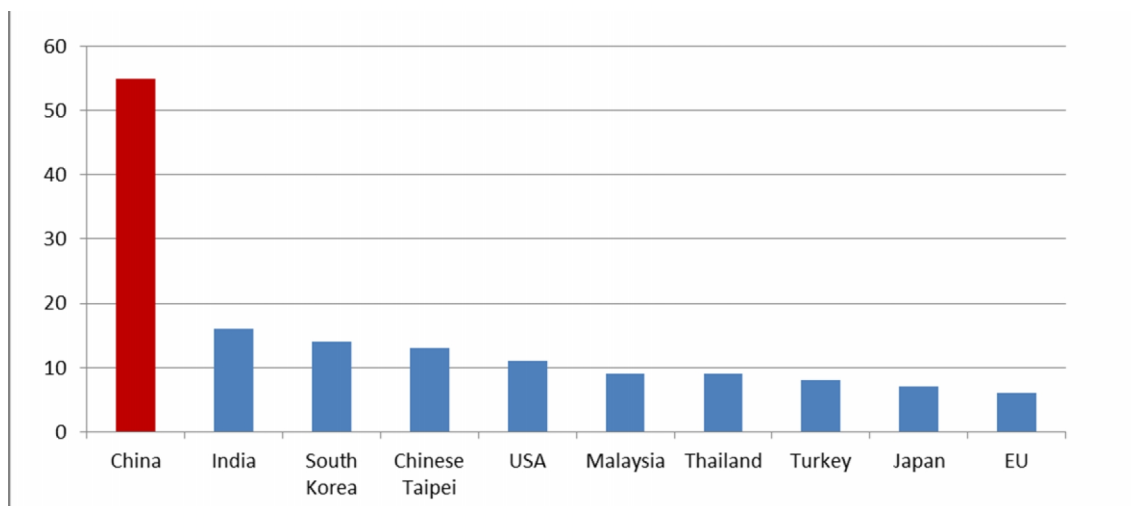
¹² As suggested by C. Tietje/K. Nowrot, [Myth or Reality? China's Market Economy Status under the WTO Anti-dumping Law after 2016](#), Policy Papers on Transnational Economic Law No 34, December, 2011.

3. Selected WTO members' positions

3.1. Chinese trade policy and early recognitions of Market Economy Status

China has been active in promoting its recognition as a full market economy. Indeed, taking into account that China is the main target of AD measures (see figures 1 and 2) advocating early MES is one of China's main trade policy objectives. The main reasons for countries to grant early MES to China were: (1) MES as a pre-condition for Free Trade Agreement (FTA) negotiations with China; (2) countries that are or have also been subject to NME status (such as Vietnam or Russia), (3) conclusion of memoranda to promote Chinese investment (Brazil and Argentina), (4) to attract investments, loans and Chinese foreign aid (African countries).¹³ In some cases, however, recognition was merely rhetorical.

Figure 1: Top 10 countries targeted in anti-dumping investigations in 2014



Data source: Antidumping.com, April 2015.

Most of these recognitions were granted in the framework of FTA negotiations, as was the case for New Zealand (the first to grant MES to China), Australia, Peru, Chile and ASEAN countries.

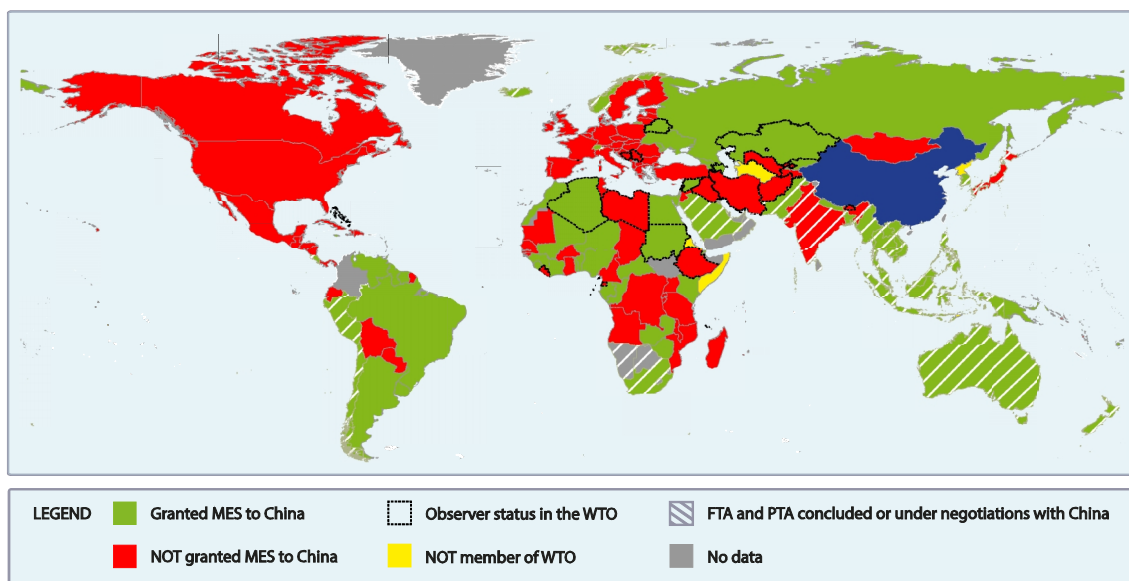
The map below shows an indicative list of countries that have granted MES to China and their WTO status, as well as whether they have concluded or are negotiating PTAs or FTAs with China. In the absence of official data on the subject (no official list was released nor could be obtained for the drafting of this publication), the original data used were created in 2012 by Scott Kennedy and his co-author Zhao Shuang.¹⁴ The data were gathered from online press and news releases in Chinese and English. The list is purely indicative as it is possible that other countries have in the meantime recognised China as an MES, but documentation to confirm that has not been found. However,

¹³ Between 2006 and 2009, China doubled its grants and interest-free loans to African countries for an approximate value of US\$5 billion in preferential loans. In 2009 the Chinese government pledged to disburse US\$10 billion in preferential loans for infrastructure building, [WTO Trade Policy Report on China](#), WT/TPR/S/230, 26 April 2010.

¹⁴ The original data were compiled by S. Kennedy and Zhao Shuang for their article '[China's Frustrating Pursuit of Market Economy Status: Implications for China and the World](#)', in S. Kennedy and S. Cheng, [From Rule Takers to Rule Makers: The Growing Role of Chinese in Global Governance](#), Research Centre for Chinese Politics and Business and International Centre for Trade and Sustainable Development, 2012

some modifications have been made to the original data. In particular Uruguay, which apparently gave MES to China in 2009, has been added.¹⁵ Moreover, as South Africa is in charge of SACU's commercial policy which includes trade remedies, a South African decision to give China MES status could have an impact for all SACU members. Given this doubt, the other SACU members (including Botswana, Lesotho, Namibia and Swaziland) were codified in the dataset with the tag of 'n.a.' (information not available) as no clear information has been found to prove whether these countries are non-recognisers or recognisers. The same decision was taken for the countries of the Gulf Cooperation Council, for which a clear indication of granting MES to China was found only for Saudi Arabia.¹⁶ Sri Lanka and the Maldives have also been included in the 'n.a.' group as the two countries have started negotiating an FTA with China, but the memoranda agreed for the launch of these negotiations could not be found to allow for verification of whether MES was a condition for the opening of those negotiations.¹⁷

Figure 2: Map of WTO members that granted earlier MES status to China and membership¹⁸



Data source: the original data has been compiled by S. Kennedy and Zhao Shuang for their article "[China's Frustrating Pursuit of Market Economy Status: Implications for China and the World](#)", in S. Kennedy and S. Cheng, *From Rule Takers to Rule Makers: The Growing Role of Chinese in Global Governance*, Research Centre for Chinese Politics and Business and International Centre for Trade and Sustainable Development, 2012; The original data was modified by the author as explained above.

