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**The trade remedy issue in the context of non-market economy within the WTO
legal system – a case study of the “double remedy” issue**

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A Thesis Submitted for the Degree of Doctor of Philosophy in Law

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Author's declaration

I hereby declare that this thesis has not been and will not be, submitted in whole or in part to another University for the award of any other degree.

Signature:

Abstract

Recently, regulating the modern trade remedies in the context of non-market economy always raises vigorous debates, which potentially challenges the efficiency of the dispute settlement regime in the WTO. Following a finding by the Ministry of Commerce of the PRC in July 2020 that the non-market conditions exist in the US energy and petrochemical sector, the terminology of “non-market economy” is no longer an emblematic of countries with particular market situation (“PMS”) such as China. In fact, all WTO members are potential targets of “non-market economy” treatment nowadays in the trade remedies investigations. However, the WTO trade remedies agreements are ambiguous on regulating the trade behaviours of the modern “non-market economies”, which provides no substantial references about the implementation of trade remedies. Therefore, the unclear provisions raise controversy over trade remedies applications and brings uncertainty to trade disputes settlements, which is contrary to the “predictable and transparent” principle of the WTO.

This research aims to prevent the abuse of trade remedies through exploring the appropriate interpretation and application of the WTO trade remedies agreements, using the “double remedy” issue of China as a special case. It contributes to the promotion of good international economic governance and increasing the predictability and stability of the WTO dispute settlement on the remedies. Specifically, it originally provides proposals from both anti-dumping and countervailing perspective to clarify the procedure of trade remedies investigations.

To avert the abuse of countervailing measures, this research submits that the potential subsidization behaviour, especially by a “public body”, in the anti-subsidy investigations should be conscientiously evaluated. Accordingly, this research contributes substantially on the clarification of term “public body”. It provides the specific criteria to define the “public body” by the doctrinal analysis of WTO tribunal reports and international treaties, which provides predictability to identify a subsidy.

To avoid the abuse of anti-dumping measures, this research contends that it is crucial to carefully determine the normal value in the anti-dumping investigations. This research further demonstrates that when calculating dumping margin of either market or non-market economies, the primary choice in determining the normal value shall be based on the actual cost of production, even though such a cost is considered to be “distorted”. When it is necessary to construct the normal value, all factors related to the cost in that country, including “price distortions”, should be considered ‘as long as they reflect the prevailing conditions in the market of exportation’.

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List of abbreviations

AB – appellate body

AD – anti-dumping duty

ADA – Anti-dumping Agreement

AP – accession protocol

ASCM – Agreement on Subsidies and Countervailing Measures

BOC – Bank of China

CAFC – Court of Appeals for the Federal Circuit

CAP – China’s Accession Protocol to the World Trade Organisation

CIT – Court of International Trade

CPC – Communist Party of China

CPTPP – Comprehensive and Progressive Agreement for Trans – Pacific Partnership

CVD – countervailing duty

DM – dumping margin

DOC – department of commerce

DSB – dispute settlement body

EC – European Commission

EP – exporting price

ESA – European System of Accounts

EU – European Union

FTA – free trade agreement

GAAP – general accepted accounting principles

GATS – General Agreement on Trade in Services

GATT – General Agreement on Tariffs and Trade

GDP – gross domestic product

GOK – Government of South Korea

ITC – International Trade Commission

NAFTA – North American Free Trade Agreement

NDRC – National Development and Reform Commission

NME – non-market economy

NV – normal value

OCTG – oil country tubular goods

OECD – Organisation for Economic Co-operation and Development

PMS – particular market situation

SASAC – State-owned Assets Supervision and Administration Commission

SOAE – state-owned assets of enterprise

SOCB – state-owned commercial bank

SOE – state-owned enterprise

TPP – Trans – Pacific Partnership

UN – United Nations

US – United States

VCLT – Vienna Convention on the Law of Treaties

WBG – World Bank Group

WTO – World Trade Organisation

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Free Trade Agreement Australia 2005 (USA-Australia FTA)

Free Trade Agreement Singapore 2004 (USA- Singapore FTA)

