

ARTICLES

TRADE, LAW, AND DIPLOMACY: CHINA'S NON-MARKET ECONOMY STATUS

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ABSTRACT

This Article presents an in-depth exploration of one of the most intricate systemic challenges confronting the global economy: the controversial non-market economy (NME) status of China. This issue, while primarily economic, has far-reaching implications extending into the realm of international politics, shaping the dynamics of global trade relations. Despite China's transition to a market economy post-2016, several countries, including the United States and EU, continue to categorize it as an NME, thus impacting anti-dumping duty calculations via surrogate country methods. Adopting a rigorous law and economics framework, this study provides a comprehensive legal analysis of the World Trade Organization (WTO) rules related to the continuance of China's NME status post-2016. This Article also explores the consequent effects on international disputes over anti-dumping, subsidies, and countervailing measures involving China.

A robust methodology forms the backbone of this research, with a novel application of game theory modeling, offering crucial insights into the potential future patterns of NME clause invocations against China by different global economies. The findings underscore that irrespective of China's NME status, other countries, especially the United States, are well-equipped with a range of trade remedy measures to maintain a certain "special treatment" against China. The empirical analysis, based on an extensive data set, reveals a transformative trend in the anti-dumping disputes lodged at the WTO against China in the post-2016 period. A significant reduction in arbitrary investigation initiations and an uptick in expiry (of the measure) without review suggest a strategic shift in national responses to the evolving NME discourse.

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This Article concludes by urging policymakers to carefully weigh the consequences of sustaining or discarding China’s NME status, underlining the vital need for a balanced and equitable global trade environment. The research not only enhances our understanding of the complexities surrounding China’s NME status but also lays a solid foundation for future investigations in this critical area of international trade policy.

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I. INTRODUCTION

China’s NME status has been a contentious issue in international trade for decades. Despite China’s significant economic growth and modernization efforts since joining the World Trade Organization in 2001, some countries continue to treat it as an NME for the purpose of anti-dumping investigations.¹ This approach has been a significant bone of contention between China and its trading partners, leading to several disputes at the WTO.² While the WTO’s legal framework on NME treatment appears to be clear, its implementation has been the subject of heated debate, with some arguing that the WTO’s legal provisions do not reflect the economic reality of China’s market-oriented reforms.³

1. The basic objective of the WTO is to ensure free and fair trade among member countries. In case a firm is pursuing a strategic pricing channel for gaining market share, its actions can come under the purview of the Anti-Dumping framework developed under the WTO. The importing countries can initiate Anti-Dumping investigations under three possible scenarios: (1) when the exporting firm is selling the product in their target market at a considerably lower price vis-à-vis the corresponding domestic price, (2) when the exporting firm is selling the product in an export market with higher elasticity of demand at a lower price and vice versa, and (3) when the exporting firm is selling the product at a price below the corresponding domestic production cost. The NME status of a country is particularly important under the third scenario, at the time of calculation of Anti-Dumping duties. See World Trade Organization, Ministerial Decision of 10 November 2001, *Accession of the People’s Republic of China*, WTO Doc. WT/L/432 (Nov. 23, 2001) [hereinafter *China’s Accession Protocol to the WTO*]; Gary Clyde Hufbauer & Cathleen Gimino-Isaacs, *The Outlook for Market Economy Status for China*, PETERSON INST. FOR INT’L ECON. (Apr. 11, 2016, 4:45 AM), <https://www.piie.com/blogs/trade-and-investment-policy-watch/outlook-market-economy-status-china>.

2. See *Disputes by Member*, WTO, https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm (last visited Sept. 11, 2023).

3. See U.S. TRADE REPRESENTATIVE, 2021 REPORT TO CONGRESS ON CHINA’S WTO COMPLIANCE 2 (2022), <https://ustr.gov/sites/default/files/files/Press/Reports/2021USTR%20ReportCongressChinaWTO.pdf> [hereinafter USTR REPORT TO CONGRESS].

This disagreement has created a wedge between legal and economic perspectives on China's NME status. On the one hand, legal experts argue that the existing WTO rules explicitly permit the continued use of NME methodology in AD investigations against China.⁴ They point to the text of China's Accession Protocol to the WTO, which allowed for this treatment until December 11, 2016.⁵ After that date, some argue that China's NME status should have automatically expired, while others maintain that it is up to individual WTO members to determine whether China has met the criteria for market economy (ME) status.⁶ On the other hand, economic experts argue that China's significant progress in economic reforms and market-oriented policies should be taken into account and that the continued use of NME methodology is not reflective of China's economic reality.⁷ They point to the fact that many of China's trading partners, including Australia and Russia, have already recognized it as a market economy.⁸

The debate over China's NME status is not just a theoretical or legal issue. It has significant implications for the global trading system and the future of international trade. The continued use of NME methodology against China could undermine its export competitiveness and create trade tensions between China and its trading partners. Moreover, it could set a precedent for the treatment of other emerging market economies and create uncertainty in the global trading system. Therefore, it is important to consider the economic reality of China's market-oriented reforms and assess whether the existing WTO rules are reflective of this reality. This Article analyzes the strategic interaction of China with different trading partner countries using a game-theoretic framework. The debate over China's NME status is most pertinent to its trading partners like the United States and India. The repeated interactions and persistence of the issue motivate this study of a multi-period game⁹ to gain insights into the ongoing debate and

4. See Mirek Tobiáš Hošman, *China's NME Status at the WTO: Analysis of the Debate*, 20 J. INT'L TRADE L. & POL'Y 1, 8 (2021).

5. See *China's Accession Protocol to the WTO*, *supra* note 1, art. 15(d).

6. See KAREN M. SUTTER, CONG. RSCH. SERV., IF10385, CHINA'S STATUS AS A NONMARKET ECONOMY (NME) 2 (2019).

7. See Hošman, *supra* note 4, at 8.

8. See MEADHBH COSTELLO, INST. OF INT'L & EUR. AFFS., CHINA'S MARKET ECONOMY STATUS: A POLITICAL ISSUE 2 (2016).

9. Game theory is a mathematical theory with many potential applications in the study of strategic interactions among states or individuals. In economics, there is extensive application of this theory to understand situations like contest or conflict of interest. This metaphor of game is used in situations with two or more players, not having identical interest, who can affect the

potential solutions that could bridge the gap between legal and economic perspectives on China's NME status.

The discussion raises an interesting perspective regarding the question of whether China can indeed be termed a market economy. It appears that there are several past instances of intervention by the Chinese government across various sectors, which infringed upon the market access of WTO partner countries.¹⁰ As a result, both “developed” (e.g., the EU, the United States) and “developing” (e.g., India) countries considered China an NME up until 2016 and used WTO-permitted provisions like “surrogate country method”¹¹ to compute Anti-Dumping Duty (ADD) against Chinese exports.¹² Now, even in the post-2016 period, the continuation of government interventions in China has caused many countries to consider China exclusively an NME, a status that has significant ramifications for ADD calculations.¹³ On the other hand, China held the view that, after December 2016, the imposition of NME methodologies in AD cases would be WTO-incompatible in nature, and, hence, partner countries should not practice such a policy.¹⁴ Therefore, China has moved to the WTO dispute

outcome. Particularly, in this context, the conflict has been continuing over time, therefore it is ideal to capture the interaction using a multi-period game. Multi-Period games involve a sequence of several stage games played one after the other. See GUILLERMO OWEN, *GAME THEORY* (2013).

10. See Timothy Webster, *Paper Compliance: How China Implements WTO Decisions*, 35 MICH. J. INT'L L. 525, 565–67 (2014).

11. WTO members need to embrace market economy conditions before joining the multilateral forum. This enables the firms operating in their territories to procure all the necessary raw materials and intermediate inputs for their production process at market prices. In case of any trade discord that can lead to potential imposition of Anti-Dumping duties, the designated authorities in the importing country may then consider their pricing mechanism as market-determined and compute the dumping margin accordingly. However, in case an exporting country is characterized by NME status, the authorities in the importing country reserve the right to not consider the price of the exportable as appropriate. The underlying logic is that the administered/state-subsidized input price may provide an unfair advantage to the exporters, lowering the calculated dumping margin in the process. Under this scenario, they can instead consider the input market prices prevailing in another comparable country as a ‘surrogate’ for the exporter country for determining the ‘normal’ price and compute the dumping margin on that basis. For a general discussion, see Yanling Yu, *The Issue of Non-market Economy Status in China's Anti-dumping Investigations Against Imports: A Development for the Implementation of New Rules or A Balancing Strategy?*, J. WOR. TRD. 55, 943–968, (2021).

12. See SUTTER, *supra* note 6, at 1–2; James J. Nedumpara & Archana Subramanian, *China and the Non-Market Economy Treatment in Anti-Dumping Cases: Can the Surrogate Price Methodology Continue Post-2016?*, 4 J. INT'L & COMPAR. L. 253, 272 (2017).

13. See Adam Williams, *What a Dump! The Current State of Antidumping Duty Calculations in Non-Market Economy Cases*, 32 EMORY INT'L L. REV. 433, 441–59 (2018).

14. See Hufbauer & Cimino-Isaacs, *supra* note 1.

settlement body on occasions in the post-2016 period to challenge the WTO compliance of partner countries harping on its NME status for calculations of ADD.¹⁵

The main thesis of this Article is that, despite China's declaration of being a market economy post-2016, its NME status continues to be a significant issue in the realm of international trade. This status significantly impacts the application of trade remedy measures, such as AD and countervailing duties (CVD), where surrogate country methods are employed. Through a multi-dimensional analysis involving legal perspectives, game theory, and empirical data, this Article argues that, regardless of China's NME status, countries like the United States and others possess a variety of trade remedy measures to maintain a "special treatment" approach to China. However, the enforcement of such measures is shifting in the post-2016 landscape, with a decrease in arbitrary investigations and an increase in the phrase "expiry (of the measure) without review."¹⁶ This Article suggests that China will persist in pursuing the removal of the NME provision, while emerging economies, such as India, may continue to consider China as an NME due to domestic market dynamics and perceived gains. Therefore, it is crucial for policymakers to carefully consider the implications of maintaining or discarding China's NME status in striving for a more balanced and equitable global trade environment. In sum, the Article presents a nuanced understanding of the complexities surrounding China's NME status within the WTO framework and its impact on the global trade environment, informing the development of more effective and equitable trade policies.

The theoretical framework of law and economics offers a valuable lens through which to analyze the ongoing debate surrounding China's NME status. This interdisciplinary approach combines the principles of economic theory with the structure of legal rules and institutions, illuminating the economic implications and motivations inherent in legal decision-making. In the context of this Article, law and economics can help to better understand the efficiency and cost-benefit aspects of maintaining or discarding China's NME status. This includes interpreting the economic motives behind AD disputes, trade remedy measures,

15. See, e.g., Request for Consultations by China, *United States—Measures Related to Price Comparison Methodologies*, WTO Doc. G/ADP/D115/1, G/L/1169, WT/DS515/1 (Dec. 12, 2016); Request for Consultations by China, *European Union—Measures Related to Price Comparison Methodologies*, WTO Doc. G/ADP/D116/1, G/L/1170, WT/DS516/1 (Dec. 12, 2016).

16. For a general discussion, see Ming Du, *From 'Non-Market Economy' to 'Significant Market Distortions': Rethinking the EU Anti-Dumping Regulation and China's State Interventionism*, 41 Y.B. EUR. L. 314 (2022).

and the application of the surrogate country method for calculating duties. By adopting this framework, this Article aims to provide a robust analysis of the economic incentives and consequences underpinning the legal arguments and decisions made by WTO members in relation to China's NME status. This approach not only enhances our understanding of the current global trade environment but also aids in proposing more effective and equitable trade policies.

This Article employs a multi-faceted research methodology to probe the complexities of China's NME status and its global implications. First, through a meticulous legal analysis, it delves into the WTO's jurisprudence and existing literature to understand the ongoing debates surrounding China's NME status and the associated trade remedy measures. Second, the Article utilizes a game theoretic model to unravel the potential trajectories of different economies invoking the NME clause on China. Finally, it provides an empirical analysis of AD disputes initiated at the WTO against China, particularly in the post-2016 period, further illustrating the real-world implications of the NME debate. Together, these methods of legal analysis, game theory modeling, and empirical analysis form the backbone of this Article's research approach, enabling legal scholars and practitioners to scrutinize the intricacies of China's NME status within the global trade framework.

This Article is organized in five parts. First, it examines the accession discussions regarding China's NME status in detail. Second, it elaborates on the legality of continuing China's NME status beyond 2016 in light of WTO jurisprudence. Third, it discusses the implications of the NME clause on the AD and subsidy and countervailing measures (SCM)-related disputes involving China. Fourth, based on the evidence emerging from the legal context and past trade policy reflections, a game theoretic model is proposed to explain the anticipated trajectory of different economies invoking the NME clause on China in the future. Finally, in line with these observations, this Article draws certain policy conclusions.

II. CHINA'S NME STATUS IN THE WORLD TRADE ORGANIZATION: ACCESSION, LEGALITY, AND GLOBAL TRADE IMPLICATIONS

As of January 2024, China has filed twenty-five complaints with the WTO.¹⁷ These conflicts are notable for two reasons. First, they have

17. See *Disputes by Member*, *supra* note 2.

almost exclusively targeted the United States and the EU.¹⁸ Second, sixteen of the twenty-three lawsuits have focused on trade remedies, notably the United States and the EU's AD rules and practices.¹⁹ China has also filed complaints concerning EU and U.S. SCM and safeguard-related measures.²⁰

While China initiated these trade remedy complaints for a number of reasons, one consistent source of apprehension has been the classification of China as an NME in AD investigations by the United States and the EU.²¹ This approach of treating China as an NME has been criticized as not only discriminatory but also trade-restrictive, as this typically results in large AD duties.²²

China's NME has been a topic of debate for a long time.²³ When China joined the WTO on December 11, 2001, it agreed that, for the next fifteen years, WTO members could assume the NME position of China.²⁴ That is, WTO members could treat China as an NME in AD actions unless the Chinese producers engaged in the transaction proved otherwise. In practice, the Assumption permitted WTO members to employ the "NME Methodology." Through the Methodology, WTO members could substitute Chinese domestic pricing or costs for the corresponding figures in a market economy (ME) third country to assess the normal value to calculate the dumping margin.²⁵ This Methodology, however, is unequivocally rejected by the global commerce sphere, with particular disapproval from WTO member nations. Moreover, WTO members strongly disagree with China's belief that it ought to receive ME classification subsequent to the expiration of the 2016 deadline. This has ignited vehement opposition, both political and industrial, in the United States and the EU.²⁶ In 2015, China

18. As observed from the WTO documents, while five and seventeen complaints have been filed against the EU and United States respectively, only one complaint has been lodged against Australia (DS 603). *See id.*

19. *See id.*

20. *See id.*

21. *See* GISELA GRIEGER, EUR. PARLIAMENTARY RSCH. SERV., PE 593.570, BRIEFING ON CHINA'S WTO ACCESSION: 15 YEARS ON TAKING, SHAKING OR SHAPING WTO RULES? 6–7 (Dec. 2016); *see also* Weihuan Zhou & Shu Zhang, *Anti-Dumping Practices and China's Implementation of WTO Rulings*, 230 CHINA Q. 512, 512–17 (2017).

22. *See* DANIEL IKENSON, CATO INST., NONMARKET NONSENSE: U.S. ANTIDUMPING POLICY TOWARD CHINA 10 (2005).

23. *See generally* Hořman, *supra* note 4.

24. *China's Accession Protocol to the WTO*, *supra* note 1, art. 15(d).

25. *Id.* art. 15.

26. *See* FRANÇOIS GODEMENT, EUR. COUNCIL ON FOREIGN RELS., CHINA'S MARKET ECONOMY STATUS AND THE EUROPEAN INTEREST 5–6 (2016); Chad P. Bown, *Trump Says China is Not a Market*

threatened that if the NME Methodology was still being employed after December 11, 2016, it would resort to the WTO's dispute settlement system.²⁷

Pursuant to a request on December 12, 2016, China initiated consultations with the United States and the EU concerning the continued application of the NME Methodology.²⁸ This action prompted an exceptionally complex debate among trade experts and governmental representatives, and the concerned parties attached significant weight to the conflict. Robert Lighthizer, the then U.S. Ambassador to the WTO, called it the “most significant litigation matter that we have at the WTO right now” and suggested that a decision in China's favor would be “cataclysmic” for the WTO.²⁹ Although the grievance against the United States was withdrawn during the consultation stage, the dispute with the EU culminated in the creation of a WTO panel on July 10, 2017, to adjudicate the matter.³⁰ The panel's authority in the EU-China dispute (DS516) expired in July 2020 following a 12-month stay of proceedings.³¹ Hereinafter, this Article endeavors to scrutinize China's NME status and the WTO's position thereon. The Article then examines the U.S. stance on China's NME classification and culminates in an assessment of pertinent stakeholder apprehensions.

A. *Unraveling China's NME Conundrum*

Under the WTO's legal framework, China's designation as an NME allows its trading partners, including the United States, to use a special framework to determine whether China's exports are being sold at unfairly low prices and, if so, to apply additional AD duties. Since 2001, China has been subject to a special assumption that it is an NME under

Economy. That's a Big Deal, WASH. POST (Dec. 12, 2016, 7:00 AM), <https://www.washingtonpost.com/news/monkey-cage/wp/2016/12/12/trump-says-china-is-not-a-market-economy-heres-why-this-is-a-big-deal/>.

27. See *China Warns of Potential WTO Fight Over NME Methodology in AD Cases*, INSIDE U.S. TRADE (Nov. 13, 2015), <https://insidetrade.com/daily-news/china-warns-potential-wto-fight-over-nme-methodology-ad-cases>.

28. A summary of the two disputes and their current status can be found at *DS515: United States—Measures Related to Price Comparison Methodologies*, WTO, www.wto.org/english/tratop_e/dispu_e/cases_e/ds515_e.htm (last visited Jan. 11, 2018).