In many cases, where completing an FTA was the main reason for granting MES to China, a feasibility study on the impact of the FTA was conducted prior to negotiations, and sometimes also before commitment to grant China MES. This is, for example, the case for **Australia**, which first signed a FTA with China in October 2003.¹⁹ In this FTA,

¹⁵ See the following [news website](#) and M. Myers, 'Shaping Chinese Engagement in Latin America', in J. I. Dominguez and A. Covarrubias (eds), *Routledge Handbook of Latin America in the World*, 2015

¹⁶ Only a footnote in an article seems to suggest that all GCC countries have recognised China as an MES, while negotiating the FTA with China. See: Chien Huei Wu, 'A new landscape in the WTO: economic integration among China, Taiwan, Hong Kong and Macau', in *European Yearbook of International Economic Law*, 2012

¹⁷ The FTA negotiations between [China and Sri-Lanka](#) and between [China and the Maldives](#) were launched respectively in 2014 and in 2015.

¹⁸ We particularly thank Professor Scott Kennedy (Center for Strategic & International Studies, CSIS) for sharing this data with EPRS.

¹⁹ [Trade and Economic Framework Agreement](#) between Australia and China, 2003.

paragraph 8 established that a study on the feasibility of a FTA between Australia and China was to be conducted and completed by 2005. During that period, Australia temporarily committed not to apply *inter alia* section 15 of the Chinese protocol.²⁰ After conclusion of the feasibility study, and a decision to begin negotiation of the FTA, Australia also officially declared China a MES country.²¹ While the Australian feasibility study conducted between 2003 and 2005 only reviewed the potential impact of a FTA with China,²² the Australian Foreign Ministry also requested an expert opinion on the impact of granting early MES to China.²³ The main reasons given by the expert to proceed with early recognition of MES were the possibility of introducing adjustments to normal value calculations under the AD rules for market economies, as well as the importance to Australia of improved market-access and trade relations with China.²⁴

Many other WTO members registered their commitment to recognise China's MES in Memoranda of Understanding.²⁵ China considers these agreements as binding. The commitments in the memoranda differ from country to country, as does the implementation of the commitment. Some Memoranda contain an explicit prohibition to apply section 15 of the Chinese WTO accession protocol (Costa Rica and Peru),²⁶ or express a commitment to grant MES status to China (Brazil).²⁷ Argentina's commitment was vaguer requiring not to discriminate against Chinese products (it was not a legal

²⁰ Paragraph 8 of the [Trade and Economic Framework Agreement between China and Australia](#): '*As an expression of the will of the two countries to build an even stronger economic and trade relationship, Australia and China will jointly undertake a feasibility study into a possible bilateral Free Trade Agreement (FTA) negotiation. (See Annex II for details.). The study will be completed by 31 October 2005.*

Recognising China's tremendous achievements in establishing a market economy, Australia will not apply 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 during the course of the study. Recognising that Australia and China should negotiate on an equal basis, a joint decision by the two Parties to negotiate an FTA will take account of the results of the feasibility study and only follow Australia's formal recognition of China's full market economy status.'

²¹ [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](#). See paragraph 2.

²² [Australia-China Free Trade Agreement – Joint Feasibility Study](#), March, 2005.

²³ Suggested in A. Stoler, '[Market Economy Status for China: Implications for Antidumping Protection in Australia](#)', speech at the Australia-China Business Council of South Australia, 28 September 2004.

²⁴ *idem*.

²⁵ Memoranda of Understanding were concluded with [Australia](#), [Brazil](#), [Argentina](#), [Costa Rica](#), South Africa (Record of Understanding), [Norway](#), [Switzerland](#), South Korea, [Peru](#), [Costa Rica](#), Chile (Memorandum de Entendimiento entre el Ministerio de Relaciones Exteriores de la República de Chile y el Ministerio de Comercio de la República Popular China sobre el Fomento del Intercambio Económico y Comercial entre ambos Países, 18 November 2004), and [ASEAN](#)

²⁶ [Memorandum of Understanding on launching negotiations of China-Costa Rica Free Trade Agreement between the Ministry of Commerce of the People's Republic of China and the Ministry of Foreign Trade of the Republic of Costa Rica](#), November 2008; [Memorandum de Entendimiento sobre el Fortalecimiento de las Relaciones Económicas y comerciales entre el Ministerio de Comercio Exterior y Turismo de la República del Perú y del Ministerio de Comercio de la República Popular de China](#), September 2007.

²⁷ [Memorandum de Entendimiento entre a República Federativa do Brasil e a República Popular da China sobre Cooperação em Matéria de Comércio e Investimento](#)

commitment to grant MES).²⁸ In many countries, commitments in the memoranda were interpreted as a political statement, requiring further domestic implementation to be effective (e.g., Brazil and Argentina).²⁹ The record of understanding between **South Africa** and China was similarly interpreted; in a South African court case, the judgement declared that the record of understanding had to be incorporated into the domestic framework to be legally enforceable.³⁰ However, in South Africa NME/MES determination within AD investigations is mainly left to the discretion of the local authorities; therefore, in a 2010 judgement, the South African Supreme Court considered that the authorities could apply market economy treatment in a specific case, even though South African firms had proved that NME conditions prevailed in that particular Chinese sector.³¹ This means that implementation of the commitment is ultimately left at the discretion of the South African authorities. With no legal implementation within the domestic framework of the commitment to permanently grant MES, which methodology to use is determined on a case-by-case basis.³²

Brazil has never implemented its commitment (neither legally nor in practice),³³ considering that the memorandum of understanding concluded with China was a purely political statement which needs further domestic implementation to have legal effect. This position was confirmed in the Brazilian courts, which continue to apply NME rules provided for in article 7 of decree No 1602.³⁴ **Argentina** has also not ratified the memoranda, and therefore also never implemented the commitment to grant MES status.³⁵ In addition, these two countries are emerging as active users of anti-dumping

²⁸ [Memorando de Entendimiento entre la República Argentina y la República Popular China sobre Cooperación en Materia de Comercio e Inversiones](#), 17 November 2004

²⁹ Memoranda of Understanding, as any international agreement, will be binding only if they have been concluded following treaty procedures and if the wording used suggests a binding commitment (i.e. wording that requires implementation or suggests a prohibition, instead of wording that only requires a best endeavour and that therefore does not suggest any binding commitments). In any case, whether binding or not binding, in some jurisdiction a commitment will need to be first implemented nationally. It is rare that international commitments can be directly enforced in front of domestic courts, in most cases they can be enforced only after domestic implementation of the commitment.

³⁰ See reference to the SATMC v. ITAC case, in G. Brink, [Anti-dumping and China: three major Chinese victories in dispute resolution](#), CILSA vol. XLVII, 2014; G. Brink, [Anti-Dumping in South Africa](#), Tralac Working Paper, July 2012

³¹ The Supreme Court of Appeal of South Africa, [ITAC and the Minister of Trade and Industry vs. SATMC et al.](#), Case No: 738/2010, judgment delivered on 23. September 2011; the latter decision was criticised by G. Brink for the legal reasoning employed: G. Brink, [Anti-dumping and China: three major Chinese victories in dispute resolution](#), CILSA vol. XLVII, 2014; G. Brink, [Anti-Dumping in South Africa](#), Tralac Working Paper, July 2012

³² [South African anti-dumping laws](#)

³³ Brazil, anti-dumping case on [non-framed mirrors](#), March 20, 2015; See also: IBA divisions project team et al., [Anti-dumping investigations against China in Latin America, International Bar Association \(IBA\)](#), 2010; Inter-American Bank, [Report Mercosur \(second semester 2004-first semester 2015\)](#), Mercosur Report No10, February 2006

³⁴ [Decree N°1602](#), 26 August 1997; see also: Müslüm Yılmaz, *Domestic Judicial Review of Trade Remedies: Experiences of the most active WTO members*, Cambridge University Press, 2013 ([partial view on Google books](#))

³⁵ IBA Divisions Project Team et al., [Anti-dumping investigations against China in Latin America, International Bar Association \(IBA\)](#), 2010; the legal rules of Argentina with respect to the NME treatment were modified in 2006 by [decree 1219/2006](#), which did not mention China's status. The more recent Argentinian anti-dumping law reform of 2008 ([decree 1393/2008](#)) simply incorporates the rules of decree 1219/2006 without modification.