General Agreement on Tariffs and Trade 1994

North American Free Trade Agreement

Vienna Convention on the Law of Treaties 1969

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Chapter 1: Introduction

1.1 Statement of the problem

The WTO has confronted a dilemma clarifying the controversy over the trade remedies applications in the context of “non-market economy”. On 17th July 2020, the Ministry of Commerce of the PRC (MOFCOM) in its anti-dumping investigation found that non-market conditions exist in the US energy and petrochemical sector and ‘accordingly swapped out US exporters’ costs in calculating the dumping margin.¹ This is a big reversal of roles because the US has constantly imposed trade remedies on China and reasoned by China’s “non-market economy” status, such as the *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* Case.²

The recent development between the US and China is a microcosm of the dilemma that the WTO has confronted. Following the announcement of the MOFCOM, the terminology of “non-market economy” is no longer emblematic of countries with particular market situation (“PMS”) such as China. In fact, the WTO cases, such as the *European Union - Anti-Dumping Measures on Biodiesel from Argentina* Case and the *Ukraine - Anti-Dumping Measures on Ammonium Nitrate* Case, have demonstrated that all WTO members are potential targets of “non-market economy treatment” nowadays.³

¹ Henry Gao, ‘The US Is Now Officially a Non-Market Economy, According to China’ (*International Economic Law and Policy Blog*) <<https://ielp.worldtradelaw.net/2020/07/the-us-is-now-officially-a-non-market-economy-according-to-china-.html>> accessed 10 July 2020; Zhiguo Yu and Sandeep Thomas, ‘The US Is Now a “Non-Market Economy” – Anti-Dumping Ruling by China’ (*International Economic Law and Policy Blog*) <https://ielp.worldtradelaw.net/2020/07/the-us-is-now-a-non-market-economy-anti-dumping-ruling-by-china.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+ielpblog+%28International+Economic+Law+and+Policy+Blog%29> accessed 10 July 2020. The ruling is available only on the Chinese webpage of MOFCOM. Direct link to the ruling <http://images.mofcom.gov.cn/trb/202007/20200717145528534.pdf>.

² For example, see Panel Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/R, adopted 22 October 2010; Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011.

³ See Appellate Body Report, *Ukraine - Anti-Dumping Measures on Ammonium Nitrate*, WT/493/AB/R, adopted 12 September 2019; Appellate Body Report, *European Union - Anti-Dumping Measures on Biodiesel from Argentina*, WT/473/AB/R, adopted 6 October 2016.

As highlighted by James J. Nedumpara and Archana Subramanian, “countries such as Albania, Bulgaria, Cambodia,

Accordingly, the modern “non-market economy treatment”, such as the significant distortions and the PMS approach, has considerable effects on trade beyond that of the traditional “non-market economy” issue.

However, from the WTO’s perspective, the term “non-market economy” is nowhere defined in any GATT or WTO agreements, the WTO trade remedies agreements are ambiguous on regulating the trade behaviours of the modern “non-market economies”, which provides no substantial references about the implementation of trade remedies.⁴ Therefore, the WTO dispute settlement regime is confronting increasing challenges due to the controversy over trade remedies applications raised by the blurry “non-market economy” treatment under the WTO trade remedy agreements. The pressing question here is how to clarify the procedure in trade remedies investigations in the context of “non-market economy”, thus sticking to the “predictability” principle and maintaining the function of the WTO.

In this regard, analysing the “double remedy” issue⁵ of China is effective and significant. China is a representative sample and subject of the “non-market economy” issue, which is based on three interactive points. First, China has large economic volume, which significantly contributes to the global trade. Second, an increasing number of disputes in the trade remedies investigations have occurred between China and WTO members due to the “non-market economy” issue. Third, the landmark

Czechoslovakia, Hungary, Mongolia, Poland, Romania, Soviet Union, and Vietnam” were also subject to NME treatment in anti-dumping investigations and especially linked with issue of state interference. See James J. Nedumpara and Archana Subramanian, ‘China’s Long March to Market Economy Status: An Analysis of China’s WTO Protocol of Accession and Member Practices’ in James J Nedumpara and Weihuan Zhou (eds), *Non-Market Economies in the Global Trading System: The Special Case of China* (Springer Singapore 2018) <<https://www.springer.com/gp/book/9789811313301>> accessed 9 July 2020. See Mark Wu, ‘The “China, Inc.” Challenge to Global Trade Governance’ (2016) 57 Harvard International Law Journal 261.