29. Shawn Donnan, *Trump Trade Tsar Warns Against China 'Market Economy' Status*, FIN. TIMES (June 21, 2017), <https://www.ft.com/content/4d6ba03e-56b0-11e7-9fed-c19e2700005f>.

30. See *DS516: European Union—Measures Related to Price Comparison Methodologies*, WTO, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds516_e.htm (last visited Dec. 3, 2020).

31. See *id.*

Article 15 of China's WTO Accession Protocol.³² This presumption expired on December 11, 2016, and China claims it must now be classified as an ME.³³ The United States maintains that China is not automatically qualified for ME categorization and has established a method to determine if China is still classified as an NME under U.S. domestic law.³⁴

1. Overview of the Problem

Made all the wiser from the persistence of trade barriers erected during the General Agreement on Tariffs and Trade (GATT) period, nations involved in the Uruguay Round negotiations (1986–1994) focused on the removal of such measures through a multilateral set-up, committing to trade policy reform and enhanced transparency of regulations.³⁵ As the Uruguay Round negotiations overlapped with a third wave of globalization from the late eighties onward,³⁶ agriculture, services, intellectual property rights (IPR), and other new provisions were included in the multilateral forum at the end of eight eventful years,³⁷ widening the portfolio of its successor, the WTO. The broad objectives of the WTO, since its inception in 1995, centered around achieving “an appropriate level of liberalization” and creating a framework characterized by the rule of law enforcing an “optimal level of predictability”³⁸ in a wide array of sectors and disciplines. The potential for enhanced trade policy reform subsequently motivated a sizable number of countries not participating in the GATT forums earlier to come forward and

32. *China's Accession Protocol to the WTO*, *supra* note 1, art. 15.

33. *See* Hufbauer & Cimino-Isaacs, *supra* note 1.

34. To be reclassified from an NME to a market economy by the United States, a country needs to file a formal application with the U.S. Department of Commerce. Commerce will subsequently investigate through consideration of six criteria, namely: currency convertibility, wage determinations, ease of foreign joint venture operations, government control in production, government control in resource allocation and other factors. For details, see SUTTER, *supra* note 6, at 1–2.

35. *See* J. Michael Finger, *A Diplomat's Economics: Reciprocity in the Uruguay Round Negotiations*, 4 *WORLD TRADE REV.* 27, 34–36 (2005); *see also* Terry Collins-Williams & Robert Wolfe, *Transparency as a Trade Policy Tool: The WTO's Cloudy Windows*, 9 *WORLD TRADE REV.* 551, 559, 568 (2010); Debra P. Steger, *Introduction to the Mini-Symposium on Transparency in the WTO*, 11 *J. INT'L ECON. L.* 705, 707 (2008); Debra P. Steger, *The Future of the WTO: The Case for Institutional Reform*, 12 *J. INT'L ECON. L.* 803, 805 (2009).

36. *See* WILL STRAW & ALEX GLENNIE, INST. FOR PUB. POL'Y RSCH., *THE THIRD WAVE OF GLOBALISATION* 47–48 (2012).

37. *See* CRAIG VANGRASSTEK, WTO, *THE HISTORY AND FUTURE OF THE WORLD TRADE ORGANIZATION* 39–80 (2013).

38. *Id.* at 202.

enthusiastically join the newly established WTO. In 1995, in addition to the existing seventy-six GATT members, thirty-six newcomers agreed to join the multilateral forum, taking the participation tally to 112.³⁹ The WTO thus established itself as a regulator of global trade flows with a mandate to secure the free and fair movement of goods and services across member countries. Once the WTO was established, augmented market access on the principle of reciprocity-based reform measures encouraged new members to join.⁴⁰ The periodic inclusion of new members further attracted non-member countries who had not yet joined the WTO to join.⁴¹

However, the rising interest among the non-member countries, many of which were least developed countries (LDCs) or former command economies, created the need for harmonizing policy frameworks. As the newer member countries joined after 1995, a binding guarantee from these countries regarding free and fair market access reforms was of crucial importance. In other words, before formal accession to the WTO, the new members were expected to fulfill certain preconditions in their domestic markets, which would better prepare them for anticipated future reforms in line with the WTO's principles. In particular, new applicant countries were expected to enact appropriate legal frameworks and institutions, which would be amenable to effectively enforcing the contract of accession in a transparent manner.⁴² The early nineties revealed, however, that when faced with an economic challenge (e.g., widening trade deficit, continued recession, growing unemployment), countries usually take recourse to more stringent or protectionist trade policies.⁴³ Although possible negative consequences of applying tariffs in the medium-to-long run vis-à-vis output and

39. Trade Policy Review Body, *Annual Report by the Director-General: Overview of Developments in International Trade and the Trading System*, WTO Doc. WT/TPR/OV/1 (Dec. 1, 1995).

40. See Olivier Cattaneo & Carlos A. Primo Braga, *Everything You Always Wanted to Know About WTO Accession (But Were Afraid to Ask)* 2 (World Bank, Working Paper No. 5116, 2009).

41. WTO membership can promote openness and sound governance to attract fresh foreign direct investment. See Marc Bacchetta & Zdenek Drabek, *Effects of WTO Accession on Policy-Making in Sovereign States: Preliminary Lessons from the Recent Experience of Transition Countries* 19 (WTO, Dev. & Econ. Rsch. Div., Working Paper No. DERD-2002-02, 2002).

42. See Cattaneo & Braga, *supra* note 40, at 4–6; see also Qingjiang Kong, *China's WTO Accession: Commitments and Implications*, 3 J. INT'L ECON. L. 655, 655–77; Julien Chaise & Jamieson Kirkwood, *One Stone, Two Birds: Can China Leverage WTO Accession to Build the BRI?*, 55 J. WORLD TRADE 287, 293–95 (2021).

43. See Grant W. Gardner & Kent P. Kimbrough, *The Effects of Trade-Balance-Triggered Tariffs*, 31 INT'L ECON. REV. 117, 117–18 (1990).

productivity are noted in subsequent literature,⁴⁴ policy myopia and expected political benefits in the short run may influence a country, particularly a large one, to ignore such possibilities.⁴⁵

Trade distortion was relatively higher in NMEs, where subsidies or similar capacity-creating support led to overcapacity⁴⁶ or where the pricing mechanism resulted in deviations from market-based outcomes.⁴⁷ The WTO, therefore, aspired to help the new applicants evolve into rule-based, transparent market economies before their eventual accession. Between 1995 and 1996, a total of thirty-one accession agreements were in progress at the WTO, most of which involved countries that were formerly centrally planned (i.e., non-market) or transition economies, including several sizable markets, such as those in Russia and China.⁴⁸ However, the prominence of Russia compared to China in multilateral trade negotiations was substantially different. In the aftermath of the collapse of the Soviet Union, Russia was busy attempting to keep up with the world trading system.⁴⁹ In contrast, China, an observer member of the GATT since 1984,⁵⁰ was already de facto integrated into the world economy.⁵¹ Furthermore, in July 1986, China applied to resume its contracting party status in the GATT,⁵² and a working party was established in March 1987 to assess China's request to reinstate its status.⁵³ The Working Party met on twenty occasions between 1987 and 1995. During the WTO tenure, it further held eighteen meetings between March 22, 1996, and January 17, 2001, to deliberate on this matter.⁵⁴

44. See Davide Furceri et al., *Macroeconomic Consequences of Tariffs* 26–28 (IMF, Working Paper No. WP/19/9, 1990).

45. See ALAN M. JACOBS, *GOVERNING FOR THE LONG TERM: DEMOCRACY AND THE POLITICS OF INVESTMENT* 5 (2011).

46. See Sherzod Shadikhodjaev, *Non-Market Economies, Significant Market Distortions, and the 2017 EU Anti-Dumping Amendment*, 21 J. INT'L ECON. L. 885, 886 (2018).

47. See Justin-Damien Guénette, *Price Controls: Good Intentions, Bad Outcomes* 2 (World Bank Grp., Working Paper No. 9212, 2020).

48. See Murray G. Smith, *Accession to the WTO: Key Strategic Issues*, in *THE WORLD TRADING SYSTEM: CHALLENGES AHEAD* 167, 167 (Jeffrey J. Schott ed., 1996).

49. See *id.* at 168–69.

50. Ya Qin, *China and GATT: Accession Instead of Resumption*, 27 J. WORLD TRADE 77, 81 (1993).

51. See Smith, *supra* note 48, at 169.

52. GATT Secretariat, *China's Status as a Contracting Party: Communication from the People's Republic of China*, GATT Doc. L/6017 (July 14, 1986).

53. GATT Secretariat, *Working Party on China's Status as a Contracting Party*, GATT Doc. L/6191/Rev. 2 (Apr. 26, 1988).

54. World Trade Organization, Ministerial Conference Fourth Session, *Report of the Working Party on the Accession of China*, at 1, WTO Doc. WT/MIN(01)/3 (Nov. 10, 2001).

Given its focus on an export liberalization growth strategy since the late seventies, China's urge to join the WTO grew throughout the nineties.⁵⁵ However, no longer considered a contracting party to the GATT,⁵⁶ China had to engage in bilateral negotiations with WTO members on the issue of its accession.⁵⁷ While the expectation of enhanced access to the Chinese market motivated WTO members to engage, they were nevertheless concerned with China's NME status. They were concerned with the widespread presence of state-owned enterprises (SOEs), state interventions in production and trade, the lack of transparency in policymaking, and the absence of a strong IPR regime, among other issues.⁵⁸ In particular, the question of granting a permanent Most Favored Nation (MFN) status to China was deliberated in various fora in the United States, with discussions intensifying after Democrats won the 1992 presidential election.⁵⁹ Sensing the reservations of WTO members to its accession, China was quite forthcoming during negotiations about its bound tariffs and other commitments, but China also heavily stressed the importance of obtaining developing country status to ensure certain policy flexibilities (e.g., the possibility of offering comparatively deeper protections to domestic players under Article XVIII and Part IV of the GATT).⁶⁰

China was ultimately able to join the WTO and enjoy greater market access.⁶¹ However, as a part of its accession, China had to make a few compromises. First, China had to undertake commitments to reduce average agricultural and non-agricultural tariffs from thirty-one and a half to fourteen and a half percent and thirty-five to seventeen percent, respectively, during the next five years, in addition to similar

55. See HUI FENG, *THE POLITICS OF CHINA'S ACCESSION TO THE WORLD TRADE ORGANIZATION: THE DRAGON GOES GLOBAL* 54–64 (2006).

56. While China was one of the signatories to the GATT in October 1947, after its civil war, the Republic of China (ROC), distinct from the current rule of the People's Republic of China (PRC), declared its withdrawal from the multilateral forum in March 1950. See Qin, *supra* note 50, at 78–81.

57. See Changsoo Kim, *Terms of Endearment: The United States' China Policy and China's Accession to the World Trade Organization*, 10 J. E. ASIAN AFFS. 74, 75 (1996).

58. See *id.* at 91, 94–95.

59. See *id.* at 85–89; Alan S. Alexandroff, *Concluding China's Accession to the WTO: The U.S. Congress and Permanent Most Favored Nation Status for China*, 3 UCLA J. INT'L L. & FOREIGN AFFS. 23, 23–24 (1998).

60. See HAROLD K. JACOBSON & MICHEL OKSENBERG, *CHINA'S PARTICIPATION IN THE IMF, THE WORLD BANK, AND GATT: TOWARD A GLOBAL ECONOMIC ORDER* 90–91 (1993).

61. See Longyue Zhao & Yan Wang, *China's Pattern of Trade and Growth After WTO Accession*, 2 J. CHINESE ECON. & FOREIGN TRADE STUD. 178, 179, 181 (2009).

investment liberalizations.⁶² The promise to make such substantive reform commitments, as guided by the WTO principles, helped pave the road for China's early entry into the WTO despite being an NME.⁶³ Second, certain safeguard restrictions on China's clothing and garment exports were to remain in place for four years, even during the post-MultiFibre Arrangement (MFA) period (i.e., up to December 2008), provided that the Agreement on Textile and Clothing (ATC) resulted in market disruptions in the form of growing imports.⁶⁴ Third, China could join the WTO on the condition that its NME status would remain up until December 11, 2016.⁶⁵ Finally, a special WTO provision permitted any WTO member to specifically target exports from China. Until December 31, 2013, any WTO member could roll back tariff concessions made to China in case a substantial threat to their exports arose.⁶⁶

China objected to both the NME clause and safeguard provisions⁶⁷ but finally gave in to the negotiating pressure. In September 2001, the WTO gave its final nod of approval on China's full-fledged membership, requiring that: "China shall eliminate and shall not introduce, re-introduce or apply non-tariff measures that cannot be justified under the provisions of the WTO Agreement."⁶⁸ China ultimately joined the WTO on December 11, 2001.⁶⁹

China was allowed to join the WTO because of its market size and because, despite being classified as an NME, China agreed to additional reform commitments. China considered the WTO-induced competition to be a welcome catalyst for enforcing further reforms on domestic entities.⁷⁰ It was expected that access to the markets of other WTO members would help China to eventually comply with the global trade

62. See Gregory C. Chow, *Impact of Joining the WTO on China's Economic, Legal and Political Institutions*, 8 PAC. ECON. REV. 105, 106 (2003).

63. However, several of China's commitments were unattainable in nature. See WEINIAN HU, CTR. FOR EUR. POL'Y, CHINA AS A WTO DEVELOPING MEMBER, IS IT A PROBLEM? 15–19 (2019).

64. See Working Party on the Accession of China, *Report of the Working Party on the Accession of China*, ¶¶ 241–42, WTO Doc. WT/ACC/CHN/49 (Oct. 1, 2001); SUPACHAI PANITCHPAKDI & MARK L. CLIFFORD, CHINA AND THE WTO: CHANGING CHINA, CHANGING WORLD TRADE 70–71 (2002).

65. See PANITCHPAKDI & CLIFFORD, *supra* note 64, at 71.

66. See *China's Accession Protocol to the WTO*, *supra* note 1, art. 16(9).

67. For a general discussion on the special provisions of the China Protocol, see Julia Ya Qin, "WTO-Plus" Obligations and Their Implications for the WTO Legal System: An Appraisal of the China Accession Protocol, 37 J. WORLD TRADE 483, 490 (2003).

68. *China's Accession Protocol to the WTO*, *supra* note 1, art. 7(2).

69. *Accessions: China*, WTO, https://www.wto.org/english/thewto_e/acc_e/a1_chine_e.htm (last visited Dec. 19, 2023).

70. See Nicholas R. Lardy, *Issues in China's WTO Accession*, BROOKINGS INST. (May 9, 2001), <https://www.brookings.edu/testimonies/issues-in-chinas-wto-accession/>.

architecture. Nevertheless, as reflected in the first few Trade Policy Reviews on China, there were possibilities for deeper compliance with WTO principles.⁷¹

A few well-documented concerns have arisen in the early years of China's participation in the WTO. First, for a considerably long period of time, China pegged its currency, the *yuan*, against the U.S. dollar but did not allow the *yuan* to appreciate despite the massive foreign exchange inflow resulting from the export surplus.⁷² The alleged continuation of currency manipulation was one of the major drivers behind the recent U.S.- China trade war.⁷³ Second, the alleged provision of subsidies to Chinese state-owned enterprises (SOEs) in general and export-oriented firms in particular have led to sizable distortions, specifically in terms of lost market access for other WTO members.⁷⁴ Third, since 2004, Chinese industrial and consumer goods exports have increasingly been subjected to global AD investigations, eventually facing ADD.⁷⁵ Fourth, the sectoral imports in China have been subject to various discriminatory non-tariff barriers, whose protectionist influence is complementary to corresponding tariffs.⁷⁶ Fifth, while China has significantly reformed its interest rate regime to regulate the capital market,⁷⁷ the influence of monetary policy on interest rates is still

71. See Trade Policy Review Body, *Report by the Secretariat: People's Republic of China*, at ix–xv, WTO Doc. WT/TPR/S/161 (Feb. 28, 2006); Trade Policy Review Body, *Report by the Secretariat: People's Republic of China*, at ix–xvi, WTO Doc. WT/TPR/S/199 (Apr. 16, 2008); Trade Policy Review Body, *Report by the Secretariat: People's Republic of China*, at vii–ix, WTO Doc. WT/TPR/S/230 (Apr. 26, 2010); Trade Policy Review Body, *Report by the Secretariat: People's Republic of China*, at ix–xii, WTO Doc. WT/TPR/S/264 (May 8, 2012); Trade Policy Review Body, *Report by the Secretariat: People's Republic of China*, at 9–13, WTO Doc. WT/TPR/S/300 (May 27, 2014).

72. See Elizabeth L. Pettis, *Is China's Manipulation of Its Currency an Actionable Violation of the IMF and/or the WTO Agreements?*, 10 J. INT'L BUS. & L. 281, 282–84 (2011); Masahiro Kawai & Li-Gang Liu, *Trilemma Challenges for the People's Republic of China* 6–13 (Asian Dev. Bank Inst., Working Paper No. 513, 2015).

73. See Ryan Hsu, *Currency Manipulation: The Trade War*, STREETFINS (Aug. 20, 2019), <https://streetfins.com/currency-manipulation-the-trade-war/>; Daniel C.K. Chow, *Can the United States Impose Trade Sanctions on China for Currency Manipulation?*, 16 WASH. U. GLOB. STUD. L. REV. 295, 325–26 (2018).

74. See Dessie Tarko Ambaw & Shandre Thangavelu, *Industrial Subsidies and Impact on Exports of Trading Partners: Case of China*, 26 REV. DEV. ECON. 1310, 1310 (2021); Fabrice Defever & Alejandro Riaño, *Subsidies with Export Share Requirements in China*, 126 J. DEV. ECON. 33, 33 (2017).

75. See Stefano Schiavo et al., *Anti-Dumping Activities Against China: Patterns and Effects*, 38 ECON. POL. 7, 11 (2020); see also Du, *supra* note 16, at 315.

76. See Michele Imbruno, *China and WTO Liberalization: Imports, Tariffs and Non-Tariff Barriers*, 38 CHINA ECON. REV. 222, 223, 232 (2016).