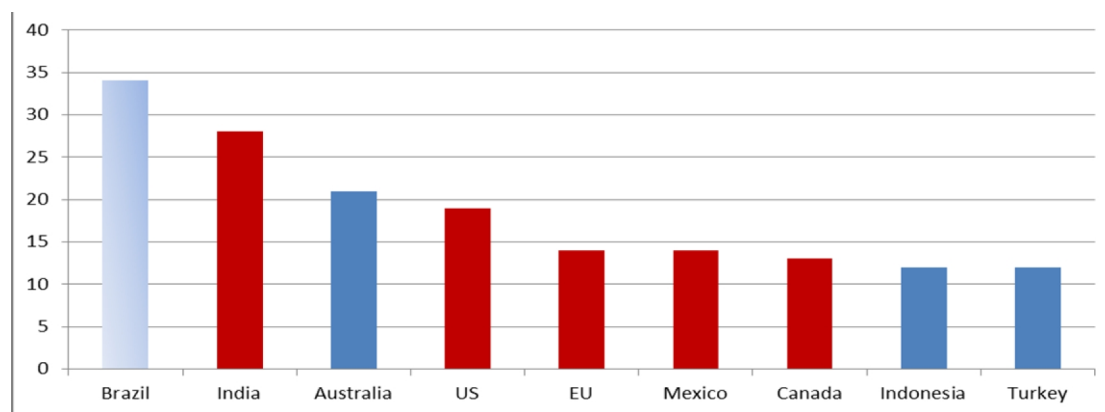
duties; particularly Brazil.³⁶ Moreover, Brazil and Argentina are examples of top-bottom trade policy decisions taken without stakeholder consultation. Indeed, in both countries domestic firms fiercely opposed the decision and protectionist pressures were such that the governments had to revisit their decision to grant early MES to China.³⁷

Finally, in some Memoranda of Understanding granting MES, a framework for consultation and cooperation in anti-dumping investigations was created.³⁸

3.2. Comparative analysis of countries not granting MES to China

Some of the main users of anti-dumping duties are to be found within the group of countries that do not recognise China as a market economy: the US and India, as well as the EU (see Figure 3).

Figure 3: Top 10 users of anti-dumping duties in 2014



Data source: Antidumping.com, April 2015

3.2.1. Current procedure for granting MES in the EU

A NME applying for economy-wide MES in the framework of anti-dumping investigations must prove, in the EU, that it meets five criteria: (1) a low degree of government influence in the allocation of resources and in decisions of enterprises, (2) an absence of distortion in the operation of the privatised economy, (3) the effective implementation of company law with adequate corporate governance rules, (4) effective legal framework for the conduct of business and proper functioning of a free-market economy (including intellectual property rights, bankruptcy laws, ...), and (5) the existence of a genuine financial sector. At present, six countries have submitted requests for economy-wide MES: China, Vietnam, Armenia, Kazakhstan, Mongolia and Belarus.³⁹ Four reports have been published assessing the achievements toward MES

³⁶ According to the global trade protection report statistics published by antidumping.com, Brazil was the most active user of anti-dumping in 2014 (see figure 3); further data: F. Undinez, [The Political Economy of the Chinese Market Economy Status given by Argentina and Brazil](#), CS No. 14, July-December, 2014 and on the [World Bank website](#).

³⁷ IBA Divisions Project Team et al., [Anti-dumping investigations against China in Latin America, International Bar Association \(IBA\)](#), 2010; Inter-American Bank, [Report Mercosur \(second semester 2004-first semester 2015\)](#), Mercosur Report No 10, February, 2006.

³⁸ See Article 3 of the [Memorandum of Understanding between the government of the Republic of South Africa and the Government of the People's Republic of China on promoting bilateral trade and economic cooperation](#).

³⁹ Commission staff working document accompanying the Report from the Commission to the Council and the European Parliament on 32nd Annual Report from the Commission to the Council and the European Parliament on the EU's anti-dumping, anti-subsidy and safeguard activities, [COM\(2015\) 43 final](#), 4 February 2015.

by China (2008),⁴⁰ Armenia (2009),⁴¹ Vietnam (2010),⁴² and Mongolia (2014).⁴³ Until now, none of these countries met all five criteria. While Vietnam and Kazakhstan requested a new assessment, and Mongolia submitted new documentation in 2014,⁴⁴ China has not requested new assessment of its compliance with EU market economy criteria.⁴⁵

The criteria to determine economy-wide market economy status are not legally prescribed, but are derived from the criteria in article 2(7) (c) of the anti-dumping regulation.⁴⁶ The latter provision clarifies the conditions with which a group of firms or industries in NME must comply in order to claim market economy treatment in the context of anti-dumping investigations. As economy-wide criteria appear to be a derivation of those at the corporate-level, a legal parallel could be drawn between the two sets of requirements.

The first criterion requires a low degree of government influence over the allocation of resources and decisions of enterprises, whether directly or indirectly (e.g. public bodies), through the use of state-fixed prices or discrimination in the tax, trade or currency regime. This criterion does not reject government influence, but rather prohibits any unduly and/or substantial government market distortion.⁴⁷ In 2008, the first criterion was not considered met because the Chinese state continued direct and indirect restrictions on exports and imports, as well as subsidisation of inputs and their implications on competitive conditions and domestic prices.⁴⁸

The second requirement focuses on the operation of the newly established private sector and demands an absence of state-induced distortion in the operation of enterprises linked to privatisation and the use of non-market trading⁴⁹ or compensation

⁴⁰ Commission staff working document on progress by the People's Republic of China towards graduation to market economy status in trade defence investigations, [SEC\(2008\) 2503 final](#), 19 September 2008.

⁴¹ Commission staff working document on progress by Armenia towards graduation to market economy status in trade defence investigations, [SEC\(2009\) 1681 final](#), 18 December 2009.

⁴² Commission staff working document on preliminary assessment of the Socialist Republic of Vietnam's request for graduation to market economy status in trade defence investigations, [SEC\(2010\) 122 final](#), 5 February 2010.

⁴³ European Commission, [Report from the European Commission to the Council and the European Parliament - 33rd Annual Report from the Commission to the Council and the European Parliament on the EU's Anti-dumping, Anti-subsidy and Safeguard activities \(2014\)](#), Brussels 3 August 2015.

⁴⁴ idem.

⁴⁵ idem.

⁴⁶ Article 2(7) of [Council Regulation \(EC\) No 1225/2009](#)

⁴⁷ For example, in the Armenian assessment, government interventions in the water and energy sectors were not considered as substantial government distortion, as they had little impact on prices and costs in the economy. Commission staff working document on progress by Armenia towards graduation to market economy status in trade defence investigations, [SEC\(2009\) 1681 final](#), 18 December 2009.

⁴⁸ Commission staff working document on progress by the People's Republic of China towards graduation to market economy status in trade defence investigations, [SEC\(2008\) 2503 final](#), 19 September 2008.