77. See Dong He et al., *Interest Rate Determination in China: Past, Present, and Future*, 11 INT'L J. CENT. BANKING 255, 256 (2015).

weak.⁷⁸ Sixth, the question of China abiding by IPR principles has often been raised. For instance, China's technology transfer provisions (e.g., joint venture requirements) often force foreign players to effectively transfer core technologies to domestic competitors. In addition, theft of IPRs across sectors (e.g., agricultural science, biotechnology) has been regularly noted.⁷⁹ Finally, as far as General Agreements on Trade in Services (GATS) commitments are concerned, existing licensing provisions, requirements to form joint ventures with SOEs, and a failure to comply with prior agreements, among other things, significantly limit the scope of market access on China's imports.⁸⁰

The ongoing controversy over China's NME status is widely regarded as the most critical issue in WTO AD law, given its impact on the legitimacy of the dispute resolution mechanism, the WTO's integrity, and member nations' trust in the multilateral trading system. WTO cases addressing China's market-economy status represent only the initial phase of a multi-stage trade conflict between China and its trading partners in forthcoming years.⁸¹ It is vital to underscore that China acceptance of its NME status resulted from the WTO's perspective on the country's economic system and its interpretation of applicable legal provisions, which ultimately did not support China's market-economy status claim.⁸² Although it may appear that the conflict has been resolved, with China conceding defeat and accepting its NME status, the fundamental issues remain highly pertinent. The legal debate over China's NME status is likely to influence the continuous evolution of AD practices and legislation at both the WTO and national levels.

Given the importance of China's NME status at the WTO, this section aims to summarize and clarify the often convoluted and occasionally technical issues surrounding the expiration of China's NME status in 2016.

78. See Sonali Das & Wenting Song, *Monetary Policy Transmission and Policy Coordination in China* 20 (IMF, Working Paper No. WP/22/74, 2022).

79. See STEPHEN EZELL, INFO. TECH. & INNOVATION FOUND., FALSE PROMISES II: THE CONTINUING GAP BETWEEN CHINA'S WTO COMMITMENTS AND ITS PRACTICES 17–20 (2021).

80. See *id.* at 25–26.

81. Mark Wu, *Foreword*, in *NON-MARKET ECONOMIES IN THE GLOBAL TRADING SYSTEM: THE SPECIAL CASE OF CHINA*, at v, vi (James J. Nedumpara & Weihuan Zhou eds., 2018). Furthermore, Mark Wu noted that history will likely view the debate over China's ME status as a contributing factor to the global trading system's crisis and the eventual resolution's shape.

82. See LAURA PUCCIO, EUR. PARLIAMENTARY RSCH. SERV., GRANTING MARKET ECONOMY STATUS TO CHINA: AN ANALYSIS OF WTO LAW AND OF SELECTED WTO MEMBERS' POLICY 5 (2015).

2. Legislative Framework Vis-à-Vis China's Status

China's NME status was established in Article 15 of China's Accession Protocol (CAP).⁸³ The relevant parts state the following:

(a) In determining price comparability under **Article VI of the GATT 1994** and the Anti-Dumping Agreement, the importing WTO Member shall use either Chinese prices or costs for the industry under investigation or a methodology that is not based on a strict comparison with domestic prices or costs in China based on the following rules:

(i) If the producers under investigation can clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product, the importing WTO Member shall use Chinese prices or costs for the industry under investigation in determining price comparability;

(ii) The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product. . . .

(d) Once China has established, under the national law of the importing WTO Member, that it is a market economy, the provisions of subparagraph (a) shall be terminated provided that the importing Member's national law contains market economy criteria as of the date of accession. In any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession. In addition, should China establish, pursuant to the national law of the importing WTO Member, that market economy conditions prevail in a particular industry or sector, the non-market economy provisions of subparagraph (a) shall no longer apply to that industry or sector.⁸⁴

Article 15 of CAP states that for the fifteen years following China's WTO entry, investigation authorities (IAs) can use one of two primary

83. See Andrei Suse, *Old Wine in a New Bottle: The EU's Response to the Expiry of Section 15(a)(ii) of China's WTO Protocol of Accession*, 20 J. INT'L ECON. L. 951, 951–52 (2017).

84. *China's Accession Protocol to the WTO*, *supra* note 1, art. 15(a), 15(d) (emphasis added)

strategies. First, the IA may use Chinese prices and costs if the producer under investigation “can clearly show that market economy conditions prevail in the industry”⁸⁵ Second, if the manufacturer cannot clearly demonstrate that the industry is subject to market economy conditions, the IA “may use a methodology that is not based on a strict comparison with domestic prices or costs in China”⁸⁶ Moreover, paragraph 15(d) adds two further conditions. To begin, once China is granted ME status by a certain country, paragraph 15(a) is repealed in its entirety. This means that, under such a scenario, the IA of the importing country cannot use an AD methodology based on Article 15. Second, in any case, the provisions of subparagraph 15(a)(ii) shall expire fifteen years after the date of admission.⁸⁷

In other words, any member state can use the above-mentioned methodology. When dealing with China, the CAP stipulates specific requirements for AD behavior against China, so long as the member state does not grant China the ME status under domestic law. There are no multilateral norms for establishing whether a country is a market economy, and the term “NME” is not specified in WTO protocols. As a result, it is understandable that China has prioritized gaining ME status in its foreign policy agenda and has embarked on an active diplomatic campaign to be recognized as an ME by its trade partners.⁸⁸ Over eighty trading partners now recognize China as an ME.⁸⁹ For instance, New Zealand (2004), Australia (2005), Peru (2004), Chile (2004), and all ASEAN members (2004) are among the countries on that long list.⁹⁰ Many of these countries also happen to be China’s Regional Trade Agreement (RTA) partners.⁹¹ China has also attempted to persuade the United States and the EU to alter their positions. However, both have repeatedly examined China’s economy and have remained

85. *Id.* art. 15(a)(i).

86. *Id.* art. 15(a)(ii).

87. *Id.* art. 15(d).

88. See Gary Clude Hufbauer, *The Pros and Cons of Granting China Market Economy: Is China Becoming a Market Economy Under World Trade Organization Rules?*, 96 CONG. DIG. 24, 26 (2016).

89. Hošman, *supra* note 4, at 5.

90. See CECILIA BELLORA & SÉBASTIEN JEAN, CENTRE D’ETUDES PROSPECTIVES ET D’INFORMATIONS INTERNATIONALES, GRANTING MARKET ECONOMY STATUS TO CHINA IN THE EU: AN ECONOMIC IMPACT ASSESSMENT 3 (2016); Francisco Urdinez & Gilmar Masiero, *China and the WTO: Will the Market Economy Status Make Any Difference After 2016?*, 48 CHINESE ECON. 155, 163 (2015).

91. Interestingly, the severity of the ADD measures imposed on China in several RTA partner countries (e.g., South Korea, Thailand, Indonesia, Pakistan) intensified in the post-bloc formation period. See YANLIN SUN & JOHN WHALLEY, CTR. FOR INT’L GOVERNANCE INNOVATION, CHINA’S ANTI-DUMPING PROBLEMS AND MITIGATION THROUGH REGIONAL TRADE AGREEMENTS 9–11 (2015).

unwilling to award the much sought-after ME status to the dragon. According to Chinese officials, paragraph (d) means that the NME status will be abolished fifteen years after China's WTO entrance on December 11, 2016.⁹² However, as the deadline approached, the United States and the EU made clear that they did not intend to automatically offer China ME status and would continue to regard it as an NME in their AD procedures.⁹³ As a result, China filed WTO disputes against the United States and the EU on December 12, 2016, one day before its NME status was set to expire.⁹⁴

It is widely considered that the surrogate country technique inflates AD rates and encourages importing nations to retaliate against China with more stringent contingency measures.⁹⁵ AD margins in the United States, for example, have averaged 154% against China, compared to the corresponding figure of forty-nine percent against other exporting countries. Conversely, AD margins in the EU have averaged sixty-one percent against China, compared to thirty-one percent against other countries.⁹⁶

B. *The U.S. Position on China's NME Status*

The United States has played a significant role in shaping the discussions surrounding China's NME status, with various stakeholders expressing divergent views. This section delves into the U.S. government's position on China's NME status, the rationale behind their stance, and the concerns raised by different stakeholders. In Section 2. B.1, we explore the U.S. Department of Commerce's (U.S. DOC) requirement for ME status and its decision to continue treating China as an NME country. We examine the controversy surrounding the U.S. DOC's application of countervailing legislation to China and discuss

92. See Raj Bhala, *Enter the Dragon: An Essay on China's WTO Accession Saga*, 15 AM. U. INT'L L. REV. 1469, 1514 (2000); see also Henry S. Gao, *Elephants in the Room: Challenges of Integrating China into the WTO System*, 6 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 137, 141–42, 148 (2011).

93. For the U.S. official standpoint in this regard, as expressed in the WTO forums, see the Committee on Anti-Dumping Practices, *Minutes of the Regular Meeting Held on 27 April 2017*, ¶¶ 2.7, 2.13, WTO Doc. G/ADP/M/52 (July 28, 2017).

94. *China Files WTO Complaint Against US, EU over Price Comparison Methodologies*, WTO (Dec. 12, 2016), https://www.wto.org/english/news_e/news16_e/ds515_516rfc_12dec16_e.htm [hereinafter *China Files Complaint Against US, EU*].

95. See Weihuan Zhou, *Appellate Body Report on EU–Biodiesel: The Future of China's State Capitalism Under the WTO Anti-Dumping Agreement*, 17 WORLD TRADE REV. 609, 612 (2018); JIEUN LEE, RSCH. SEMINAR IN INT'L ECON., CHINA'S NONMARKET ECONOMY TREATMENT AND U.S. TRADE REMEDY ACTIONS 13–15 (2011).

96. Thomas J. Prusa, *NMEs and the Double Remedy Problem*, 15 WORLD TRADE. REV. 619, 620 (2017).

the legal and trade implications of this decision. Section 2.B.2 addresses the diverse concerns of stakeholders in the United States, including those advocating for China's market economy status and those opposed to it. This section also considers the impact of these views on trade relations, industry dynamics, and international agreements such as the United States-Mexico-Canada Agreement (USMCA). By analyzing the United States' position on China's NME status and the concerns of various stakeholders, this section provides a comprehensive understanding of the complexities surrounding the issue and its implications for the future of global trade and WTO dynamics.

1. The U.S. Department of Commerce's Requirement for Market Economy Status and China's NME Status

According to the U.S. DOC, China remains an NME country under U.S. law because "the state's role in the economy and its relationship with markets and the private sector results in fundamental distortions in China's economy."⁹⁷ In stating this, the U.S. DOC reaffirmed its previous conclusions about China's economic standing.

Surprisingly, the U.S. DOC chose to apply its countervailing legislation to the Chinese market in 2007 because the Chinese economy had undergone sufficient economic reform to allow the U.S. DOC to identify and countervail subsidies.⁹⁸ This decision is highly contentious because, particularly in NME countries where the state is substantially involved in the economy, designating certain official actions as subsidies may indicate that the state is effectively subsidizing itself. It is also controversial whether China should be considered an NME country in AD investigations while acting on market principles in CVD investigations. Furthermore, the U.S. DOC routinely conducts concurrent AD and CVD inquiries for identical products, imposing separate AD and CVD duties, thereby potentially leading to the aforementioned issue of double remedies.⁹⁹ The U.S. DOC's testing method has been subject to extensive disapproval within the legal academic community.¹⁰⁰ The

97. Memorandum from Leah Wils-Owens, Off. of Pol'y, Enft & Compliance, United States Dep't of Comm., to Gary Taverman, Deputy Assistant Sec'y for Antidumping and Countervailing Duty Operations, United States Dep't of Comm. 4 (Oct. 26, 2017) (on file as United States Dep't of Comm., Int'l Trade Admin. Document No. A-570-053).

98. Leila Choukroune, *China and the WTO Dispute Settlement System: The Global Trade Lawyer and the State Capitalist*, 2012 CHINA PERSPECTIVES 49, 53 (2012).

99. See SUTTER, *supra* note 6, at 1.

100. For a detailed discussion, see Williams, *supra* note 13.

utilization of this test in historical instances merely serves to accentuate the absurdity inherent in its application.

According to the Chinese government and some analysts, Section 15 (a)(ii) of the CAP contains language that effectively requires WTO members to stop utilizing NME methodologies to calculate AD margins on Chinese imports after fifteen years (i.e., following December 11, 2016).¹⁰¹ During his state visit to the United States in August 2015, Chinese President Xi Jinping encouraged the United States to recognize China's MES.¹⁰² In December 2015, a Chinese Foreign Ministry official stated that continuing to use the NME approach after December 2016 would result in punishing Chinese firms "in an unfair, unjust, unreasonable and discriminative manner."¹⁰³ Because China has faced the maximum number of AD probes amongst the WTO member countries,¹⁰⁴ getting ME status from its trading partners appears to be a top Chinese priority.

Other observers note that the language in Section 15 of the CAP is confusing at best. A section of the literature argues that even after Section 15(a)(ii) expires, WTO members can continue to consider China an NME in practice until China can demonstrate eligibility for ME status under the laws of each country. For instance, it has been noted that to take recourse through alternative pricing methodologies (e.g., via the surrogate country method) against exports from a partner country (i.e., China), it is not necessary to invoke the NME provision. Instead, flexibilities incorporated in Article 2 of the ADA (i.e., under a "particular market situation") are sufficient for the same.¹⁰⁵ Others point to Section 9 of the Protocol, in which China agreed, with some exclusions, to "allow prices for traded goods and services in every sector

101. See SUTTER, *supra* note 6, at 2.

102. *Id.*

103. *Id.*; see also Li Wei, *Towards Economic Decoupling? Mapping Chinese Discourse on the China–US Trade War*, 12 CHINESE J. INT'L POL. 519 (2019); Dan Wei, *Antidumping in Emerging Countries in the Post-Crisis Era: A Case Study on Brazil and China*, 16 J. INT'L ECON. L. 921 (2013); Pasha L. Hseih, *China's Development of International Economic Law and WTO Legal Capacity Building*, 13 J. INT'L ECON. L. 997 (2010).

104. See Chad P. Bown, *China's WTO Entry: Antidumping, Safeguards, and Dispute Settlement*, in CHINA'S GROWING ROLE IN WORLD TRADE 281, 284–301 (Robert C. Feenstra & Shang-jin Wei eds., 2010); Julien Chaisse & Debashis Chakraborty, *Normative Obsolescence of the WTO Anti-Dumping Agreement—Topography of the Global Use and Misuse of Initiations and Measures*, 6 ASIAN J. INT'L L. 233, 238–45 (2016).

105. For a detailed account of this perspective, see André J. Washington, *Not So Fast, China: Non-Market Economy Status Is Not Necessary for the "Surrogate Country" Method*, 19 CHI. J. INT'L L. 260, 287–94 (2018).

to be decided by market forces.”¹⁰⁶ These observers claim that because China has not met this criterion, WTO members can continue to treat China as an NME.¹⁰⁷

The U.S. position on this issue was initially rather vague. During a congressional hearing in February 2000, the then U.S. Trade Representative (USTR) Ambassador Charlene Barshefsky stated that the bilateral agreement with China on WTO accession would allow the United States to continue using its existing NME methodology in its application of U.S. AD laws “for fifteen years after China’s accession to the WTO.”¹⁰⁸ In June 2017, during his confirmation hearings for USTR Ambassador, Robert Lighthizer claimed that a WTO ruling against the United States on China’s NME status would be “cataclysmic for the WTO.”¹⁰⁹

The U.S. policy stance against Chinese dumping has hardened over time.¹¹⁰ In 2017, through an in-depth review of Chinese policies relating to legal and institutional frameworks, restrictions on foreign investment flows, price restrictions, and consequent ramifications on the factor markets, the U.S. DOC came to the following conclusion:

[T]he Chinese government continues to maintain and exercise broad discretion to allocate resources with the goal of achieving specific economic outcomes. China’s institutional structure, and the control the Chinese government and the CCP exercise through that structure, result in fundamental economic distortions such that non-market conditions prevail in the operation of China’s economy. These non-market conditions are built upon deeply entrenched institutional and governance features of China’s Party-state, and on a legal mandate to “maintain a leading role for the state sector.” Accordingly, China is a NME country.¹¹¹

106. Colin Patch, *A Unilateral President vs. a Multilateral Trade Organization: Ethical Implications in the Ongoing Trade War*, 32 GEO. J. LEGAL ETHICS 883, 887 (2019)

107. *See id.*; SUTTER, *supra* note 6, at 2.

108. *Accession of China to the WTO: Hearing Before the H. Comm. on Ways and Means*, 106th Cong. 49 (2001) (statement of Hon. Charlene Barshefsky, Ambassador, U.S. Trade Rep.); *see also Accession of China to the WTO: Hearing Before the H. Comm. on Ways and Means*, 106th Cong. 26 (2001) (statement of Hon. Lawrence H. Summers, Secretary, U.S. Dep’t of the Treasury).

109. *President’s Trade Policy Agenda and Fiscal Year 2018 Budget: Hearing Before the S. Comm. on Finance*, 115th Cong. 12 (2018).

110. *See* Minsoo Lee et al., *Trade Effects of US Antidumping Actions Against China*, 31 ASIAN ECON. J. 3, 4 (2017); *see also* Schiavo, *supra* note 75, at 8–9.

111. U.S. DEP’T OF COM., INT’L TRADE ADMIN., A-570-053, CHINA’S STATUS AS A NON-MARKET ECONOMY 195 (2017) [hereinafter USDOC MEMO].

The aforesaid U.S. policy stance has been further stressed in the USTR report submitted to Congress in 2022 on China's WTO Compliance. The views expressed clearly underline the approach the United States will take on China's NME status in the near future:

China's government continues to employ a wide array of interventionist industrial policies and supporting measures, which provide substantial government guidance, massive financial resources and favorable regulatory support to Chinese industries across the economy, often in pursuit of specific targets for capacity and production levels and market shares . . .

China has also limited market access for imported goods and services and restricted the ability of foreign manufacturers and services suppliers to do business in China . . . The principal beneficiaries of these non-market policies and practices are China's state-owned and state-invested enterprises and numerous nominally private domestic companies that are attempting to move up the economic value chain in industries across the economy.¹¹²

2. The U.S. Stakeholder Divide on China's NME Status

Some stakeholders in the United States prefer giving ME status to China, in part to avoid damaging trade relations with China and/or to use it as leverage with China on a variety of commercial issues.¹¹³ Other groups promote ME status for China because they believe the NME methodology in AD scenarios is harmful to importing firms and U.S. consumers.¹¹⁴ Others argue that granting China ME status would weaken the United States' ability to effectively counter China's dumping practices, especially at a time when many Chinese industries, like steel, are experiencing significant overcapacity.¹¹⁵ These industries could, in turn, flood global markets with low-cost products, harming U.S. firms and workers. On September 30, 2018, Canada, along with the United States and Mexico, signed the USMCA. Article 32.10 of the USMCA requires a party to notify the other parties of its plans to enter

112. USTR REPORT TO CONGRESS, *supra* note 3, at 3.

113. *See* SUTTER, *supra* note 6, at 2.

114. *See id.*

115. *See id.*

into a free trade agreement (FTA) with an NME.¹¹⁶ If the first party signs an FTA with an NME, the other two parties can exit the USMCA and negotiate a bilateral FTA.¹¹⁷

Some may argue that because China dropped its case against the EU and elected not to prosecute its case against the United States, there is no need to spend time discussing this problem.¹¹⁸ The significance of China's NME position, however, is as crucial as ever. Because the WTO accords on the "particular market situation" (PMS) concept are ambiguous, CAP's NME Methodology provides an effective alternative for the United States, EU, and others to deal with cheap Chinese imports in the future. It is reasonable to suppose that WTO authorities will develop the PMS idea sooner or later, with the prospect of a more restrictive legal interpretation. Furthermore, while we can only speculate on the reasons behind China's decision to discontinue its lawsuit against the EU, given the unfair treatment it permits, China is quite likely to pursue the lawsuit again if the WTO Appellate Body reactivates its operations.¹¹⁹

III. CHALLENGES AND CONTROVERSIES SURROUNDING CHINA'S NME STATUS IN THE WORLD TRADE ORGANIZATION: AN ANALYSIS OF THE ANTI-DUMPING FRAMEWORK AND ACCESSION PROTOCOL

The WTO is currently grappling with a number of complex issues, including that of China's NME status. CAP previously allowed

116. Agreement Between the United States of America, the United Mexican States, and Canada, art. 32.10(2), Sept. 30, 2018 [hereinafter USMCA].

117. The USMCA contains an "anti-China" clause that outlines legal ramifications if a party negotiates or enters an FTA with an NME. Similar language is present in U.S. FTA objectives with the EU, Japan, and the United Kingdom. See Geraldo Vidigal, *A Really Big Button That Doesn't Do Anything? The Anti-NME Clause in US Trade Agreements Between Law and Geoeconomics*, 23 J. INT'L ECON. L. 45, 45 (2020) (explaining that the clause's symbolic impact surpasses its actual legal consequences). Replicating the USMCA clause in bilateral agreements is challenging, as it requires cooperation between the two non-signatories. However, it resembles two unilateral treaty remedies, suggesting its purpose is to allow termination of U.S. FTAs if the other party enters an NME FTA. Although the clause may have minimal concrete effects in agreements already allowing unilateral withdrawal, its legitimizing and signaling properties encourage a united front in the U.S.-China geo-economic dispute.

118. See *DS516: European Union—Measures Related to Price Comparison Methodologies*, WTO, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds516_e.htm (last visited Dec. 3, 2020) [hereinafter *EU—Price Comparison Methodologies*]; *DS471: United States—Certain Methodologies and their Application to Anti-Dumping Proceedings Involving China*, WTO, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds471_e.htm (last visited Nov. 1, 2019).

119. For a discussion on the operational challenges faced by WTO Appellate Body, see generally Matteo Fiorini et al., *WTO Dispute Settlement and the Appellate Body Crisis: Insider Perceptions and Members' Revealed Preferences*, 54 J. WORLD TRADE 667 (2020).

importing nations to treat China as an NME for the purposes of AD investigations on the basis of the nation's ongoing transition to an ME at the time of its WTO membership.¹²⁰ However, this controversial provision came to an end on December 11, 2016, leading to a new wave of debate over the "NME Assumption."¹²¹ The dispute over China's NME status gained heightened attention following the nation's decision to initiate WTO dispute proceedings against the EU and the United States on December 12, 2016, for continuing to label China as an NME.¹²² This action sparked an intricate discussion between trade specialists and state leaders, leading to divergent interpretations of CAP.¹²³ The expiration of the panel's power in the EU-China dispute, after a twelve-month postponement, may suggest that the debate is over.¹²⁴ China might simply have lost and must accept its position at the WTO. However, the underlying issues remain of paramount relevance for future disputes relating to contingency measures, particularly AD, within the multilateral framework.

In Section 3.A., we provide an overview of the WTO's AD framework, highlighting its significance in the context of China's NME status. Section 3.B. focuses on the divergent interpretations of CAP post-2016, providing insights into the debates and discussions that have taken place among various stakeholders.

A. *Understanding Anti-Dumping Measures: The Legal Framework and Calculations for Dumping Margins*

Article VI of the GATT, also known as the Anti-Dumping Agreement (ADA), serves as the current legal foundation for AD behavior and potential AD measures. The IA's primary approach for calculating anti-dumping charges is to compare the domestic and export prices of identical goods.¹²⁵ Comparing export prices to the country of the IA and a

120. U.S. GOV'T ACCOUNTABILITY OFF., GAO-06-231, U.S. CHINA TRADE: ELIMINATING NONMARKET ECONOMY METHODOLOGY WOULD LOWER ANTIDUMPING DUTIES FOR SOME CHINESE COMPANIES 8 (2006).

121. *See* Du, *supra* note 16, at 347.

122. *China Files Complaint Against US, EU, supra* note 94.

123. *See* HU, *supra* note 63, at 14; *see also* Du, *supra* note 16.

124. *EU—Price Comparison Methodologies, supra* note 118.

125. *See* General Agreement on Tariffs and Trade 1994 art. VI(1)(a), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187 [hereinafter GATT 1994]; Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 art. 2.1, Apr. 15, 1994, 1868 U.N.T.S. 201 [hereinafter ADA Implementation Agreement].

third country,¹²⁶ as well as comparing the export price to the calculated price of production in the place of origin,¹²⁷ are other techniques that may be utilized if the domestic price is unavailable for any reason. If there is a price disparity between the export price and the price of comparison (i.e., the margin of dumping), the complaining company can demonstrate “injury” to the domestic players.

The ADD may result from another company’s dumping conduct.¹²⁸ This tax cannot be raised above the margin of dumping.¹²⁹ The so-called “surrogate method” of calculating the dumping margin is possibly the most contentious tactic that enables investigators to disregard the domestic pricing mechanism in the exporters and substitute the same in line with their interpretation instead.

1. Article 15 of China’s Accession Protocol and the Key Issue

Two fundamental approaches can be used to deal with China for fifteen years following the beginning of its membership in the WTO, as per Article 15 of CAP. If the producer under inquiry “can clearly show that market economy conditions prevail in the industry,” they may first utilize the Chinese pricing and costs.¹³⁰ Second, according to subparagraph 15(a)(ii), the producer may adopt “a methodology that is not based on a strict comparison with domestic prices or costs in China” if they are unable to adequately demonstrate that market economy conditions are prevalent in the sector.¹³¹

Two additional prerequisites are added in paragraph 15(d). First, the entire clause in paragraph 15(a) must be ended once China is granted ME status by a certain country. Thus, the IA of such a country is not permitted to employ an AD methodology based on Article 15. Second, in any case, the provisions of subparagraph 15(a)(ii) must be re-enacted within fifteen years of the date of admission.¹³² There are at least four

126. GATT 1994 art. VI(1)(b)(i); ADA Implementation Agreement art. 2.2.

127. GATT 1994 art. VI(1)(b)(ii); ADA Implementation Agreement art. 2.2.

128. See GATT 1994 art. VI(6); ADA Implementation Agreement art. 3.

129. GATT 1994, art VI(2)–(3); ADA Implementation Agreement art. 9.3.

130. *China’s Accession Protocol to the WTO*, *supra* note 1, art. 15(a)(i).

131. *Id.* art. 15(a)(ii); see also James J. Nedumpara & Archana Subramanian, *China’s Long March to Market Economy Status: An Analysis of China’s WTO Protocol of Accession and Member Practices*, in *NON-MARKET ECONOMIES IN THE GLOBAL TRADING SYSTEMS: THE SPECIAL CASE OF CHINA* 13, 23 (James J. Nedumpara & Weihuan Zhou eds., 2018).

132. *China’s Accession Protocol to the WTO*, *supra* note 1, art. 15(d).

different interpretations of what this implies in the literature, and its meaning is uncertain, as discussed in the next section of this Article.¹³³

Any member state may employ the aforementioned methods, and in its dealings with China, the CAP stipulates specific guidelines for AD conduct so long as the member state does not grant China ME status under its domestic law. As mentioned above, there are no international standards for determining whether a nation has an ME, and the WTO texts do not define the term NME. Therefore, it seems sensible that China made the acquisition of ME status the top of its foreign policy priority and launched an aggressive diplomatic push to have its trading partners treat China as an ME.¹³⁴

China's move to engage the WTO dispute settlement body against the EU and the United States in 2016 on obtaining ME status did not result in tangible benefits. China claims that other WTO members can treat it as an NME and use pricing from a different country to determine if Chinese goods are being sold below cost because of the terms of its entrance to the WTO in 2001.¹³⁵ However, according to China, a portion of that clause expired on December 11, 2016, after which WTO trading partners are required to stop using such surrogate pricing.¹³⁶

2. The U.S. Perspective on China's NME Status

According to the U.S. DOC, China's WTO accession agreement allowed for the continued use of "alternative antidumping approaches" and did not mandate that countries instantly grant China MES.¹³⁷ According to a senior U.S. DOC official, "[t]he United States remains concerned about serious imbalances in China's state-directed economy, such as widespread production overcapacity, including in the steel and aluminum industries, and significant state ownership in many

133. See, e.g., Minyou Yu & Jian Guan, *The Non-Market Economy Methodology Shall Be Terminated After 2016*, 12 GLOBAL TRADE & CUSTOMS J. 16 (2017); Du, *supra* note 16.

134. For instance, China persuaded its RTA partner countries to grant it ME status as part of the trade deal. See Chunding Li et al., *China's Regional and Bilateral Trade Agreements*, in THE ECONOMIES OF CHINA AND INDIA: COOPERATION AND CONFLICT 175 (Manmohan Agarwal et al. eds., 2017).

135. See SUTTER, *supra* note 6, at 1.

136. See Hufbauer, *supra* note 88, at 26.

137. Ben Blanchard & David Lawder, *China Launches WTO Complaint Against U.S., EU over Dumping Rules*, REUTERS (Dec. 12, 2016), <https://www.reuters.com/article/us-china-trade-wto-idUSKBN14112M>. For a discussion on the U.S. DOC's perspective on China's NME status, see Panel Report, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, ¶¶ 14.54–14.59, WTO Doc. WT/DS379/4 (adopted Mar. 25, 2011).

industries and sectors”¹³⁸ China has not implemented the reforms required to run on free market principles. Additionally, some of the greatest levelers of AD measures under this process against China are the United States and the EU.

3. The EU Perspective on China’s NME Status

China requested talks with the EU on December 12, 2016, regarding specific aspects of the EU rule relating to the calculation of normal value for NME nations in AD cases involving Chinese goods. Specifically, import WTO members were granted a limited exception to apply a methodology not based on a precise comparison with local pricing or costs in China under paragraph 15(a) (ii) of CAP. In any case, the terms of subparagraph (a) (ii) shall expire fifteen years after the date of admission, or on December 11, 2016, according to paragraph 15(d). As a result, starting on that day, imports from China have now been subject to WTO regulations that control how WTO members determine all components of price comparability. However, unless the manufacturer proves that it satisfies the requirements outlined below, the EU continues to assess normal value using a unique calculating approach. China claimed that the EU is breaking its international responsibilities as a result. Specifically, China claimed that the measures by the EU appeared to be inconsistent with:¹³⁹

- Articles 2.1 and 2.2 of the Agreement on Implementation of Article VI of the GATT 1994 (the ADA); and
- Articles I:1 and VI:1 of the GATT 1994.

The adopted resolution signifies a considerable defeat for China, coinciding with the EU’s intensified efforts to curb China’s expansionist endeavors within the continent. Concurrently, as China permitted the dispute to expire, the EU revealed an unparalleled initiative aimed at obstructing Beijing’s subsidies for exporters.¹⁴⁰ It deserves mention that the EU employs a far more stringent method for deciding China’s

138. *Id.*

139. See Request for Consultation by China, *European Union—Measures Related to Price Comparison Methodologies*, ¶¶ 4–7, WTO Doc. WT/DS616/1 (Dec. 15, 2016).

140. Bryce Baschuk, *China Loses Landmark WTO Dispute Against EU*, BLOOMBERG (June 16, 2020), <https://www.bloomberg.com/news/articles/2020-06-16/not-with-a-bang-china-loses-landmark-wto-dispute-against-eu#xj4y7vzkg>.

ME status “since it focuses on the liberalisation of all prices, not just wages as the United States does.”¹⁴¹

The European Commission (EC) revised its AD policy in 2017 to effectively address distortions resulting from China’s NME status.¹⁴² Subsequently, the EC recommended a new strategy for dealing with China, but the EU’s twenty-eight members and the European Parliament still need to approve the proposal.¹⁴³ The recent EU Parliament recommendation has taken note of, ‘structural shortcomings of the Chinese market’ and the ‘need to improve fair conditions’, though an explicit mention of anti-dumping provisions has not been made therein.¹⁴⁴

4. India’s Stance on the Status of China

Due to two crucial reasons, the standpoint of India on the NME question is particularly intriguing: (1) India and China are partnering through a plurilateral trade agreement (PTA),¹⁴⁵ but the former has not agreed to extend ME status to the latter as China’s other FTA partners have,¹⁴⁶ and (2) India is using ADDs more frequently, most of

141. For a detailed comparison of the criteria considered by the EU and the United States for determining China’s market economy status, see Boyka Stefanova & Paskal Zhelev, *Revisiting China’s Market Economy Status: State Capitalism Within the WTO Liberal Trading System*, 14 AUSTRALIAN & N.Z. J. EUR. STUD. 94, 97–98 (2022).

142. 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 O.J. (L 338) 1, 1–2.

143. See European Parliament Resolution of 16 September 2021 on a New EU-China Strategy, 2022 O.J. (C 117) 40, 48–51.

144. See European Parliament recommendation of 13 December 2023 to the Council and the Vice-President of the Commission/High Representative of the Union for Foreign Affairs and Security Policy concerning EU-China relations (2023/2127(INI)), 2023, 12.

145. Asia-Pacific Trade Agreement, 1975, though the sectoral coverage under this RTA is limited in nature. For details, see Ram Upendra Das, *Asia-Pacific Trade Agreement: A Future Roadmap*, in THE ASIA-PACIFIC TRADE AGREEMENT: PROMOTING SOUTH-SOUTH REGIONAL INTEGRATION AND SUSTAINABLE DEVELOPMENT 499, 499 (Joong-Wan Cho & Rajan Sudesh Ratna eds., 2018).

146. On the contrary, the possibility of granting additional market access to China by partnering through a deeper RTA, namely, Regional Comprehensive Economic Partnership (“RCEP”), caused India to exit the negotiations in 2019, despite participating therein since 2013. For details, see generally Bibek Ray Chaudhuri & Debashis Chakraborty, *India’s Withdrawal from the Regional Comprehensive Economic Partnership: Deciphering Commodity Level Undercurrents*, 56 ECON. & POL. WKLY. 26 (2021).

which are directed at China.¹⁴⁷ India now continues to view China as an NME from a legal perspective, and its legal system has not undergone any modification to award China ME status after 2016.¹⁴⁸ In addition, no official declaration regarding India's plans in relation to China's ME status has been made. However, India has, on several occasions, also embraced a practical approach of not imposing ADD on imports of primary or intermediate products from China.¹⁴⁹

For China, the NME presumption by Indian policymakers is still valid.¹⁵⁰ It is interesting to note that India has awarded ME status to another trade partner, Vietnam while rejecting China's request for ME status recognition.¹⁵¹ The EU and U.S. approaches are considered to be the models for the Indian law on NME provisions.¹⁵² Similar to the EU, the regulation includes a list of countries for which the NME presumption is true.¹⁵³ In these countries, the inquiry will use the NME Methodology until the company or industry can demonstrate that it adheres to ME principles. In the latter scenario, the firm(s) or industry in question can receive ME treatment within the confines of that

147. For details, see Debashis Chakraborty & Julien Chaisse, *Tightrope Walk Between Faith and Skepticism: India's 'Contingency Plan' for Free Trade*, 15 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 91, 113 (2020).

148. From a practical standpoint, in a number of disputes since December 2016, Directorate General of Trade Remedies ("DGTR") in India has considered China an NME during its investigations. For instance, during a recent DGTR report in August 2022, China was considered an NME and constructed normal value was used. For details, see Ministry of Commerce and Industry of India, Directorate General of Trade Remedies, Notification Final Finding: Mid-Term Review of Anti-Dumping Duty Imposed on Imports of Aluminium Alloy Road Wheels Originating in or Exported from China PR, F. No. 7/12/2021-DGTR, ¶¶ D(8)(j)–(k) (Issued on August 30, 2022).

149. For instance, in October 2022, the Ministry of Finance, Government of India, did not accept the recommendations made by the Directorate General of Trade Remedies (DGTR) on imposition of ADD on a chemical product being imported from China, which is used as a raw material for manufacture of pharmaceutical products. See *Govt Not to Impose Anti-Dumping Duty on Chinese Chemical*, ECON. TIMES (Oct. 26, 2022), <https://economictimes.indiatimes.com/news/economy/foreign-trade/govt-not-to-impose-anti-dumping-duty-on-chinese-chemical/articleshow/95099166.cms>.