⁴⁹ See, for example, in the assessment of Armenia, the consideration given to whether barter trade was still in place. Commission staff working document on progress by Armenia towards graduation to market economy status in trade defence investigations, [SEC\(2009\) 1681 final](#), 18 December 2009.

schemes.⁵⁰ China was considered to have met the second requirement in a preliminary assessment undertaken by the Commission in 2004.⁵¹

The third criterion requires 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, and public availability of accounting information). These corporate governance rules are important for the reliability of costs information and prices derived. To meet this requirement, it is not sufficient to have a legal framework in place – the country must prove that rules are applied in practice (by establishing independent audit systems that can verify the application of the rules, as well as via the number of professional accountants operating in the country).⁵² In the 2008 assessment, the Commission still considered the restrictions on business licences and the continued influence of the Chinese state in corporate decision-making (via over-representation of state shareholders on company boards) as problematic.⁵³ While some partial privatisation and reorganisation had taken place, the Commission considered further state-owned enterprise (SOE) reforms to be necessary. Furthermore, while recognising the efforts in training accountants and the alignment of accounting principles to International Financial Reporting Standards (IFRS), the 2008 report considered their implementation was still weak at that point in time. For these reasons, the third criterion was not met in 2008.⁵⁴

The fourth requirement demands the establishment and implementation of a coherent, effective and transparent set of laws, which guarantee the respect of property rights and the operation of a functioning bankruptcy regime. All these rules ensure that market access and exit operates according to market economy rules. As for the third criterion, the enactment of legal rules is not sufficient to meet this criterion; the applicant country has to prove effective implementation of these rules by courts and tribunals.⁵⁵ China failed the fourth criterion in 2008 on the basis of the Commission's

⁵⁰ See, for example, in the Assessment of Armenia, whether public schemes for the compensation of debts had been removed.

⁵¹ [Commission staff working document on progress by the People's Republic of China towards graduation to market economy status in trade defence investigations, SEC\(2008\) 2503 final, 19/09/2008.](#)

⁵² This was one of the main issues in Commission staff working document on preliminary assessment of the Socialist Republic of Vietnam's request for graduation to market economy status in trade defence investigations, [SEC\(2010\) 122 final](#), 5 February 2010.

⁵³ The issue of state representation in company shareholder boards emerged in a recent case concerning the granting of economy market treatment to a Chinese firm as part of an AD investigation. In its interpretation of the second criterion under article 2(7) (c), the Court of First Instance of the European Communities clarified that this requirement does not entail that government cannot maintain any kind of shares in the privatised companies; however, the decisions undertaken by the government as minority shareholder within the company must follow commercial considerations and not distort the market operations of the company. This case may also influence future assessment of economy-wide criteria. Case T-498/04, [Zhejiang Xinan Chemical Industrial Group Co. Ltd v. Council of the European Union](#), 17 June 2009.

⁵⁴ [Commission staff working document on progress by the People's Republic of China towards graduation to market economy status in trade defence investigations, SEC\(2008\) 2503 final, 19/09/2008.](#)

⁵⁵ The low number of bankruptcy cases was one of the main issues in the Vietnamese report of 2010: [Commission staff working document on preliminary assessment of the Socialist Republic of Vietnam's request for graduation to market economy status in trade defence investigations, SEC\(2010\) 122 final, 5/02/2010](#)

doubts with respect to the actual status of private property in Chinese law, favoured credit access for SOEs, and the unclear state of implementation and effective enforcement of intellectual property rights, the new bankruptcy law, and competition law.⁵⁶

The fifth criterion requires the existence of a genuine financial market, operating independently from the state and which, in law and practice, is subject to sufficient guarantee provisions. This requirement clearly avoids indirect state interference in prices via the financial market, for example, through issuing preferences in credits. The 2008 assessment considered that China did not meet the requirements of criterion five on several grounds, including: continued favoured SOE access to credit, the role of the Chinese government (and state banks) in the banking and financial sector, the lack of implementation of international standards for prudential lending and the role of the Central Bank in setting interest rates for lending, thus preventing banks from determining interest rates in line with customer creditworthiness.⁵⁷

Between 1995 and 2014, the EU initiated 119 AD proceedings⁵⁸ and issued 85 AD measures⁵⁹ against Chinese goods. EU-China dialogue on the issue of MES is held within the Market Economy Status working group.⁶⁰ In 2013, then-Commissioner Karel De Gucht suggested that the EU would grant China MES from 2016.⁶¹ Commissioner Cecilia Malmström took a more prudent stance to analyse carefully the issue.⁶²

3.2.2. The US legal framework

Current US law gives huge discretion to the US administration to determine NME/MES. When granted, MES can still be revoked if successfully challenged. Indeed the administration can make a determination, with respect to any foreign country, at any time, and that determination will remain in effect until revoked by the authority (see box).

Box 4: 19. US Code § 1677(18): (C) Determination in effect⁶³

(i) Any determination that a foreign country is a nonmarket economy country shall remain in effect until revoked by the administering authority.

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

⁵⁶ [Commission staff working document on progress by the People's Republic of China towards graduation to market economy status in trade defence investigations, SEC\(2008\) 2503 final, 19/09/2008.](#)

⁵⁷ *idem.*

⁵⁸ [AD initiations data with information on reporting country and exporting country available on the WTO website](#), visited in September 2015

⁵⁹ *idem.*

⁶⁰ The working group certainly met until 2008, however since then no consultation on MES has taken place between the EU and China. See: [Commission staff working document on progress by the People's Republic of China towards graduation to market economy status in trade defence investigations, SEC\(2008\) 2503 final, 19/09/2008.](#) For the list of the various cooperation frameworks existing between the EU and China, refer to: <http://strategicpartnerships.eu/pays/eu-china/>; http://eeas.europa.eu/china/docs/eu_china_dialogues_en.pdf

⁶¹ Speech by [Commissioner de Gucht to the European Parliament](#), November 2013.

⁶² The [Wall Street Journal Europe](#), December 2014.

⁶³ [19. U.S.C. § 1677\(18\)](#)

In other words, a foreign country will be considered as an NME if it has been considered such in the past, as long as that status is not successfully challenged; which is the case for China. Determination of MES/NME status is based on the factors inscribed in US law (see box 6).

Box 5: 19. US Code § 1677(18): Nonmarket economy country⁶⁴

(A) **In general** *The term 'nonmarket economy country' means any foreign country that the administering authority determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise.*

(B) **Factors to be considered** *in making determinations under subparagraph (A) the administering authority shall take into account—*

(i) the extent to which the currency of the foreign country is convertible into the currency of other countries;

(ii) the extent to which wage rates in the foreign country are determined by free bargaining between labor and management,

(iii) the extent to which joint ventures or other investments by firms of other foreign countries are permitted in the foreign country,

(iv) the extent of government ownership or control of the means of production,

(v) the extent of government control over the allocation of resources and over the price and output decisions of enterprises, and

(vi) such other factors as the administering authority considers appropriate.'