150. See Puccio, *supra* note 82, at 19–20.

151. See *India Grants Market Economy Status to Vietnam*, HINDU (Oct. 25, 2009), <https://www.thehindu.com/news/national/India-grants-market-economy-status-to-Vietnam/article16888472.ece>.

152. See Puccio, *supra* note 82, at 20.

153. Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995, Rule 8, Annex 1.

specific AD case (i.e., every probe must include a verification of the firm(s) or industry's status).¹⁵⁴

B. *The Ambiguous WTO Accession Protocol and the Challenges of China's NME Status in Anti-Dumping Disputes*

The status of China as an ME or NME has been a contentious issue with significant implications for international trade. CAP, which governed China's entry into the WTO, has been subject to conflicting interpretations regarding China's automatic graduation to ME status after a specified period. This text explores the ambiguity surrounding CAP and debunks the notion of China's automatic ME status. Additionally, it examines the legal implications of NME status in both the United States and the EU, highlighting the alternative methodologies employed in AD investigations. The complex dynamics between the United States, China, and the WTO further complicate the future of the multilateral trade regime.

1. The Ambiguity of China's Accession Protocol: Debunking the Myth of Automatic Market Economy Status

CAP's ambiguous wording has led to conflicting interpretations. In the bilateral agreement concerning China's accession to the WTO, the United States and China expressly consented to preserving their AD methodology, allowing China to be treated as an NME in future AD cases without legal challenge risk, which served as the foundation for the CAP.¹⁵⁵

When China joined the WTO, the EC's official position stated that "specific procedures for dealing with cases of alleged dumping by Chinese exporters, which may not yet be operating in normal market economy conditions, will remain available for up to fifteen years after China enters the WTO."¹⁵⁶ China has pushed for this viewpoint. It asserted that, for the purposes of AD investigations, it must be

154. *Id.*

155. After China joined the WTO, this clause was agreed to be in effect for 15 years. See *Summary of U.S.- China Bilateral WTO Agreement*, NAT'L ARCHIVES, <https://clintonwhitehouse4.archives.gov/WH/New/WTO-Conf-1999/factsheets/fs-006.html#:~:text=Summary%20of%20U.S.%2D%20China%20Bilateral%20Agreement&text=The%20Agreement%20provides%20increased%20access,be%20completed%20by%20January%202004> (last visited Jan. 4, 2017).

156. *Proposal For A Council Decision Establishing The Community Position Within The Ministerial Conference Set Up By The Agreement Establishing The World Trade Organization On The Accession Of The People's Republic Of China To The World Trade Organization*, ¶55, COM (2001) 517 final (Feb. 26, 2002).

immediately considered an ME following the termination of Section 15 (a) (ii).¹⁵⁷

However, as the deadline approached, novel interpretations of the consequences of the expiry of subparagraph a(ii) were put forward. It was argued that Section 15 does not state that China automatically becomes an ME after December 2016.¹⁵⁸ Instead, it merely calls for the termination of one section provision that sets forth a method for WTO members to utilize in determining dumping margins for goods exported from China. It suggests that the introduction to paragraph (a) and its first subparagraph, as well as all other provisions of Section 15, continue to be in effect even after December. These clauses allow WTO members to continue using Chinese prices and require Chinese producers to prove that ME conditions are prevalent in their sector in order to have their prices and costs taken into consideration. Additionally, clause (d), which requires China to demonstrate that it is a market economy in conformity with WTO members' domestic legislation, is left in place.¹⁵⁹

Therefore, it has been assumed that the remaining clauses need China to show that it is an ME under the domestic law of an importing country even after December 11, 2016, and in case of its failure to prove the same, the other nations are free to treat it as an NME. The meaning of the remaining clauses of Section 15 would be rendered meaningless by the opposite interpretation. The WTO Appellate Body's custom of reading treaties in accordance with "the principle of effective treaty interpretation requires us to give meaning to every phrase of the provision" supports this position.¹⁶⁰ In light of these arguments, the concept of China's automatic graduation to ME status fifteen years after its accession to WTO was simply equated to "an urban myth that seems to have gone global."¹⁶¹

2. The Legal Implications of NME Status

The classification of countries as NMEs by major economic powers, like the United States and the EU, plays a significant role in shaping

157. See SUTTER, *supra* note 6, at 2.

158. See BERNARD O'CONNOR, THE MYTH OF CHINA AND MARKET ECONOMY STATUS IN 2016, at 1, <http://worldtradelaw.typepad.com/files/oconnorresponse.pdf>.

159. See *id.* at 2–4.

160. Appellate Body Report, *Canada—Certain Measures Affecting the Renewable Energy Generation Sector*, ¶ 5.57, WTO Doc. WT/DS412/AB/R, WT/DS426/AB/R (adopted May 24, 2013).

161. Bernard O'Connor, *Market-Economy Status for China Is Not Automatic*, CTR. FOR ECON. POL'Y (Nov. 27, 2011), <https://cepr.org/voxeu/columns/market-economy-status-china-not-automatic>.

global trade policies and practices. This status critically affects AD investigations and the choice of valuation methods in international trade. Against this backdrop, the WTO faces challenges in harmonizing these national approaches with its own rules and dispute resolution mechanisms, especially in the context of major global economies. The following analysis focuses on the legal ramifications of NME status, particularly discussing its implications within the frameworks of the United States, the EU, and the WTO, and the broader impact on international trade dynamics.

When a nation is classified as an NME under the 1930 Tariff Act, the United States adopts a stance that such a country does not adequately adhere to market principles to allow for the use of its prices and costs in the U.S. DOC's AD analysis.¹⁶² This designation triggers the use of alternative methodologies for normal value calculations in AD investigations, eschewing reliance on the exporting country's domestic market prices. The status, once conferred, remains until the U.S. DOC decides otherwise.¹⁶³ This classification signals a judgment that the country's economic practices do not align with free-market principles, a stance that has significant repercussions for international trade. By adopting alternative methodologies for determining normal value in AD investigations, the United States effectively bypasses the domestic market prices of the exporting NME. This approach reflects concerns about potential market distortions or government interventions in such economies. The persistence of this status until actively revoked by the U.S. DOC underscores its weight in trade policy, embedding a level of uncertainty and complexity in trade relations with NME-designated countries.

Similarly, the EU, upon assigning NME status in accordance with its legal framework, permits the EC to employ distinct methodologies for calculating AD margins.¹⁶⁴ Typically, the EU depends on a surrogate country for normal value calculations, underpinned by a belief that domestic prices in NMEs are not reliable.¹⁶⁵ By employing surrogate countries for normal value calculations in AD margins, the EU strategically addresses concerns about unreliable domestic prices in NMEs. This practice reflects a cautious stance towards economies where

162. USDOC MEMO, *supra* note 111, at 4, 7.

163. Tariff Act of 1930, 19 U.S.C. § 1677(18)(C)(i).

164. LAURA PUCCIO, EUR. PARLIAMENTARY RSCH. SERVICE, CALCULATION OF DUMPING MARGINS: EU AND US RULES AND PRACTICES IN LIGHT OF THE DEBATE ON CHINA'S MARKET ECONOMY STATUS 5 (2016).

165. See André J. Washington, *Not So Fast, China: Non-Market Economy Status is Not Necessary for the "Surrogate Country" Method*, 19 CHI. J. INT'L L. 260, 274 (2018).

market forces are perceived to be significantly influenced or controlled by government entities.

The EU and the United States exhibit both convergences and divergences in their approach to NME status, particularly concerning China. Both regions use alternative methodologies for AD investigations when dealing with NMEs, indicating a shared skepticism towards economies they perceive as state-influenced or lacking in market principles. However, their methods diverge: the United States focuses on a broader range of economic factors, while the EU typically employs surrogate countries for value calculations. This difference implies varied challenges for China in addressing trade disputes. China must navigate these distinct approaches, which could lead to inconsistent rulings and affect its global trade strategies.

In the U.S. and EU frameworks, NME status serves as a critical juncture, enabling the adoption of alternative methods for normal value assessment during AD inquiries. Specifically, in the United States, under Section 1677 18(B) (iv) of the Tariff Act of 1930, normal values in AD cases involving NME countries are ascertained based on the production factors in nations recognized as market economies by the U.S. DOC.¹⁶⁶ Notably, this NME status does not appear to carry any other legal significance under U.S. legislation.¹⁶⁷

The implications of NME status under the WTO regime are less definitive. The only clear aspect is that for countries meeting the criteria of the Second Ad Note of Article VI of the GATT, “special difficulties” may arise, suggesting that strict price comparisons with domestic markets in these nations might not always be appropriate.¹⁶⁸ The United States interprets this as a green light from the GATT to explore alternative approaches when strict comparisons fall short.¹⁶⁹ Consequently, this interpretation of NME status opens doors to varied methodologies for normal value calculations. However, whether these methods are applicable to “lesser form NMEs” remains a topic of debate.

The ongoing geopolitical and economic rivalry between the United States and China presents a formidable challenge to the sustainability

166. 19 U.S.C. § 1677(18) (B) (iv).

167. See Vera Thorstensen et al., *WTO—Market and Non-Market Economies: The Hybrid Case of China*, 1 *LAT. AM. J. INT’L TRADE L.* 765, 778 (2013).

168. GATT 1994, annex I, ad art. VI ¶ 2.

169. Third Party Submission of the United States of America, *European Union—Measures Related to Price Comparison Methodologies*, ¶¶ 112–18, WTO Doc. WT/DS516 (Nov. 21, 2017) [hereinafter U.S. Legal Interpretation].

of the WTO's dispute resolution mechanism.¹⁷⁰ China's WTO membership and its NME status are poised to continuously test the resilience of the multilateral trade system. Despite appearances suggesting resolution due to the expiration of certain disputes, the WTO currently navigates precarious waters, leaving its response to the complexities introduced by China's membership uncertain.

The protracted debate over China's NME status within the WTO and its implications for AD disputes signify profound systemic and legal consequences. The ambiguity in China's WTO Accession Protocol has not only challenged the existing frameworks of major economies, like the United States and the EU but also highlighted the limitations in the WTO's ability to mediate complex economic and legal disputes. This scenario underscores a pressing need for clearer legal standards and more robust mechanisms within the WTO to address the evolving landscape of global trade, ensuring fair competition while accommodating diverse economic models. The resolution of China's NME status is thus pivotal, not only for the involved nations but for the integrity and efficacy of the international trade system as a whole.

The debate surrounding China's NME status within the WTO, particularly in the context of AD disputes, leads directly into the next phase of analysis in Section IV. This section builds upon the established legal and systemic foundations to explore the practical applications of these frameworks. It aims to critically examine how the principles and controversies discussed thus far have manifested in actual WTO AD actions against China, providing a comprehensive understanding of the real-world implications of these complex legal dynamics.

IV. ANTI-DUMPING ACTIVISM AGAINST CHINA: AN ANALYSIS OF WTO ANTI-DUMPING INITIATIONS AND MEASURES

This Article intends to analyze the state of AD activism against the key exporting nations from January 1995 to June 2022 with the help of the following [Table 1](#).¹⁷¹ To obtain a temporal perspective, the period

170. See Center for Strategic and International Studies, *The WTO: Looking Forward*, YouTube (Oct. 12, 2018), https://www.youtube.com/watch?v=gbUCpb7cdZE&ab_channel=CenterforStrategic%26InternationalStudies ("We really need to recognize that the economic system of China is not compatible with WTO norms" and "the WTO as currently constituted is not equipped [to deal with China]."); Mark Wu, *The "China, Inc." Challenge to Global Trade Governance*, 57 HARV. INT'L L. J. 261, 263–64 (2016).

171. The data for the analysis has been drawn from: *Anti-Dumping*, WTO, https://www.wto.org/english/tratop_e/adp_e/adp_e.htm (last visited Nov. 28, 2023) [hereinafter WTO Anti-Dumping Gateway].

of analysis has been divided into four periods. The 1995–2000 period can be considered the early phase of the WTO when countries were adjusting to the new multilateral architecture and cases of potential violation of WTO agreements were relatively high. The 2001–2005 period represents a time when, in the aftermath of the Doha Ministerial (2001), countries implemented WTO-led reforms on one hand and becoming more accustomed to the WTO architecture, lodged many disputes on the other. During the 2006–2010 period, in the aftermath of the Hong Kong Ministerial (2005), WTO negotiations intensified, but after the U.S. sub-prime crisis in 2008–2009, the pace of reforms eventually slowed. Over the 2011–2015 period, the enthusiasm for reforms remained limited for various reasons, as reflected in the modest outcomes reached at the WTO Ministerial Meetings during this period.¹⁷² The continuation of several WTO-incompatible practices, including the ones related to AD measures, persisted from 2016 to 2020.¹⁷³ The average AD initiations over the five periods from 1995–2020 are reported in the table, while the corresponding final AD measures are presented in parentheses. Given the disruption in trade flows and the deviations from the earlier trend, the scenario for the post-COVID-19 years (i.e., 2021 and 2022) has been reported separately.

Table 1 shows that for all the reported periods, China topped the list of countries that faced AD investigations on their exports. The scenario was not different, even during the first reported period (1995–2000) when China was a non-member of the WTO forum. A similar trend emerges for the imposition of final AD measures as well, reported in the parentheses. While other emerging economies, namely Russia and Vietnam, have also witnessed AD investigations against their exports during the study period, there is a stark difference in the number of cases faced by these three economies. One key reason behind the high number of AD cases initiated and the final duty imposed against China has been the invocation of NME provisions during investigations by several “developed” and developing countries.

172. See *25 Years of the WTO*, WTO, https://www.wto.org/english/thewto_e/25y_e/25ytimeline_e.htm (last visited Dec. 19, 2023).

173. See *WTO Anti-Dumping Gateway*, *supra* note 171.

A. TABLE 1: ANALYSIS OF ANTI-DUMPING INITIATIONS AGAINST KEY EXPORTERS (JANUARY 1, 1995 TO JUNE 30, 2023)

Exporter	Average Scenario					2021	2022	2023 (up to June 20, 2023)
	1995- 2000	2001- 2005	2006- 2010	2011- 2015	2016- 2020			
China	35 (25)	52 (39)	67 (50)	64 (45)	72 (50)	46 (66)	38 (35)	23 (11)
Korea, Republic of	21 (11)	20 (14)	10 (7)	19 (11)	21 (15)	12 (14)	4 (11)	3 (2)
Chinese Taipei	13 (8)	16 (10)	9 (8)	14 (10)	10 (6)	7 (9)	2 (5)	5 (1)
United States	15 (9)	15 (9)	12 (6)	10 (8)	8 (5)	4 (5)	1 (3)	1 (1)
India	10 (6)	13 (6)	5 (5)	11 (5)	10 (7)	9 (11)	8 (5)	5 (5)
Thailand	9 (6)	11 (7)	9 (6)	9 (7)	10 (6)	6 (8)	4 (3)	4 (2)
Indonesia	10 (6)	12 (7)	8 (7)	6 (4)	10 (5)	5 (13)	3 (4)	1 (3)
Japan	12 (10)	12 (8)	5 (4)	7 (5)	8 (6)	3 (3)	0 (1)	3 (0)
Russian Federation	10 (8)	9 (7)	4 (3)	4 (2)	8 (5)	10 (9)	1 (4)	1 (1)
Malaysia	5 (3)	8 (3)	7 (5)	5 (4)	11 (5)	6 (15)	1 (5)	4 (1)
Brazil	9 (8)	7 (4)	5 (3)	5 (2)	7 (5)	4 (2)	2 (3)	2 (2)
European Union	5 (3)	7 (6)	5 (2)	5 (5)	6 (3)	4 (4)	1 (2)	0 (0)
Turkey	4 (2)	4 (3)	3 (2)	6 (3)	8 (4)	6 (11)	4 (2)	3 (2)
Viet Nam	1 (1)	4 (2)	2 (2)	6 (5)	10 (6)	8 (11)	4 (3)	3 (3)
Total	258 (159)	267 (181)	195 (133)	225 (144)	264 (165)	186 (287)	89 (108)	76 (53)

Source: Authors' analysis based on WTO AD Gateway data¹⁷⁴

The average number of AD measures faced by China fluctuated between 2011 and 2015 and came down to some extent after 2020. While the decline in the number of cases can be in part explained by the post-pandemic dynamics, it has been argued that several Chinese entrepreneurs, in the face of both AD activism from the “developed”

174. *Id.*

countries (primarily the United States) and cost considerations, have gradually shifted production outside of China.¹⁷⁵ Therefore, the apparent decline in AD activism against the Chinese players needs to be viewed with a wider canvas in mind:

[T]he evasion of US anti-dumping duties by some Chinese exporters through trade rerouting via third countries or regions. Using detailed monthly trade data reported by China and the US Customs during the period of 2002–06, we find that US anti-dumping actions against China lead to a stronger positive correlation between US imports from third countries and Chinese exports to the same third countries. Such a positive correlation is more pronounced for the products subject to anti-dumping duties (treatment groups) than similar products not subject to these duties (control groups). The evidence is stronger for less-differentiated products whose certificates of origins are easier to be modified and is stronger for third countries where the rerouting cost is low.¹⁷⁶

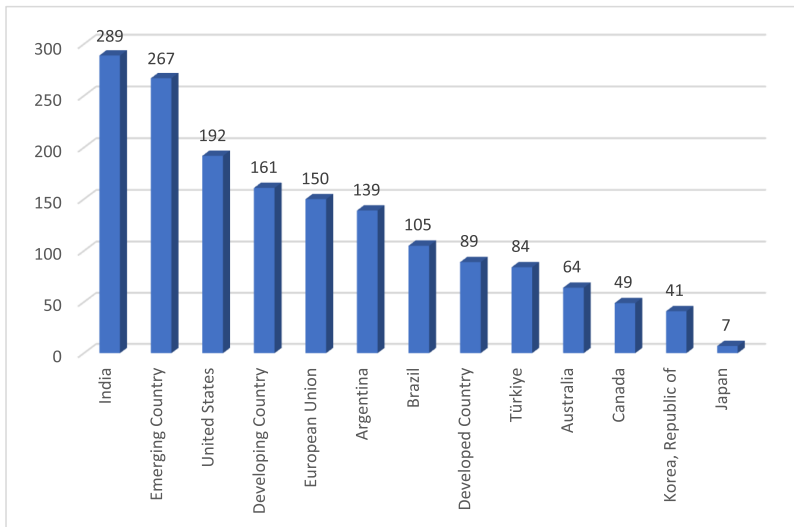
The analysis further intends to judge the state of cumulative AD initiation and final measures against China by the key economies with the help of [Figures 1](#) and [2](#), respectively. For the purpose of this analysis, the AD initiation and final measure figures for the leading economies (e.g., EU, India, United States) have been reported, but for the other countries, who are moderately active against Chinese exports, an appropriate group has been assigned (i.e., “developed,” “developing” and emerging countries). While the high-income countries (e.g., Canada, Singapore) have been placed in the “developed” category, the low-to-middle income countries (e.g., Chile, Philippines) are placed in the “developing” segment. Several upper-middle-income countries experiencing higher growth rates with considerable future growth potential (e.g., Mexico, Russia) have been put in the “emerging” category.