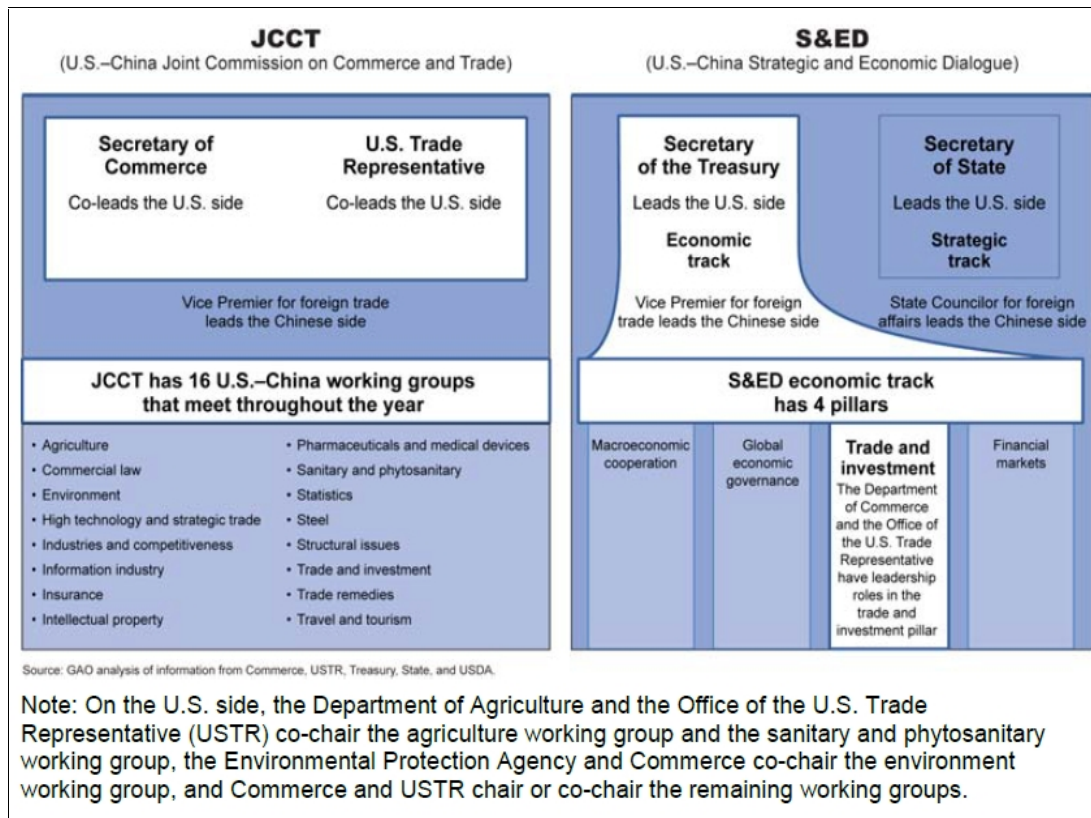
The determination is therefore based on six factors: (1) the presence of currency manipulation, (2) determination of wages following free labour market dynamics, (3) openness to joint ventures and foreign investments, (4) the extent of government ownership and control of production means, (5) the extent of government control over the allocation of resources (pricing and output decisions), (6) any other relevant factor. These elements are not given in any particular order, nor weighted.⁶⁵

The US and China discuss anti-dumping issues within the Joint Commission on Commerce and Trade and within the Strategic and Economic Dialogue. The dialogue on MES status of China is currently mainly conducted within the Strategic and Economic Dialogue (S&ED).⁶⁶ In both consultation frameworks, parties can issue commitments for better cooperation.

⁶⁴ [19. U.S.C. § 1677\(18\)](#)

⁶⁵ G. W. Bowman, N. Covelli, D. A. Gantz, I. H. Uhm, [Trade Remedies in North America, Kluwer Law International](#), 2010.

⁶⁶ On the commitments taken within the Strategic and Economic Dialogue, refer to: United States Government Accountability Office, [US-China Trade - United States has secured commitments in key bilateral dialogues, but US Agency reporting on status should be improved](#), February, 2014. Before the creation of the Strategic and Economic Dialogue, discussion on MES was conducted within a structural working group created in 2004 under the auspices of the US-China Joint Commission on Commerce and Trade. See: United States Government Accountability Office, [US-China Trade - Eliminating Non-Market Economy Methodology would lower Antidumping duties for some companies](#), January, 2006.

Figure 4: US and China consultation frameworks (actors involved):

Data source: [United States Government Accountability Office](#), February 2014..

The Government Accountability Office (GAO) also issued a report in 2006 on the possible impact on US trade remedies of the removal of NME status for some Chinese companies.⁶⁷ Firstly, the report's context is significant; its objective is not to analyse the impact of granting economy-wide MES, but the impact of ceasing application of one single anti-dumping duty to all Chinese firms, and also considers the impact of introducing individual treatment.⁶⁸ The report's conclusions remain relevant to understanding the implications of full MES recognition for the US. The GAO conclusions may, however, not be replicable in the EU, as the EU and the US apply different methodologies to calculate normal values for NME,⁶⁹ and therefore MES effects may differ.

The GAO report concludes that, firstly, as shown in figure 5, anti-dumping duties were lower on average for companies not receiving individual treatment and for whom market economy rates would be applied. Secondly, for firms for whom individual

⁶⁷ United States Government Accountability Office, [US-China Trade - Eliminating Non-Market Economy Methodology would lower Antidumping duties for some companies](#), January 2006.

⁶⁸ In the case of NME, the assumption was that as production and natural resources were controlled by a single entity, the state; one single margin and therefore one single duty rate should suffice. Individual treatment grants different duty rates to different exporters, on the basis of the exporter's individual export price and the normal value determined in the interpretation.

⁶⁹ The EU uses the surrogate country approach, which means that the EU will use the domestic prices of a third country with similar market characteristics (according to legally defined criteria) to China in the sector under investigation. The US uses surrogate prices (prices artificially determined). For more on the normal value determination in the EU and the US respectively, refer to: Van Bael and Bellis, EU anti-dumping and other trade defence instruments, Wolters Kluwer, 2011; W. Müller, N. Khan, T. Scharf, EC anti-dumping law, Oxford University Press, 2009; G. W. Bowman, N. Covelli, D. A. Gantz, I.H. Uhm, Trade Remedies in North America, Kluwer Law International, 2010

treatment is applied, GAO found little variation in average rates (rates would be significantly lower in the market economy case only for cooperative firms). Thirdly, the impact of applying Chinese prices was also considered to vary, depending on whether the industry or sector price distortion tended to increase or decrease Chinese domestic prices; in the first case duty rates based on Chinese prices were expected to be higher and vice versa for the second case. Fourthly, trade significance (in volume terms) of country-wide rates appeared to decrease over time. Finally, GAO also carried out an econometric analysis, which found an overall reductive effect on Chinese rates, but also substantial persisting variations in rates. Furthermore, in the GAO report, 2016 is referred to as a deadline for the application of NME treatment to China; however this does not seem to be the official position of the US.

Figure 5: Comparison of Chinese AD duties with NME and with MES potential change and effects

	Overall ^a	Group ^a	Individual rates ^b		
			All	Cooperative	Adverse inferences
Average China (NME) rates	67%	98% (Country-wide)	53%	51%	(Rarely applied) ^c
Average market economy rates	44%	37% (All others)	55%	16%	77%
Change from NME to market economy methodology for China companies	Chinese price information replaces surrogate price information	Country-wide rates eliminated, uninvestigated companies receive all others rate	Separate rates test eliminated		
Potential effect on average China rates	Effect unknown but likely to vary by industry	Rates likely to be significantly lower	Rates likely to fall into two distinct groups	Rates likely to be relatively low for cooperative companies	Rates likely to be relatively high for uncooperative companies

Source: GAO analysis of Commerce data.

^aAverages based on 25 products with comparable China and market economy cases (1985-2004).

^bAverages based on subset of 18 products with comparable China and market economy cases in which individual rates were applied. However, averages are nearly identical for full group of 25 products.

^cCommerce applied adverse inferences only three times, for an average rate of 78 percent.

Data source: [United States Government Accountability Office](#), 2006.

In October 2000, the US congress created the US-China Economic and Security Review Commission, with the legislative mandate to monitor, investigate, and submit an annual report on the national security implications of the bilateral trade and economic relationship between the United States and the People's Republic of China to Congress, and to provide recommendations, where appropriate, for legislative and administrative action. The US-China Economic and Security Review Commission writes an annual report on the major issues persisting between the US and China.⁷⁰ (An extract of the 2014 report focusing on the market economy status of China is included in annex). The main points made in the 2014 report suggest that:⁷¹

- if a new legal determination of the status is requested, China would still be a NME according to US law;

⁷⁰ US [Annual reports gateway](#).

⁷¹ US-China Economic and Security Review Commission, [2014 Annual Report](#), November 2014.

- in the executive summary of the report, it seems clear that the US will still apply its legal criteria for the determination of MES even after the 2016 deadline. In the report, the US position is uncertain with respect to the 2016 deadline, and there seems to be interest in O'Connor's interpretation;
- China does consider 2016 as a deadline, and the US fears that China could bring the challenge to the WTO dispute settlement body;
- the US administration maintains discretion to decide and to grant MES for political and diplomatic reasons. In the absence of a judicial review, decisions by the US administration on the granting of MES cannot be challenged in courts by firms.

Among the MES criteria, the criterion on **exchange rates**⁷² seems to be the major stumbling block for Chinese MES status under US anti-dumping law. Some analysts suggest the possibility of a double dispute settlement threat, one submitted by China with respect to its MES status and the other submitted by the US against China on currency manipulation.⁷³ Independently of whether the US will submit a currency subsidy case against China, it is possible that the US policy will not change its current stance on NME because of a threat of WTO dispute settlement on the 2016 deadline. Indeed the WTO system does not provide for retroactive damages or remedy systems, so the US could still apply NME until the end of a dispute on the subject within the WTO, without incurring costs beyond those of the dispute.⁷⁴

3.2.3. India

The case of India is particularly interesting for two reasons: (1) India is part of a PTA⁷⁵ with China but did not sign any commitment to apply MES to China, as was the case for China's other FTA partners, (2) India is also an increasing user of anti-dumping duties, and most of these are directed at China (see figure 6). It seems that no formal statement regarding the future intentions of India with respect to the China's MES has been issued. From a legal point of view, India currently considers China as an NME and does not present any obligation in its legal framework to grant China MES after 2016. It is interesting to notice that India, while refusing MES for China, has granted MES to Vietnam.⁷⁶

In terms of cumulative statistics, India imposed more anti-dumping duties on China than on any other WTO member (see figure 6). Between 1994 and 2014, India initiated

⁷² Suggested in a US Treasury [press release](#). However, in a June 2015 meeting, China made the following commitment, thus suggesting some progress on the exchange rate criteria: *'Consistent with the reforms set out in the Third Party Plenum of the 18th CPC Central Committee and China's G-20 commitments, China is to continue market-oriented exchange rate reform, increase exchange rate flexibility, and move more rapidly toward a more market-oriented exchange rate system. The United States notes the real effective appreciation of the renminbi (RMB) and welcomes the apparent reduction in foreign exchange intervention since the last S&ED. China commits to intervene only when necessitated by disorderly market conditions, and to actively consider additional measures to transition to a market-oriented exchange rate.'*

⁷³ G. C. Hufbauer, [Looming US-China Trade Battles? Market Economy Status \(Part II\)](#), Peterson Institute for International Economics.

⁷⁴ idem.

⁷⁵ The [Asia-Pacific Agreement](#)

⁷⁶ [Memorandum of Understanding between the government of the Republic of India and the government of the Socialist Republic of Vietnam on the recognition of Vietnam's full market economy status](#)

166 AD investigations. This number is huge compared to the 80 investigations started against the EU, subject of the second highest number of Indian AD investigations. The measures imposed on China represent 25% of the total AD measures issued by India over the period 1994-2014.

Figure 6: Number of Indian investigations and Indian anti-dumping duties imposed 1994-2014 by country of export

Statutory Instrument No	Country	No. of Initiations	Duty Imposed
1	China PR	166	134
2	EU	80	64
3	Korea RP	54	41
4	Chinese Tapei	52	42
5	Thailand	37	28
6	USA	37	28
7	Japan	34	29
8	Singapore	24	19
9	Malaysia	22	17
10	Russia	22	14
11	Others	162	119
	TOTAL	690	535

Data source: [Ministry of Commerce and Industry of India](#), 30 June 2014.

The Indian law on NME is inspired by the EU and the US approach. As in the EU, the law provides for a list of countries for which NME presumption applies;⁷⁷ for those countries NME methodology will be applied in the investigation unless the firm(s) or industry proves that it follows market economy rules. In the latter case, market economy treatment can be granted to that (those) specific firm(s) or industry within the framework of that particular anti-dumping case (i.e. verification of the status of the firm(s) or industry must be made in every single investigation). The NME presumption holds in the case of China.

As in the US, the definition of MES is legally defined. NME countries that request MES status must prove that their economy follows the legal criteria contained in article 8(3) (see box 6).

⁷⁷ Article 8(2) of [Customs Tariff](#) (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 as amended in 2001.

Box 6: Extracts from the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 as amended in 2001⁷⁸

'[8. (1) The term "non-market economy country" means any country which the designated authority determines as not operating on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise, in accordance with the criteria specified in sub-paragraph (3).

(...)

Article 8(3) (a) the decisions of concerned firms in such country regarding prices, costs and inputs, including raw materials, cost of technology and labour, output, sales and investment, are made in response to market signals reflecting supply and demand and without significant State interference in this regard, and whether costs of major inputs, substantially reflect market values;

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

(c) such firms are subject to bankruptcy and property laws which guarantee legal certainty and stability for the operation of the firms, and

(d) the exchange rate conversions are carried out at the market rate :

Provided, however, that where it is shown by sufficient evidence in writing on the basis of the criteria specified in this paragraph that market conditions prevail for one or more such firms subject to anti-dumping investigations, the designated authority may apply the principles set out in paragraphs 1 to 6 instead of the principles set out in paragraph 7 and in this paragraph.]'

Article 8(4) suggests that Indian authority may grant market economy status to a country that has been determined as such by another member of the World Trade Organisation. However, MES status granted by another WTO Member must be based on a 'detailed evaluation of relevant criteria', and, more importantly, article 8(4) does not impose any legal obligation to follow the example of the other WTO member. In other words, the Indian administration maintains full discretion to decide on MES, independently from decisions taken by other WTO members.

Box 7: Extracts from the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 as amended in 2001⁷⁹

'Article 8(4): the designated authority may treat such country as market economy country which, on the basis of the latest detailed evaluation of relevant criteria, has been treated or determined to be treated as a market economy country for the purposes of anti-dumping investigations, by a country which is a Member of the World Trade Organisation.]'

3.2.4. Mexico

The Mexican anti-dumping law did not provide any clearly defined legal criteria for granting MES until a 2003 amendment inspired by the US criteria (see box 8).⁸⁰ However, no official communication has been made on Mexico's position on MES for China. An agreement was concluded between Mexico and China on trade remedies in

⁷⁸ Article 8(2) of [Customs Tariff](#) (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 as amended in 2001.

⁷⁹ idem.

⁸⁰ [Mexican Trade Remedy Laws, Regulations and Rules](#) on anti-dumping.

2008.⁸¹ However, this does not mention the market economy status issue; it only refers to the elimination of some compensatory duties applied to some Chinese goods by virtue of annex 7 to the Chinese WTO Accession Protocol, which refers to reservations by WTO members. This annex allowed Mexico to depart from WTO law and maintain some restrictions on a certain number of products until 2007.⁸²

Box 8: Mexico – extract from the 2003 amendment of the anti-dumping law⁸³

'Article 48. For the purposes of Article 33 of the Act, centrally planned economies, regardless of the name by which they are designated, shall be deemed, subject to contrary evidence, to be those whose cost and price structures do not reflect market principles, or in which the enterprises of the sector or industry under investigation have cost and price structures which are not determined in accordance with such principles, and hence, in both cases, sales of the identical or like product in the country in question do not reflect the market value or the value of the factors of production used in manufacturing an identical or like product in a third country with a market economy. In order to determine whether an economy is a market economy, the following criteria, inter alia, shall be taken into account: the currency of the foreign country under investigation must be generally convertible in the international currency markets; salaries in the said foreign country must be established through free negotiation between workers and employers; decisions relating to prices, cost and supply of inputs, including raw materials, technology, production, sales and investment, in the sector or industry under investigation, must be taken in response to market signals without any significant State interference; the industry under investigation must have only one set of accounting records which it uses for all purposes and which is audited according to generally accepted accounting criteria; and the production costs and financial situation of the sector or industry under investigation must not be distorted in relation to the depreciation of assets, bad debts, barter trade and debt compensation or other factors considered relevant.'