175. For details on the shift of Chinese production to Southeast Asia, see Chun Yang, *Relocating Labour-Intensive Manufacturing Firms from China to Southeast Asia: A Preliminary Investigation*, 3 *BANDUNG J. GLOB. S.* 1, 2 (2016).

176. Xuepeng Liu & Huimin Shi, *Anti-Dumping Duty Circumvention Through Trade Rerouting: Evidence from Chinese Exporters*, 52 *WORLD ECON.* 1427, 1427 (2018).

Figure 1 shows that India, a “developing” country, has topped the list in terms of AD initiations against China, closely followed by the “emerging” economies, “developing” countries, and the United States and the EU, respectively. Several other key emerging economies, namely Argentina, Brazil, and Turkey, are also among the importing nations that have closely probed Chinese exports in the past. It appears that, barring the exception of the United States and the EU, other “developed” countries have not been very active against Chinese exports on AD grounds. Interestingly, LDCs have generally not challenged Chinese export on the AD front and have never invoked the NME clause.

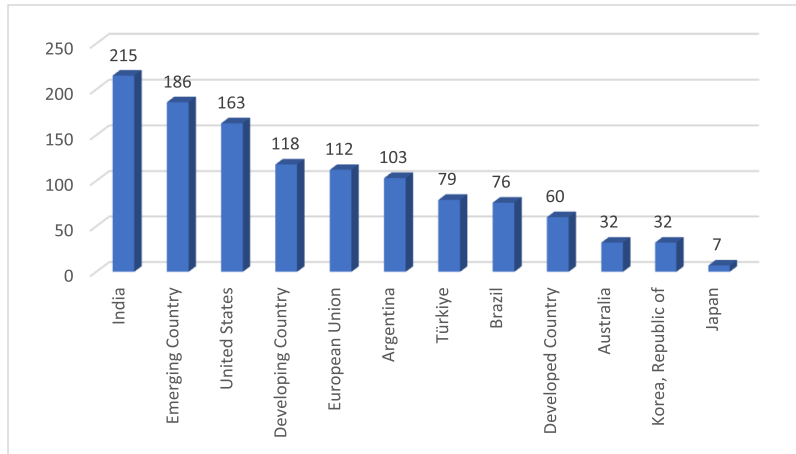
B. Figure 1: Analysis of Anti-Dumping Initiations Against China (January 1, 1995 to June 30, 2023)



Source: Authors’ analysis based on WTO AD Gateway data¹⁷⁷

177. The analysis for the figure has been drawn from: WTO Anti-Dumping Gateway, *supra* note 171.

C. Figure 2: Analysis of Anti-Dumping Final Measures Against China (January 1, 1995 to June 30, 2023)



Source: Authors' analysis based on WTO AD Gateway data¹⁷⁸

Figure 2 investigates the corresponding scenario on final AD measures. A similar picture emerges here as well. Looking into the conversion rate of the AD initiations into final AD measures (i.e., expressing the final measures as a percentage of corresponding initiation statistics), an interesting scenario emerges. The rate is highest for Turkey (94.05 percent), followed by the United States (87.17 percent), Japan (85.71 percent), emerging economies (85.33 percent), India (77.57 percent), EU (75.00 percent), Argentina (73.13 percent), Brazil (72.82 percent), and South Korea (70.00 percent). In line with the views expressed by the EU, India, and the United States, Turkey also does not consider China to be an ME.¹⁷⁹

From the analysis, it appears that the “developed,” “developing,” and “emerging” countries have targeted Chinese exports in the past, at times taking recourse to the NME provision. However, in the post-2016 period, it is India, the EU, and the United States who have been most eager to maintain the NME provision in computing AD duties as they pursue investigations against China.

178. *Id.*

179. See E Kutay Çelebi et al., *In Review: Recent Trade Law Developments in Turkey*, LEXOLOGY (Aug. 26, 2022), <https://www.lexology.com/library/detail.aspx?g=02d3d76c-b6d5-43a3-9d92-5e1beb795005>.

V. THE STATE OF SUBSIDY AND COUNTERVAILING MEASURES AGAINST CHINA: AN ANALYSIS OF WTO STATE OF SUBSIDY AND COUNTERVAILING MEASURES ACTIVISM

The analysis next focuses on the state of SCM activism against the key exporting nations from January 1995 to June 2022, as depicted in Table 2.¹⁸⁰

A. TABLE 2: ANALYSIS OF SUBSIDY AND COUNTERVAILING DUTY INITIATIONS AGAINST KEY EXPORTERS (JANUARY 1, 1995 TO JUNE 30, 2023)

Exporter	Average Scenario					2021	2022	2023 (up to 30 June 2023)
	1995- 00	2001- 05	2006- 10	2011- 15	2016- 20			
China	0 (0)	3 (2)	8 (7)	11 (7)	18 (13)	7 (16)	4 (6)	5 (0)
India	6 (3)	4 (4)	1 (1)	5 (2)	4 (4)	3 (4)	4 (3)	3 (2)
Indonesia	2 (2)	2 (1)	1 (1)	2 (0)	2 (1)	2 (0)	2 (2)	0 (1)
Korea, Republic of	3 (2)	1 (2)	1 (1)	2 (1)	1 (2)	1 (1)	0 (1)	1 (0)
Turkey	1 (1)	1 (0)	0 (0)	3 (2)	3 (1)	0 (3)	2 (0)	0 (0)
Thailand	2 (2)	1 (1)	1 (0)	1 (0)	2 (1)	0 (1)	2 (1)	0 (1)
United States	1 (1)	1 (0)	2 (2)	2 (2)	2 (1)	0 (0)	0 (0)	0 (0)
Viet Nam	0 (0)	0 (0)	1 (1)	2 (1)	3 (2)	0 (2)	0 (1)	0 (0)
Malaysia	2 (2)	1 (0)	1 (0)	2 (0)	2 (1)	1 (3)	1 (1)	0 (1)
European Union	2 (2)	2 (1)	1 (1)	1 (1)	0 (0)	0 (0)	0 (0)	0 (0)
Canada	1 (0)	2 (2)	0 (0)	1 (1)	2 (1)	0 (0)	0 (0)	0 (0)
Brazil	1 (2)	2 (2)	1 (0)	2 (0)	1 (2)	0 (0)	0 (0)	0 (0)
Argentina	3 (1)	1 (3)	1 (0)	1 (0)	1 (1)	0 (0)	1 (0)	0 (1)
Chinese Taipei	3 (3)	1 (0)	0 (0)	1 (1)	0 (0)	0 (0)	0 (0)	0 (0)
Total	20 (11)	13 (9)	14 (9)	31 (12)	44 (26)	18 (41)	19 (18)	10 (6)

Source: Authors' analysis based on WTO SCM Gateway data¹⁸¹

180. The data for the analysis has been drawn from: *Subsidies and Countervailing Measures*, WTO, https://www.wto.org/english/tratop_e/scm_e/scm_e.htm (last visited Nov. 28, 2023) [hereinafter WTO Subsidies and Countervailing Measures Gateway].

181. *Id.*

The increase in SCM initiations and final measures against Chinese exports between 2001 and 2020 can be attributed to China's failure to fulfill its reform promises. Specifically, China had informed WTO members that it would progressively work towards providing a full notification of subsidies beyond the scope of Annexes 5A and 5B of CAP, as stipulated in Article 25 of the Agreement on Subsidies and Countervailing Measures (ASCM).¹⁸² However, China has not fulfilled this obligation, which includes subsidies provided by government-owned banks (e.g., policy loans, automatic rollover of unpaid principal and interest, forgiven non-performing loans, selective use of below-market interest rates), tax subsidies, investment subsidies, and sub-national government subsidies that favor exporting firms. Additionally, subsidies granted to the telecommunications, footwear, coal, and shipbuilding sectors have been mentioned. The 2018 Trade Policy Review also indicates that China has not fulfilled its obligation of "full notification," as evidenced by its subsidies under different categories.¹⁸³

This analysis further intends to judge the state of cumulative SCM initiation and final measures against China by key economies and groupings, as shown in [Figures 3](#) and [4](#), respectively. These show that "developed" countries generally have taken up the SCM route to challenge China, while their "developing" counterparts and "emerging" economies have remained far too inert. This can be explained by the fact that proving WTO-incompatibility of subsidy policies is far more complex vis-à-vis AD policies.¹⁸⁴ The associated cost dynamics, rather than perceived WTO compliance of the Chinese subsidy regime, might have discouraged the "developing" and "emerging" countries from escalating trade discord on the grounds of state intervention and invoking the NME clause. The reason for the United States' significant representation in both [Figures 3](#) and [4](#) is attributed to a change in political regime that occurred from 2007 onward. In particular, nearly half of all U.S. CVD orders currently in force are aimed at China. This is significant because all the CVD orders the United States has imposed on China have been implemented since 2007 when the United States changed its stance and began imposing CVDs on NMEs.¹⁸⁵

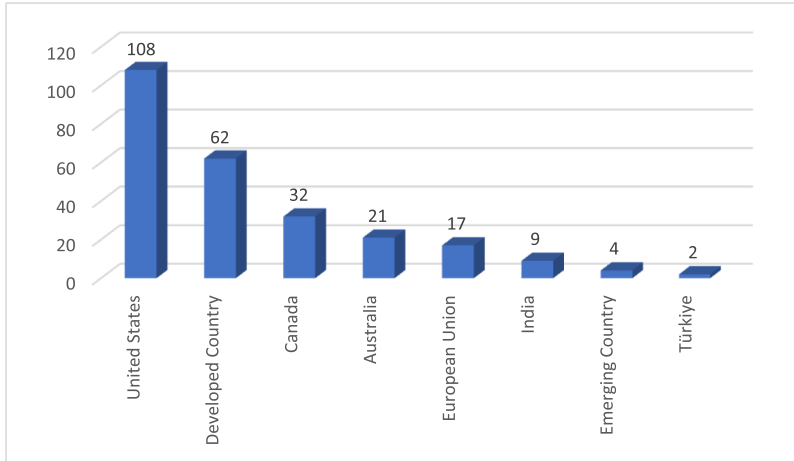
182. Hu, *supra* note 63, at 18.

183. See WTO, *Trade Policy Review—China*, WTO Doc. No. WT/TPR/S/375 12 (2018).

184. See Chad P. Bown & Jennifer A. Hillman, *WTO'ing a Resolution to the China Subsidy Problem*, 22 J. INT'L ECON. L. 557, 570 (2019).

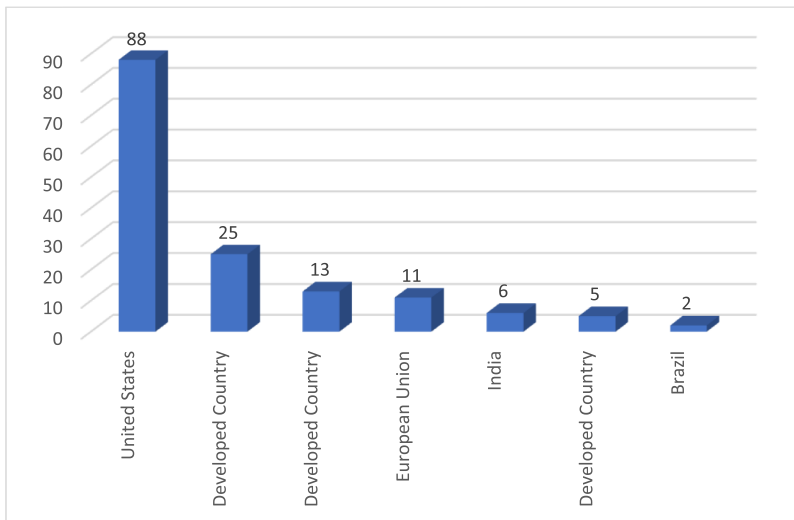
185. "China is the target of nearly half of all U.S. CVD orders currently in force . . . All the U.S. CVD orders on China have been put in place since 2007, when the United States reversed its long-standing opposition to placing CVDs on nonmarket economies." CHRISTOPHER A. CASEY & LIANA WONG, CONG. RSCH. SERV., R46882, TRADE REMEDIES: COUNTERVAILING DUTIES 14 (2021).

B. Figure 3: Analysis of Subsidy and Countervailing Limitations Against China (January 1, 1995 to June 30, 2023)



Source: Authors' analysis based on WTO SCM Gateway data¹⁸⁶

C. Figure 4: Analysis of Subsidy and Countervailing Final Measures Against China (January 1, 1995 to June 30, 2023)



Source: Authors' analysis based on WTO SCM Gateway data¹⁸⁷

186. The data for the analysis has been drawn from: WTO Subsidies and Countervailing Measures Gateway, *supra* note 180.

187. *Id.*

It is widely held that the slow pace of reform in China on reaching ME status is a function of state-dominated capitalism, which has been operational in the dragon for a long period.¹⁸⁸ In the early phase of liberalization, SOEs contributed significantly to the development process, and their importance to China's GDP and employment, despite a waning trend, is still considerable.¹⁸⁹ Given the varying efficiency of SOEs¹⁹⁰ and the need to generate export surplus,¹⁹¹ the role of subsidies, both domestic as well as export-focused, became important instruments for policymakers.¹⁹² Government support in general and specifically to the manufacturing sector is likely to continue with the 2015 launch of the "Made in China 2025 Plan", which allows for "problematic tactics such as direct government intervention, massive subsidies, investments and acquisitions in foreign markets by SOEs, and forced technology transfers."¹⁹³ This set of policy supports is likely to provide China with a competitive edge in a wide array of manufacturing segments like new information technology-related machinery and semiconductors, aerospace equipment, electric vehicles, high-tech ships, agricultural machinery, and medical devices, among others, by 2025. This could ultimately provide the dragon with a commanding position in corresponding global markets by 2049.¹⁹⁴ Given the potential disruption in exports, it will be difficult for several countries aspiring to maintain or

188. See Stefanova & Zhelev, *supra* note 141, at 99, 102.

189. See CHUNLIN ZHANG, WORLD BANK, HOW MUCH DO STATE-OWNED ENTERPRISES CONTRIBUTE TO CHINA'S GDP AND EMPLOYMENT? 1, 7 (2019), <https://documents1.worldbank.org/curated/en/449701565248091726/pdf/How-Much-Do-State-Owned-Enterprises-Contribute-to-China-s-GDP-and-Employment.pdf>.

190. For a detailed review on the importance of SOEs in the Chinese economy, see Karen Jingrong Lin et al., *State-Owned Enterprises in China: A Review of 40 Years of Research and Practice*, 13 CHINA J. ACCT. RSCH. 31, 33 (2020).

191. See SHINYA MATANO, MITSUI & CO. GLOB. STRATEGIC STUD. INST., THE IMPACT OF CHINA'S INDUSTRIAL SUBSIDIES ON COMPANIES AND THE RESPONSE OF JAPAN, THE UNITED STATES, AND THE EUROPEAN UNION 2–3 (2021).

192. For an account of state intervention through subsidies in China, see Fabrice Defever & Alejandro Riaño, *China's Pure Exporter Subsidies* 1–2 (Forum Int'l Wissenschaft, Working Paper No. 121, 2013); Richard S. Eckaus, *China's Exports, Subsidies to State Owned Enterprises and the WTO* 2–9 (Mass. Inst. of Tech. Dep't of Econ., Working Paper No. 04-35, 2004); Sourafel Girma et al., *Can Production Subsidies Explain China's Export Performance? Evidence from Firm Level Data* 5–7 (Kiel Inst. for the World Econ., Working Paper No. 1442, 2008).

193. Henry Gao, *WTO Reform and China: Defining or Defiling the Multilateral Trading System?*, 62 HARV. INT'L L.J. 1, 17–18 (2021).

194. *Id.*

grow their position in global manufacturing exports to recognize China as an NME.¹⁹⁵

VI. STRATEGIC INTERACTIONS AND POWER DYNAMICS IN INTERNATIONAL TRADE:
A GAME-THEORETIC ANALYSIS OF THE NME STATUS OF CHINA

The remaining part of the Article employs a game-theoretic framework for analyzing the possible responses of different groups of countries to China's continuation of manufacturing sector intervention and invocation of the NME clause. There exists a rich literature on the application of game theory for deciphering international trade and political undercurrents.¹⁹⁶ Global trade is influenced by different strategic choices made by countries, and game theory can explain their optimal decision choices efficiently.¹⁹⁷ As the game-theoretic framework allows the logic behind the decision outcome to be viewed in a structured manner, it is extensively adopted for explaining country perspectives in light of multilateral legal architecture.¹⁹⁸

This section, therefore, provides the rationale behind certain economies' decisions to highlight the NME status of China, including post-2016. For instance, there may be some economies that are directly or indirectly influenced by active interaction with China, resulting in some form of dependency.¹⁹⁹ For these economies, calling out China as an NME may not be an optimal choice as it may have costly aftershocks. However, for bigger economic players like the United States and the EU, invoking NME status for China may have larger as well as long-term reputational impacts and domestic gains.²⁰⁰ Therefore, the power dynamics in strategic interactions between China and the other economies play a crucial role in shaping their stances on the NME status of China. India is an interesting case where the power equation between the two nations is unequal on

195. For an account of the US thought process and response pattern, see KAREN M. SUTTER, CONG. RSCH. SERV., IF10964, "MADE IN CHINA 2025" INDUSTRIAL POLICIES: ISSUES FOR CONGRESS (2023).

196. See, e.g., Duncan Snidal, *The Game Theory of International Politics*, 38 WORLD POL. 25 (1985).

197. See Milton Mueller & Peter Lovelock, *The WTO and China's Ban on Foreign Investment in Telecommunication Services: A Game-Theoretic Analysis*, 24 TELECOMM. POL'Y 731, 733 (2000).

198. See Hojjat Khodaeyfam, & Alireza Arashpour, *Legal Framework of WTO from the Perspective of Game Theory in International Law*, 35 INT'L L. REV. 277, 277 (2018).

199. For a general discussion on the emergence of possible dependency of LDCs from their growing interaction with China, see Motolani Agbebi & Petri Virtanen, *Dependency Theory – A Conceptual Lens to Understand China's Presence in Africa?*, 44 F. FOR DEV. STUD. 429, 450 (2017).

200. For instance, antidumping actions in the United States lead to a reduction in the volume and value of imports from China on one hand and substitution of imports from China by other countries on the other. See Lee, *supra* note 110, at 5.

the one hand, and there is trade dependency on the other hand.²⁰¹ Yet, India's orientation mimics "developed" nations' actions and does not follow a submissive strategy as practiced by dependent nations (DNs). This shows that the strategic interaction between China and other nations is not identical and that the stances on the NME question thus needs to be viewed through the following three game theoretic frameworks.

A. *The Interaction Between Dependent Nations and China*

The two players in this framework are a representative dependent nation (*DN*) and China (*C*). Because the degree of dependency between the two nations is common knowledge, the strategy set and the payoffs are also known to both players, making the framework a complete information simultaneous move game. Despite the fact that the game is a complete information type, a *DN* has a choice of calling China either a *market economy (ME)* or a *non market economy (NME)*. Therefore, we can write the action set of *DN* as $A_D : \{NME, ME\}$. Similarly, China can choose to *react (R)* or to *not react (NR)* in response to the actions taken by the *DN*, making the strategy profile of China $A_C : \{R, NR\}$. Taking an NME action would help the *DN* to exhibit its sense of power denoted by R_B^D and similar gains can be enjoyed by China when it reacts, denoted by R_B^C . However, to engage in a conflicting situation would be costly for both parties, as it would involve at least a litigation cost of l_i where $i = D, C$, we assume $l_D \geq l_C$.²⁰² Other than litigation, the degree of dependency of *DN* is measured through some Chinese investments (I_C) and aid (A_C), which are compromised upon choosing NME status.²⁰³ On the other hand, choosing to classify China as an NME compromises the benefits of the trade treaty (τ) by $\rho\tau$, where $\rho \in (0, 1)$ and narrows the possibility of future geopolitical stability (σ) with China.²⁰⁴ Similarly, if China chooses

201. For a discussion on India's import dependence on China, see SANTOSH PAI, INST. OF CHINESE STUD., DECIPHERING INDIA'S DEPENDENCY ON CHINESE IMPORTS 4 (2020).

202. The assumption follows from the fact that China has become quite adept in supporting its case at the WTO DSB during the last decade, while the LDCs are still moving along the learning curve on this front. See Arie Reich, *The Effectiveness of the WTO Dispute Settlement System: A Statistical Analysis* 10–11 (Eur. Univ. Inst., Working Paper No. LAW 2017/11, 2017), https://cadmus.eui.eu/bitstream/handle/1814/47045/LAW_2017_11.pdf.

203. It has been observed that China's infrastructure-related loans in Africa have facilitated economic growth in the recipient countries and any trade-related discord may destabilize the process. See Courage Mlambo, *China in Africa: An Examination of the Impact of China's Loans on Growth in Selected African States*, 10 ECONS. 1, 17–20 (2022).

204. China has recently stressed the importance of the growing trade and investment relations with African countries, but dumping, contingency measures or NME status have not been mentioned in the policy document. For understanding the Chinese perception on stability and

to react to the decision of the DN, then it will lose access to its domestic market (m) as well as the expected return on investment undertaken (rI_C) where $r > 1$.²⁰⁵ It may also lower China’s access to raw materials in the DN and limit its political influence in these countries.²⁰⁶ Conversely, if China chooses not to react when the DN calls it an NME, this would cause a reputation loss in the global market by the amount of \tilde{w} . Given all the primitives of the model discussed above, we can summarize the payoffs in a normal form (tabular form) simultaneous move game in Table 3.

1. TABLE 3: PAYOFF MATRIX FOR 2 x 2 COMPLETE INFORMATION STATIC GAME BETWEEN OTHER DEPENDENT ECONOMIES AND CHINA

Dependent Nations	China (C)		
		React (R)	Not react (NR)
(DN)	Market Economy (ME)	$(I_C + A_C + \sigma - \rho\tau - R_B^D),$ $(A_C + rI_C + m - l_C - \sigma)$	$(I_C + A_C + \sigma + \tau),$ $(rI_C + m - A_C + \sigma)$
	Non-Market Economy (NME)	$(R_B^D - l_D - I_C - A_C - \rho\tau - \sigma),$ $(R_B^C - l_C + A_C + (1 - r)l_C - m)$	$(R_B^D - l_D + I_C + A_C - \tau + \sigma),$ $(-I_C - A_C - \tilde{w})$

In the payoff matrix, the two expressions in the parentheses of each cell represent the payoff of DN and China respectively. To derive the optimal strategy for both DN and China, we need to find out the Pure Strategy Nash Equilibrium (i.e., given the strategy for one player, the best strategy for the other). Given that DN will choose to play ME, it is best for China to choose NR, if $(A_C + rI_C + m - l_C - \sigma) < (rI_C + m - A_C + \sigma)$ (i.e, if $l_C > 2(A_C - \sigma)$). In other words, if the litigation cost is sufficiently high, then China will not engage in conflict without provocation. Similarly, we can show that if the size of the market and the return on interest from investment is low for China, then it is a sufficient condition to ensure that China will react when DN chooses NME. Now, if the sense of power is not strong enough, such that $(I_C + A_C + \sigma - R_B^D) < 0$, then DN

mutual growth through Sino-African trade, see Ministry of Foreign Affairs of the People’s Republic of China, the State Council Information Office of the People’s Republic of China, China and Africa in the New Era: A Partnership of Equals, pt. I(3) (Nov. 26, 2021), https://www.fmprc.gov.cn/mfa_eng/wjdt_665385/2649_665393/202111/t20211126_10453904.html.

205. See QUENTIN HOUNYONOU, PSL RSCH. U., ADVENT OF CHINESE GOODS INTO AFRICAN MARKETS: IMPACT ON FIRMS’ GROWTH 6-7 (2021), <https://www.gtap.agecon.purdue.edu/resources/download/10728.pdf>.

206. See Qiyue Zhang et al., *Understanding China’s Economic Engagement in Africa: An Exploration of the FDI-Trade Nexus*, 14 SUSTAINABILITY 1, 6, 8 (2022).

will never choose to call China an NME, given that the dragon may opt to react. Also, if the litigation cost is sufficiently high, such that $l_D \geq (I_C + A_C + \sigma) > R_B^D$, then ME will be the dominant strategy for the DNs to play. Given that $l_D \geq l_C$, we need the following technical assumption to ensure consistency at the equilibrium.

Assumption 1: $A_C < (I_C + 2\sigma)$

We can state this lesson formally in Proposition 1.

Proposition 1: *If litigation costs for DNs are sufficiently high such that that $l_D \geq l_D^*$ where $l_D^* = (I_C + A_C + \sigma) > R_B^D$ and litigation cost of China $l_c \geq l_c^*$ where $l_c^* = 2(A_C - \sigma)$ then PSNE is $\{ME, C\}$, otherwise the unique PSNE is $\{NME, R\}$.*

Proof: Discussed above.

B. The Interaction Between India and China

The interaction between India (*I*) and China is an interesting case for two reasons. First, both countries have huge markets, reflecting greater market power and high dependency coupled with an asymmetrical trade relationship.²⁰⁷ Second, border-related discords between the neighboring countries have intensified in recent years, which might influence bilateral economic and political relationships in the long run.²⁰⁸ Hence, the interaction between India and China is not solely dependent on economic factors. In addition, over time, the volatility of political security between India and China makes the game involving the two countries dynamic with an asymmetry of information.

It is also observed over time that India often calls out China as an NME but restrains itself from imposing restrictions, and similarly, there is no active economic retaliation from China, which suggests that economic stakes as well as security concerns play major roles in determining the structure of the game. In order to account for such conflicting behavior and preferences, this study constructs a dynamic game of incomplete information and derives a Bayesian Equilibrium.²⁰⁹

207. For instance, while China specializes in exporting finished manufacturing products to India, India reveals a dominance of agricultural and intermediate goods in its export basket to China. For an account of emerging Sino-Indian trade patterns, see Sunandan Ghosh et al., *India-China Trade: Asymmetrical Developments and Future Prospects*, 20 S. ASIA ECON. J. 70, 77, 83–84 (2019).

208. For a general discussion, see Vijay Gokhale, *The Road from Galwan: The Future of India-China Relations* 1–2 (Carnegie India, Working Paper, 2021), https://carnegieendowment.org/files/Gokhale_Galwan.pdf.

209. See generally John C. Harsanyi, *Games with Incomplete Information Played by “Bayesian” Players Part II. Bayesian Equilibrium Points*, 14 MGMT. SCI. 320 (1968).

A Bayesian Game involves the construction of a “belief function” to accommodate various *types* of players. It is a game of incomplete information, as at least one player is assumed to be unaware of the payoffs or type of the other player. In the context of this particular game, the outcome is probably guided by the asymmetry of information regarding India’s player type in a dynamic game framework. We assume that India can either be an *aggressive* (*A*) or *passive* (*P*) player in nature, which is unanticipated by China. Therefore, to formulate a Bayesian Nash Equilibrium, we assume that the first mover of the game is *Nature*, who assigns the probability of India being an aggressive-type as $\mu \in [0, 1]$, with corresponding passive-type probability being $(1 - \mu)$. The actualization of μ is known only to India but not to the other player, in this case China. Suppose that India has the action set $A_I : \{NME, ME\}$. Subsequently, China decides either to *react* or *not react*, i.e., $A_C : \{R, NR\}$. However, China is unaware of the starting node for the game because of the asymmetry of information. Due to incomplete information, upon observing the action taken by India (say, calling itself an NME), China does not know whether the action has been undertaken by an aggressive-type India or a passive-type India. In this game, knowing the types is crucial as the payoffs of both the players are conditioned on the type of player 1, which is India in this case. The game is represented in extensive form in [Figure 5](#).

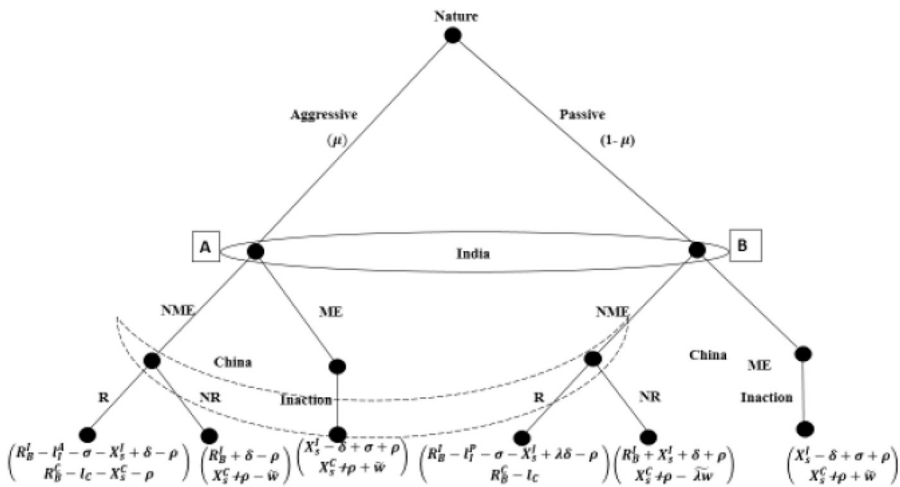


Figure 5: Extensive form representation of dynamic game of incomplete information between India and China

From the figure, we can observe that the information asymmetry is embedded into the model in the following manner. When China observes that India has chosen *NME* as the first mover of the game, it is unaware of whether it is starting the game from node A or B. However, if India chooses to play *ME* then the only response from China is *inaction/no response* for obvious reasons. So, India's player type does not play a role when the country chooses *ME* as an optimal strategy. The oval drawn in the figure shows the information set, containing the information of the type of the first player, which is unknown to the second player. It is a dynamic game, so this analysis starts solving the game by solving for the optimal action for player 2.

Before proceeding toward the solution of the game, this study first explains the payoffs. This uses the same primitives used in the earlier game explained in Table 3, with certain differences in the Sino-Indian context. When India calls China an NME, it gains a sense of power denoted by R_B^I and protects the domestic marginal players from the unfair market practices imposed by China denoted by the amount of δ .²¹⁰ As India does not have a significant trade treaty with China, by calling the dragon an NME, the country in effect forgoes the future possibility of a trade treaty, which is $\rho\tau = \rho$ (assuming $\tau = 1$ indicates the non-existence of a trade treaty). If China reacts to this strategy, then India needs to incur a litigation cost, $l_i^I, i = A$ (*aggressive*), P (*Passive*), and also be prepared for future geopolitical instability (σ). The economic loss includes: (i) loss of market access (m), (ii) Chinese Investment (I_C), and (iii) return on interest from Indian Investment in China (rI_I).²¹¹ This framework denotes all the economic losses that might be faced by India as $-X_S^I$. Similarly, the potential economic losses to be faced by China, if any, is denoted by $-X_S^C$. Therefore, formally the payoff for India is written as follows,

210. Importing cheaper Chinese goods affects a number of Indian manufacturing segments. See PARLIAMENT OF INDIA, RAJYA SABHA, DEPARTMENT RELATED PARLIAMENTARY STANDING COMMITTEE ON COMMERCE, ONE HUNDRED AND FORTY FIFTH REPORT ON IMPACT OF CHINESE GOODS ON INDIAN INDUSTRY ¶¶ 2.3–2.4 (2018), http://164.100.47.5/committee_web/ReportFile/13/97/145_2018_7_13.pdf.

211. For instance, China's share of India's export basket has increased continuously. In 2021, China ranked third in India's export basket with a share of 5.8 percent, followed by the United States (18.1 percent) and the United Arab Emirates (6.5 percent). See *Trade Summary for India 2021*, WORLD INTEGRATED TRADE SOL., <https://wits.worldbank.org/CountrySnapshot/en/IND> (last visited Sept. 21, 2023).

$$India^A|NME = \begin{cases} R_B^I - l_I^A - \sigma - X_s^I + \delta - \rho & \text{if China plays } R \\ R_B^I + \delta - \rho & \text{if China plays } NR \end{cases} \quad (1)$$

$$India^P|NME = \begin{cases} R_B^I - l_I^P - \sigma - X_s^I + \lambda \delta - \rho & \text{if China plays } R \\ R_B^I + X_s^I + \delta + \rho & \text{if China plays } NR \end{cases} \quad (2)$$

$$India|ME = X_s^I - \delta + \sigma + \rho \quad (3)$$

The payoff in [equation \(2\)](#) exhibits that the litigation cost for an aggressive India and a passive India would be different, such that $l_I^A \neq l_I^P$.²¹² Also, a passive type country can only protect a fraction ($\lambda \in (0, 1)$) of its domestic manufacturers (δ) even after considering China an *NME*, while facing an *R* strategy from China.²¹³ However, if China chooses *NR*, then India gains the benefit of protecting domestic players to the fullest extent, and the future possibility of a trade treaty is not compromised. The payoff for India in [equation \(3\)](#) is invariant with the type, as the choice is unique and the strategic action for China is also inaction (*NR*). By choosing *ME*, India gains all the economic benefits together with geopolitical stability and future prospects for trade treaties.²¹⁴ The sole loss for India comes from the inability to protect domestic manufacturing firms and, in turn, increasing its dependence on China.²¹⁵ Now, the following lays out the payoff for China.

212. It has been noted that a country chooses to lodge a dispute with the WTO when the expected benefits from the legal battle outweigh the expected costs. In that sense, expected legal costs for an *aggressive* country will always outweigh the corresponding figure for a *passive* country. For this perspective, see Chad Bown, *Trade Remedies and World Trade Organization Dispute Settlement: Why Are So Few Challenged?*, 34 J. LEGAL STUD. 515, 518–19 (2005).

213. It has been observed in the Indian context that ADDs are only partially effective in reducing imports of commodities. A passive country, even if it calls China an *NME*, in all probability will be quite cautious while imposing final ADD after conclusion of investigations (e.g., following lesser duty rule). This may, in turn, offer only a limited protection for domestic players. See Ashwani Mahajan et al., *An Analysis of Impact of Anti-Dumping Duties on India–China Trade*, 22 S. ASIA ECON. J. 1, 2 (2021).

214. In the aftermath of border-related discord between the neighbors in 2020, bilateral investment flows decreased, but this is unlikely to be a permanent shift. Chinese firms have invested heavily in Indian manufacturing segments across the country and have a strong reason to maintain a good bilateral relationship. See ANANTH KRISHNAN, BROOKINGS INDIA, *FOLLOWING THE MONEY: CHINA INC’S GROWING STAKE IN INDIA-CHINA RELATIONS* 19 (2020).