3.2.5. Canada

Under Canadian law, China is currently a prescribed country (according to the rules of section 20 of the Special Import Measures Act (SIMA)), i.e. a country for which there is a legal presumption that normal market conditions might not exist in certain industries, therefore justifying in such cases a different methodology for calculating the normal value (see box 9 for the detailed legal rules). The burden of proof falls in every investigation on the domestic Canadian industry, which has to prove whether the Chinese sector operates under non-market economy conditions. In other words, the Canadian system reverses the burden of proof with respect to the rules that apply in Section 15(a) of the Chinese Protocol of Accession to the WTO or in Article 2(7) of the EU Antidumping Regulation; in the latter rules, the burden of proof falls on the Chinese firms to prove there is a market economy in the sector in order to obtain market economy treatment. Because of China being a prescribed country and the way the burden of proof to show non-market economy conditions is reversed in investigations, authorities in Canada do not need to prove that the special market conditions exist in that sector (the domestic industry needs to prove it) and it does not need a procedure to grant economy-wide MES.

Canada has concluded an investment agreement with China.⁸⁴ However, the agreement was not subject to a condition to grant early MES, and no memorandum of

⁸¹ [Acuerdo entre el Gobierno de los Estados Unidos de Mexico y el Gobierno de la Republica Popular de China en Materia de Medidas de Remedio Comercial](#), 1 June 2008.

⁸² See : G. W. Bowman, N. Covelli, D. A. Gantz, I. H. Uhm, Trade Remedies in North America, Kluwer Law International, 2010.

⁸³ Mexican anti-dumping law: [2003 amendment](#).

understanding was concluded between China and Canada on early MES recognition. Canada did, however, albeit temporarily incorporate the 2016 deadline in its legislation in 2002.⁸⁵ The requirement to cease application of Section 20 of SIMA (prescribed country provision) to China in December 2016 was, nevertheless, recently repealed.⁸⁶

Box 9: Canadian anti-dumping law and NME

'- Section 20(1) SIMA:⁸⁷

20. (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 (...)

- Section 17(1) and (2) of the Special Import Measures Regulation concerning the application of section 20(1) SIMA to China:⁸⁸

(1) For the purposes of subsection 20(1) of the Act, the customs territory of the People's Republic of China is a prescribed country

(2) This section ceases to have effect on December 11, 2016. SOR/2002-349, s. 1. [Repealed, SOR/2013-81, s. 1].'

3.2.6. Japan

Japan currently uses criteria similar to the EU to determine market economy conditions. It also has a presumption of NME treatment for China.⁸⁹

Japan has initiated joint negotiations for a free trade agreement with China with South Korea.⁹⁰ Like India, it did not commit to early recognition of China's MES. Even though China requested early MES recognition from Japan, China did not insist on obtaining MES.⁹¹ Japan had already, at the time of China's request for MES in 2007, introduced an amendment to the guidelines for procedures relating to countervailing and anti-dumping duties, setting a December 2016 deadline for the application of NME status to China. However, the guidelines are not legally binding and can easily be modified (with no legislative procedure required). The 2007 Chinese statement at the First Japan-China High Level Economic Dialogue attempted to obtain an even earlier deadline for the granting of MES to China, as Japan had not legally committed to early granting of

⁸⁴ [Agreement between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments.](#)

⁸⁵ [Special Import Measures Regulation section 17](#), as amended in 2002.

⁸⁶ [Special Import Measures Regulation section 17](#), as amended 2013.

⁸⁷ [SIMA](#)

⁸⁸ See footnotes 68 and 69.

⁸⁹ As provided in the [Cabinet Order relating to Anti-Dumping Duty No416](#) (as subsequently amended).

⁹⁰ Japanese portal on the [Japan, Korea and China FTA negotiations](#).

⁹¹ [MOFCOM of December 2007](#) press release; [First Japan-China High Level Economic Dialogue](#), press release, December 2007.

MES.⁹² Moreover, China probably did not insist on early MES recognition from Japan, simply because Japan rarely used anti-dumping measures.⁹³ The Joint Study Report, which was drafted to evaluate the FTA between Japan, China and Korea, contains a chapter on the use of trade remedy measures.⁹⁴ In particular, the study reported that between 1995 and 2010, Japan initiated six AD investigations and applied seven AD measures in total, of which only one investigation and one measure were respectively initiated and introduced against Chinese firms. In total Japan has only one AD measure still in force against Chinese firms.⁹⁵

Box 10: Extract from the 2007 amendment of paragraph 3 of the guidelines for procedures relating to countervailing and anti-dumping duties⁹⁶

'(1) The phrase "a fact that the market economy conditions regarding production and sale of a specified product prevail", which producers of the specified product of Chinese origin (excluding those of Hong Kong and Macao) or of Vietnamese origin shall clearly show as provided for in paragraph 3 of Article 2 of Cabinet Order Relating to Anti-Dumping Duty, contains those facts described below".

(i) a fact that decisions by producers regarding prices, costs, production, sales and investment are made based on market economy principles, and without significant government interference in this regard (the term "government," herein and in (iv) below, means the central government, local governments or other public organizations of the country of origin of the imported product concerned);

(ii) a fact that costs of major inputs (such as raw materials) reflect market prices;

(iii) a fact that wage rates are determined by free negotiations between labour and management;

(iv) a fact that means of production are not owned nor controlled by government;

(v) other facts as the Minister of Finance considers it appropriate (...)

(2) It shall be noted that paragraph 3 of Article 2 and Article 10bis of Cabinet Order Relating to Anti-Dumping Duty shall be effective until 10 December 2016 with regard to specified products of Chinese origin, pursuant to the conditions provided for in Section 15(d) of Protocol on the Accession of the People's Republic of China, and until 31 December 2018 with regard to specified products of Vietnamese origin, pursuant to the conditions provided for in Article 2 of Protocol on the Accession of the Socialist Republic of Viet Nam, and paragraphs 255(d) and 527 of the Report of the Working Party on the Accession of Viet Nam.'

3.3. Conclusions

Most countries actively using trade remedies against China have not granted early MES recognition to China, and seem to favour a criteria-based assessment of MES (see for example US and India), rather than automatic recognition after 2016. Japan has only a non-legally binding provision under which it would consider granting market economy treatment to China from December 2016. However, Japan has made no official statement saying that it will follow this guideline, and does not seem to support the

⁹² [First Japan-China High Level Economic Dialogue](#), press release December 2007.

⁹³ Ming Wan, [Engaging China - the political economy and geographical approach of the United States, Japan and the EU](#), The Asia-Pacific Journal: Japan Focus.

⁹⁴ [Joint Study Report for an FTA among China, Japan and Korea](#), 2011.

⁹⁵ [Trade Policy Review - Japan](#), WTO, 2015.

⁹⁶ [The 2007 amendment of paragraph 3 of the guidelines for procedures relating to countervailing and anti-dumping duties](#).

automatic grant of MES for China from 2016. Canada had introduced a similar deadline in its law in 2002, but this provision was subsequently repealed. In all the other countries the legal framework is silent with respect to the 2016 deadline, suggesting that China will have to prove MES according to these countries' domestic laws.

Countries that have granted earlier MES recognition to China have done so mainly for political reasons (mainly the conclusion of FTAs) and not in reference to a 2016 deadline. As suggested by the Australian authorities' AD expert, adjustments to the normal value calculations can, to a certain extent, be undertaken under the WTO rules foreseen for market economies.⁹⁷ A similar approach was undertaken by the EU with respect to Russia. Indeed the EU granted MES to Russia in 2002⁹⁸ mainly for political/diplomatic reasons, and used adjustments to normal values allowed under the AD rules for market economies.⁹⁹ However, the recent submission of a claim by Russia to the WTO dispute settlement body against the EU, because of these normal value adjustments mechanisms,¹⁰⁰ could demonstrate the limits of such an approach, which would use adjustments under the rules for market economies to compensate for price distortions in the transition economy. Unsurprisingly, several countries requested third party rights in this dispute, including: Argentina, Australia, Canada, China, Indonesia, Norway, Turkey, Ukraine and the United States, Brazil, Mexico, Saudi Arabia and Vietnam.

Several countries have carried out economic analysis of the impact and feasibility of FTA with China before committing to recognise Chinese MES, but few seem to have analysed the impact of market economy treatment on anti-dumping duties. The reason is fairly simple, most of these countries do not use anti-dumping measures extensively and therefore the impact of a change in methodology to determine dumping duties would remain limited. The US and the EU are much bigger users of anti-dumping duties and therefore impact might be larger, even though it is likely to remain limited to specific sectors where anti-dumping against China are applied. The GAO study and their methodological difficulties could be relevant for any future study on the subject. Any analysis of the impact of granting early recognition of MES to China would have to take into account the fact that, first of all, some firms, located in an NME, might receive market economy treatment¹⁰¹ and, second, in the rules for market economies, price adjustment might still be made. Furthermore impact will have to take into account anti-circumvention proceedings. The EU is currently experiencing a rise in anti-circumvention proceedings, in the latter proceedings normal values are not recalculated, but the authority uses (with some adjustments) the normal value

⁹⁷ ['Market Economy Status for China: Implications for Antidumping Protection in Australia'](#), speech by A. Stoler at the Australia-China Business Council of South Australia, 28 September 2004.

⁹⁸ [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.

⁹⁹ Müller, N. Khan, T. Scharf, EC anti-dumping law, Oxford University Publishing, 2009; E. Vermulst, [Assessment of trade defence policy decisions for 2014](#), European Parliament – Directorate General for External Policies, August 2015.

¹⁰⁰ [European Union – Cost Adjustment Methodologies and Certain Anti-Dumping Measures on Imports from Russia](#), DS474, panel established on 22 July 2014 but not yet composed.

¹⁰¹ The EU has not granted market economy treatment to Chinese firms in investigations initiated after 2010, but at the same time it could still grant it in the future. See E. Vermulst, [Assessment of trade defence policy decisions for 2014](#), European Parliament - Directorate General for External Policies, August 2015.

calculated in the original investigation.¹⁰² Therefore, the change to MES would have an impact not only for normal anti-dumping proceedings but also for any subsequent anti-circumvention proceedings.

The current EU and US approach of addressing the issue via bilateral dialogue with China, in order to promote Chinese progress toward the achievement of MES requirements, appears to have been successful, as China did progress over the years toward MES.¹⁰³ The desire to obtain MES can thus work as an incentive for achieving real progress towards a fully functioning market economy.

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¹⁰² Van Bael and Bellis, *EU anti-dumping and other trade defence instruments*, Wolters Kluwer, 2011.

¹⁰³ For example: the commitments made by China to the US in the framework of the bilateral dialogues: United States Government Accountability Office, [US-China Trade - United States has secured commitments in key bilateral dialogues, but US Agency reporting on status should be improved](#), February 2014.

5. Annex: Extract from the US-China Economic and Security Review Commission - Annual report of 2014

'Market Economy Status'¹⁰⁴

Even as debate focuses on how to rectify negative impacts of the bilateral trade relationship on U.S. employment, there is general agreement that granting China market economy status would exacerbate the problem. Multiple witnesses have testified to the Commission that China is not now a market economy and is not on the path to become one within the next two years. But in December 2016, the provision of China's WTO accession protocol that enables countries to treat China automatically as a non-market economy (NME) expires. China agreed to accept this temporary provision during its negotiations to join the WTO but has aggressively sought to have the designation terminated by its trading partners and will almost certainly demand that the United States treat it as a market economy after 2016. Neither NME status nor market economy status are explicitly mentioned in China's WTO Accession Protocol. However, the Protocol does specify the expiration of Article 15(a)(ii) in December 2016. At the end of 2016, the existing statutory test will be the only basis upon which the United States determines whether a country operates as a market economy is applied. Under the law, there are criteria that the Administration would have to certify that China has met before granting China market economy status. The main effect of a shift to market economy status for China would be to make it far more difficult for the United States to levy penalty tariffs on China for dumping. A 2005 study by GAO found that, "if Commerce grants China market economy status... required methodological changes could well reduce antidumping duties [and] it is not clear whether CVDs [countervailing duties] would compensate for these reductions." However, GAO also concluded that even if China is not designated as a market economy, "there is an element of uncertainty about the magnitude of the total level of protection that would be applied to Chinese products" in either scenario. China is currently the single largest target of U.S. antidumping actions. From 2001 through 2012, the United States initiated 91 antidumping cases against China, imposing measures in 66 of those cases, and spearheaded 15 of the 31 WTO complaints brought against China. A market economy is an economic system in which decisions about the allocation of resources and production are made on the basis of prices generated by voluntary exchanges among producers, consumers, workers, and owners of factors of production. In China's economy, crucial economic processes are determined by the state rather than by market forces. Chinese government officials themselves describe China as a socialist market economy, in which "the government accepts and allows the use of free market forces in a number of areas to help grow the economy, but still plays a vital role in managing the country's economic development." As of 2009, 97 nations had granted China market economy status. But because of government interventions in the Chinese marketplace, the United States and other major developed countries still recognize China as an NME. In situations involving imports from an NME, the WTO more readily allows for the "normal value" (the appropriate price in the market of the exporting country) of the imports to be determined using data from a surrogate country. Typically, the WTO requires the normal value of a country's export be based on a strict comparison with domestic prices or costs in that country. Since Chinese domestic prices and costs are often artificially

¹⁰⁴ [US-China Economic and Security Review Commission - Annual report of 2014](#)

*suppressed because of government subsidies, surrogate country data is generally crucial for trading partners to demonstrate that China is engaged in dumping. Much attention has been focused on arguments that the expiration of Article 15(a)(ii) will not give China market economy status, not least because Article 15(d) of China's Accession Protocol makes clear that China's recognition as a market economy is something it must achieve bilaterally with individual members by meeting the conditions of those members' national laws. As international trade law expert Bernard O'Connor argues in his heavily cited paper, *The Myth of China and Market Economy Status in 2016*, China's WTO Accession Protocol contains "no presumption" that it will attain market economy status in 2016, and to imply that presumption "reads out of the law China's burden to prove that it is a market economy as defined by the laws of the country it seeks recognition from." But even if market economy status is not automatic in 2016, the expiration of Article 15(a)(ii) does mean that China will no longer automatically be assumed to be an NME. In short, China's market economy status will be left to the determination of each of its trading partners, and the United States will not automatically have to grant China that status after 2016. But even if the United States opts to continue treating China as a non-market economy, the terms of the Accession Protocol will increase the evidentiary burden for justifying the use of surrogate country data in assessing duties against China after 2016. Eileen Bradner, senior director and counsel for Nucor Corporation, told the Commission that, "part of the reason our trade laws work is because they properly treat China as a non-market, government-run economy. That should not change until China itself changes." However, China is working under the assumption that market economy status will be conferred upon it in 2016, and any action by the United States to continue treating China as an NME is almost certain to provoke a challenge by China at the WTO. U.S. law lays out criteria for deciding whether or not a country is a market economy, but grants great flexibility to the U.S. executive branch in making the determination, a determination that*

Ms. Drake notes is not currently reviewable by U.S. courts. This means that if the U.S. executive branch determines it is diplomatically in our best interest to treat China as a market economy beginning in 2016, negatively impacted companies will have no clear legal recourse to challenge that decision.'

Under Section 15 of the Chinese WTO Accession Protocol, China can be treated as a non-market economy (NME) in anti-dumping proceedings. The definition of China as a NME allows importing countries to use alternative methodologies for the determination of normal values, often leading to higher anti-dumping duties. The correct interpretation of Section 15(d) of the Chinese WTO Accession Protocol has come under debate, as well as whether the latter section stipulates the automatic granting of Market Economy Status to China after December 2016. This analysis looks at the debate regarding the interpretation of Section 15(d) and the current policy of selected WTO members with respect to China's Market Economy Status.

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