215. For instance, in the pharmaceutical sector, the high competition from Chinese players in the Active Pharmaceutical Ingredient (“API”) segment may force the Indian players to operate at a low scale of operation, which will in turn compromise their ability to compete against the Chinese varieties effectively. Though India has initiated a Resilient Supply Chain Initiative (RSCI) jointly with Japan and Australia and started supporting domestic players through a production-linked-incentive (PLI) scheme, the dependence on China is still considerable for many APIs. See

$$China|R = \begin{cases} R_B^C - I_C - X_s^C - \rho & \text{if Aggressive India plays NME} \\ R_B^C - I_C & \text{if passive India plays NME} \end{cases} \quad (4)$$

$$China|NR = \begin{cases} X_s^C + \rho - \tilde{w} & \text{if Aggressive India plays NME} \\ X_s^C + \rho - \lambda \tilde{w} & \text{if passive India plays NME} \\ X_s^C + \rho + \tilde{w} & \text{if India plays ME} \end{cases} \quad (5)$$

The payoff function in [equation \(4\)](#) is derived from the argument and the primitives used before. The payoff in [equation \(5\)](#) introduces the global reputation loss of \tilde{w} when an aggressive India prefers to call China an NME, while China continues to be one of India’s primary trading partners.²¹⁶ The loss in global reputation is marginally (by a fraction $\lambda \in (0, 1)$) lower when the nature of India is passive, indicating that the allegation is not strong enough to damage its reputation.²¹⁷ In case India chooses ME status for China, then it reinforces the WTO-sanctioned status for the dragon, and thus, adds a reputation effect in the payoff.

Given the payoffs, the strategy profile, and the structure of the game, the following can now lay down the solution of the game in the following proposition.

Proposition 2: *In the dynamic game of incomplete information between India and China over NME status, the Bayesian Nash*

Amitendu Palit, *COVID-19, Supply Chains and Dependence on China: The Indian Perspective*, 32 JOINT U.S.-KOR. ACAD. STUD. 331, 332, 339 (2021).

216. In reality, it has been China’s long-time demand to India for considering it as a ME. In addition, whenever India comes out with a positive determination of ADD, by revoking the NME clause, a similar demand is placed on the Indian authorities for protecting its reputation on one hand and sending the right signal to the world on the other. Though India has rejected the claims so far, China has preferred not to escalate the discord to the WTO dispute level. For instance, see Asit Ranjan Mishra, *India Rejects Market Economy Tag for China*, LIVE MINT (June 17, 2020), <https://www.livemint.com/news/world/india-rejects-china-s-demand-to-grant-it-market-economy-status-11592394036306.html>.

217. The rationale behind the assumption is that a passive country may initiate investigations if they anticipate *material injury* from dumping, subsequently establish *causal linkage* in the report and invoke NME provisions while calculation of dumping margin, but they may still end up without imposition of a final ADD. In that case, reputational loss for the exporter country would indeed be minimal. For instance, see *Indian Government Decides Not to Impose Anti-Dumping Duty on China*, TEL. INDIA (Sept. 11, 2022), <https://www.telegraphindia.com/business/indian-government-decides-not-to-impose-anti-dumping-duty-on-china/cid/1897018>; *Government Not to Impose Anti-Dumping Duty on Chinese Chemicals*, ECON. TIMES INDIA (Oct. 26, 2022), <https://economictimes.indiatimes.com/news/economy/foreign-trade/govt-not-to-impose-anti-dumping-duty-on-chinese-chemical/articleshow/95099166.cms>.

equilibrium is China plays R if $\mu \leq \mu^*$ such that $\mu^* = \frac{R_B^C - l_C - X_s^C - \rho - \lambda \tilde{w}}{X_s^C + \rho - (1-\lambda)w}$ and India chooses aggressive if the gain from protecting domestic manufacturers is sufficiently large such that $\delta > \delta^*$ where $\delta^* = \frac{(l_B^I - l_I^I)}{(1-\lambda)}$.

Proof: We first calculate the expected payoff of China from playing R, which is $EU_R = \mu(R_B^C - l_C - X_s^C - \rho) + (1 - \mu)(R_B^C - l_C) = R_B^C - l_C - \mu(X_s^C + \rho)$. Similarly, we calculate the expected payoff of China from playing NR as $EU_{NR} = X_s^C + \rho - \mu\tilde{w}(1 - \lambda) - \lambda\tilde{w}$. Now China will choose R over NR if, $EU_R \geq EU_{NR}$, which happens only when $\mu \leq \mu^*$ such that $\mu^* = \frac{R_B^C - l_C - X_s^C - \rho - \lambda\tilde{w}}{X_s^C + \rho - (1-\lambda)w}$. Now in case $\mu \leq \mu^*$, then China will play R. In that case, given the choice of course for China, the best response for India would be to adopt an aggressive standpoint, if $R_B^I - l_B^I - \sigma - X_s^I + \delta - \rho > R_B^I - l_B^I - \sigma - X_s^I + \lambda\delta - \rho$, which can only happen when $\delta > \delta^*$, where $\delta^* = \frac{(l_B^I - l_I^I)}{(1-\lambda)}$. This indicates that when the difference between the litigation costs under the two types is marginal, it implies that the gain for the domestic market will be large, inducing India to be aggressive. The value of μ is likely sufficiently large, which restricts China from choosing R.²¹⁸

C. *The Interaction Between the United States and the EU and China*

The most interesting and complex interactions are expected to be between the major economic powers of the West (i.e., the EU and the

218. It is observed that since 2020, India has embraced an aggressive standpoint against China on the economic front. For instance, restrictions have been introduced on public procurement projects (e.g., highways and rail networks) from countries who share land borders with India. Given the technology plane of the South Asian neighbours, the intended target is China. See Press Information Bureau, Ministry of Finance, Government of India, Restrictions on Public Procurement from Certain Countries (July 23, 2020), <https://pib.gov.in/PressReleasePage.aspx?PRID=1640778>. Several tariff lines are kept under the “restricted” category, where China is a major import source. In addition, support has been introduced for domestic players manufacturing electronic products through production linked incentives, which are majorly imported from China. See Press Information Bureau, Ministry of Commerce & Industry, Government of India, Ban on Chinese Products (Sept. 16, 2020), <https://www.pib.gov.in/PressReleaseDetailm.aspx?PRID=1655065>. China, despite raising protests towards Indian policies, refrained from initiating knee-jerk reactions.

United States) and the rising power of the East, which is China. The repeated interaction between the EU and the United States and China over the NME status conflict makes the game a repeatedly dynamic game. Because the interaction between the United States and the EU with China has been similar, for simplicity, henceforth we will concentrate on the game between the United States and China, which is identical to the game between the EU and China.²¹⁹

The complexity in the game arises from the asymmetry of information about the nature of the United States in the context of its abrupt use of the surrogate country measure by granting NME status to China.²²⁰ To explain this particular situation, the following uses a sequential bargaining game with incomplete information.²²¹ This analysis assumes that China and the United States together can ensure a cooperative payoff of θ , which is a sum of the economic benefits enjoyed by each country ($X_s^C + X_s^U$), the global reputation by being a fair player ($2\tilde{W}$, assuming the reputation impact will be equal for both the countries), future benefits from trade treaties²²² (2ρ , assuming the reputation impact will be equal for both the countries), and saved litigation cost for both countries ($l_U + l_C$). Therefore, the equation is as follows:

$$\theta = (X_s^C + X_s^U + 2\tilde{W} + 2\rho + l_U + l_C) \quad (6)$$

However, the valuation of θ would be different between the United States and China, as the valuation of X_s^U is unknown to China.²²³ We assume that China is only aware that the United States can be *strongly*

219. This assumption makes sense as both the EU and the United States have noted that China has not sufficiently embraced ME principles and have consistently rejected the dragon's plea for MES. See USTR REPORT TO CONGRESS, *supra* note 3, at 7; Du, *supra* note 16, at 321.

220. See Williams, *supra* note 13, at 434–35.

221. For a general discussion on the application of this technique when the players have incomplete information, see Drew Fudenberg & Jean Tirole, *Sequential Bargaining with Incomplete Information*, 50 REV. ECON. STUD. 221 (1983).

222. Escalating trade tensions between China and the United States, through adoption of retaliatory policies, can hurt the interests of consumers and producers in both countries. See Eugenio Cerutti et al., *The Impact of US-China Trade Tensions*, IMF BLOG (May 23, 2019), <https://www.imf.org/en/Blogs/Articles/2019/05/23/blog-the-impact-of-us-china-trade-tensions>.

223. While the United States is stopping trade with China altogether, it is introducing steps to lower economic dependence and interactions with China. For instance, under the CHIPS and Science Act (2022), U.S. corporations receiving support will not be permitted to build certain facilities in China. It is difficult for China to gauge correctly where the U.S. may draw such lines in future. See Press Release, The White House, FACT SHEET: CHIPS and Science Act Will Lower Costs, Create Jobs, Strengthen Supply Chains, and Counter China (Aug. 9, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/09/fact-sheet-chips-and-science-act-will-lower-costs-create-jobs-strengthen-supply-chains-and-counter-china/>.

aggressive or *moderately aggressive*, and depending on the types, the valuation of θ would accordingly turn out to be different for the United States. Suppose for the United States, $\theta \in \{\underline{\theta}, \bar{\theta}\}$, where $\underline{\theta} > 1$.

Now, China may want to share a part of θ with the United States, so that the United States accepts China as an ME. Suppose, in period 1, that China offers a payoff of θ_1 to share with the United States. The United States can either *accept* the offer and declare China an ME or *reject* the offer and declare China an NME. Hence, the action set for the United States would be $A_U : \{Accept, Reject\}$. If the United States accepts the offer, the game ends with the payoffs of $(1 - \theta_1)$ for China, leaving θ_1 for the United States. Now the exact valuation of θ for the United States is unknown. Therefore, the question of what offer is to be made by China remains relevant. If the United States rejects ME status, China can update its belief about the type of the United States, but in period two ($t=2$) the United States would again make a counteroffer to China θ_2 , which China may in turn accept or reject. Rejection of the offer will then give China a chance to make an offer on the basis of the updated belief, and hence in that sense, the game repeats itself. On the other hand, the minimum share that China would always want to keep is $\tilde{\theta}$.

Now suppose that China offers $\underline{\theta}$ at $t=1$ and the United States accepts, then China will deduce that the United States is a moderately aggressive type of country, and the game ends there. The setting becomes more interesting when the United States rejects the offer. The rejection of the offer clearly signals the United States' player type as strongly aggressive and the posterior probability is: $\mu(\underline{\theta}|\theta_1) = 1$ and $\mu(\bar{\theta}|\theta_1) = 1 - \mu(\underline{\theta}|\theta_1) = 0$. Therefore, an offer of $\theta_1 = \underline{\theta}$ at period one ($t=1$) removes the asymmetry of information in the model. Similarly, if there had been a two-sided asymmetry of information such that the United States was also unaware of China's player type, then it would have offered $\theta_2 = \tilde{\theta}$ to reveal the type of the dragon. Therefore, if the game reaches period three ($t=3$), it indicates that both the players are a strong aggressive type²²⁴ and hence from then on, it becomes a Rubinstein-Stalh bargaining game of complete information.²²⁵

Figure 6 lays out the details of the game, where every t^{th} period sub-game is the same as $(t + 2)^{th}$ period sub-game, which ascertains that

224. The timeline of the ongoing U.S.-China trade war shows how both sides are aggressively targeting each other. See *US-China Relations in the Biden Era: A Timeline*, CHINA BRIEFING (Oct. 30, 2023), <https://www.china-briefing.com/news/us-china-relations-in-the-biden-era-a-timeline/>.

225. For a general discussion on the characteristics of complete information games, see Ariel Rubinstein, *Perfect Equilibrium in a Bargaining Model*, 50 *ECONOMETRICA* 97 (1982).

there would be more than one sub-game perfect Nash Equilibrium (SPNE), where China can offer anything $\theta_{China} \in (\underline{\theta}, \tilde{\theta}]$.

1. Figure 6. Sub-Game Perfect Nash Equilibria in Periodic Trade Negotiations

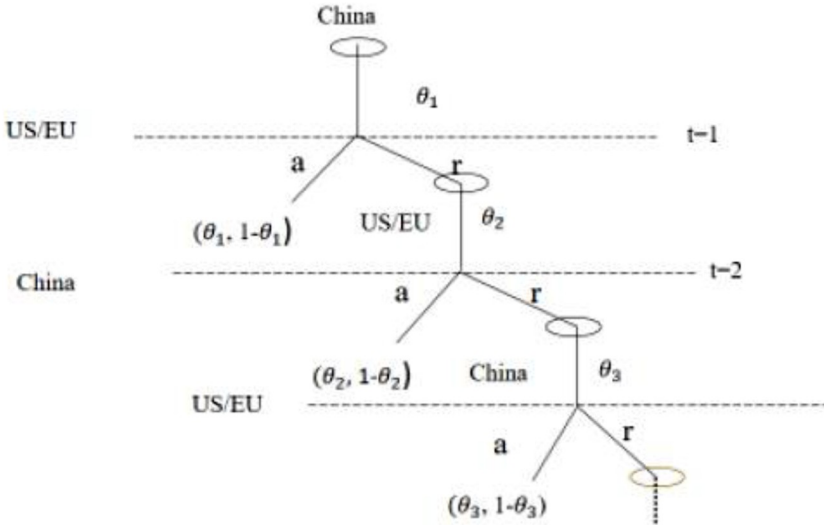


Figure 6: Extensive form representation of game between EU/US and China

Proposition 3: For a repeated sequential game of two-sided information asymmetry between China and the United States/EU, the best response for China is to offer a cooperation benefit share of $1 - \hat{\theta} = 1 - \frac{1 - \delta_U}{1 - \delta_C \delta_U}$ to the United States and contain $\hat{\theta} = \frac{1 - \delta_U}{1 - \delta_C \delta_U}$, indicating that patience will pay better for China.

Proof: Suppose the supremum SPNE payoff to China for the game starting at period t is $\hat{\theta}$. The United States knows that when it makes an offer in period $(t - 1)$, China will reject any offer that results in a payoff less than $\delta_C \hat{\theta}$ at period $(t - 1)$, where δ_C is the discount rate for China. Now, China will accept any offer which is at least equal to $\delta_C \hat{\theta}$, which leaves $(1 - \delta_C \hat{\theta})$ for the United States at period $(t - 1)$. In period $(t - 2)$, China would know that if an offer of any amount less than $\delta_U (1 - \delta_C \hat{\theta})$ is made, then the United States will reject the offer as there is no hidden information. Then, it will leave a payoff of $(1 - \delta_U (1 - \delta_C \hat{\theta}))$ for the United States at period $(t - 2)$. Since the game starting at $(t - 2)$ is identical to the

game starting at t , we can write that $\hat{\theta} = 1 - \delta_U (1 - \delta_C \hat{\theta})$, solving for $\hat{\theta}$ we get $\hat{\theta} = \frac{1 - \delta_U}{1 - \delta_C \delta_U}$. This indicates that the more impatient China gets (i.e., the larger the value of δ_C), the higher will be the optimal payoff for the United States and vice versa. Therefore, patience pays off to the competing partners. The continuation of the game indicates that both the players are patient and hence the unique solution cannot be reached.

VII. CONCLUSION

This Article offers a comprehensive examination of China's NME status and its profound implications for global trade. The main findings can be synthesized into three key areas: the legal aspects of China's NME status, the game theory model analysis, and the broader implications for the world economy and governance.

First, the Article contributes a nuanced legal perspective on the ongoing debate about China's NME status within the WTO framework. Despite China's assertion that it is a ME post-2016, several countries, particularly the United States and the EU, continue to treat it as an NME, employing surrogate country methods for calculating AD duties. The Article's analysis of WTO jurisprudence suggests that the legality of maintaining China's NME status beyond 2016 is complex and fraught with ambiguity, largely due to the absence of universally accepted criteria for defining MES.

Second, the application of game theory modeling offers a dynamic understanding of the potential trajectories of the NME debate in the future. Regardless of China's official NME status, the game-theoretic model reveals that countries like the United States are equipped with various trade remedy measures to maintain a form of "special treatment" against China. The model predicts that China will continue seeking the removal of its NME status, while other emerging economies may persist in recognizing it, influenced by their domestic market dynamics and perceived gains.

Third, the broader implications of this analysis extend to the world economy and governance. The changing landscape of AD disputes at the WTO post-2016, marked by a decrease in arbitrary investigations and an increase in "expiry without review," suggests an evolving strategic approach by countries in response to the NME debate. This changing landscape signals a need for policymakers worldwide to carefully weigh the implications of maintaining or discarding China's NME status in the pursuit of a more balanced and equitable global trade environment.

Delving deeper into the broader implications of the analysis, the ramifications of China's NME status transcend the realm of trade and permeate the broader spheres of the world economy and global governance.

From an economic standpoint, the status of China as an NME challenges the conventional dichotomy of market versus NMEs, necessitating a reevaluation of global economic models. Economies worldwide are grappling with the unique blend of state intervention and market forces that characterizes China's economic model. The economic strategies used by China, such as SOEs and state-directed investment, challenge the traditional norms of free trade and fair competition. By exploring these dynamics, the study underscores the urgent need for redefining the rules of global economic engagement to accommodate the distinctive features of economies like China. Moreover, the responses of different economies to China's NME status, as illuminated by the game-theoretic model, suggest a transformation in global economic power dynamics. Emerging economies may find strategic value in siding with China, thereby subtly shifting the balance of economic power. This realignment has potential ramifications for the global financial system and development aid, which could further influence geopolitical alliances.

From a governance perspective, the debate around China's NME status exposes the limitations of existing international legal and regulatory frameworks to accommodate the complex realities of modern global economies. The WTO, as the primary global body overseeing international trade, is confronted with the challenge of reevaluating its regulations to effectively manage disputes in the context of economies with mixed market and non-market characteristics. This underscores the need for comprehensive reforms within international trade law and policy to ensure their relevance and effectiveness in the evolving global economic landscape.

In conclusion, this Article highlights the intertwined legal and economic complexities of China's NME status and its significant ramifications for international trade relations. The Article's findings underscore the need for ongoing dialogue and research to navigate the evolving challenges and opportunities in the global trade environment. As countries grapple with the unique issues posed by mixed markets and NMEs like China, this Article presents a valuable foundation for further exploration and reform within the realms of trade policy and international law.