⁴ See James J. Nedumpara and Archana Subramanian, ‘China’s Long March to Market Economy Status: An Analysis of China’s WTO Protocol of Accession and Member Practices’ in James J Nedumpara and Weihuan Zhou (eds), *Non-Market Economies in the Global Trading System: The Special Case of China* (Springer Singapore 2018) <<https://www.springer.com/gp/book/9789811313301>> accessed 9 July 2020.

⁵ The “double remedy” issue refers to a special situation where a subsidization behaviour is offset by both anti-dumping duty and countervailing duty, which is prohibited but not thoroughly addressed by WTO law.

disputes of the “double remedy” issue are between the US and China, which demonstrates that the current WTO trade remedy agreements are ambiguous on regulating the trade behaviours of modern “non-market economies”.

China’s economy has seen specular growth rate and achieved an important status in global trade. Since the early 1980s, China’s GDP has ‘doubled every seven years whilst exports have doubled every four years’.⁶ In 2009, China surpassed Germany as the world’s top exporter with 10.4% global trade, an increase of about a third since 1978.⁷ In 2013, China surpassed the US as the world’s largest trading nation.⁸

A growing number of disputes have accompanied rapid economic growth. Between 2009 and 2015, ‘China-related cases accounted for 90% of the cases brought by the four largest economies – the US, the EU, Japan and China - against each other’.⁹ It is clear from trade remedy investigations that China is the main target of anti-dumping activities by both the US and the EU since the 1990s, as investigations for China accounted for 13-14% of total anti-dumping activities.¹⁰ Since China’s access to the WTO in 2001, anti-dumping activities targeting China by the US increased dramatically from 13% to 27%.¹¹ Similarly, they increased from 14% to 29% by the EU in the 2000s.¹² For the EU, China’s share of anti-dumping cases increased significantly to 44% in the 2010s, so it is undoubtedly the leading target country for anti-dumping activity.¹³

⁶ See Thomas J Prusa, ‘NMEs and the Double Remedy Problem’ (2017) 16 World Trade Review 619, 619.

⁷ See World Trade Organization (ed), *The WTO and Preferential Trade Agreements: From Co-Existence to Coherence* (WTO 2011) 31 <https://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report11_e.pdf> accessed 10 July 2020; Dukgeun Ahn and Jieun Lee, ‘Countervailing Duty against China: Opening a Pandora’s Box in the WTO System?’ (2011) 14 Journal of International Economic Law 329, 330; Mark Wu, ‘The “China, Inc.” Challenge to Global Trade Governance’ (2016) 57 Harvard International Law Journal 261, 261.

⁸ See Angela Monaghan, ‘China Surpasses US as World’s Largest Trading Nation’ *The Guardian* (10 January 2014) <<https://www.theguardian.com/business/2014/jan/10/china-surpasses-us-world-largest-trading-nation>> accessed 11 July 2020.

⁹ Mark Wu, ‘The “China, Inc.” Challenge to Global Trade Governance’ (2016) 57 Harvard International Law Journal 261, 263.

¹⁰ See Thomas J Prusa, ‘NMEs and the Double Remedy Problem’ (2017) 16 World Trade Review 619, 619; Chad Bown, ‘Global Antidumping Database’ <<https://datacatalog.worldbank.org/dataset/temporary-trade-barriers-database-including-global-antidumping-database/resource/dc7b361e>> accessed 10 July 2020; Mark Wu, ‘The “China, Inc.” Challenge to Global Trade Governance’ (2016) 57 Harvard International Law Journal 261, 263.

¹¹ See *ibid.*

¹² See *ibid.*

¹³ See *ibid.*

The rise of trade remedy issues relating to China is obviously bringing challenges to the WTO dispute settlement. The root of the challenge, however, is not simply the large volume of China-related cases in front of the WTO. It, rather, relates to its “non-market treatment” and the ambiguous provisions regulating it under the WTO legal system. As there are no substantial references about the implementation of trade remedies in the context of non-market economy, any trade remedies disputes relate to China is an independent case, which potentially increases the workload and affects the efficacy of the WTO in settling disputes.¹⁴

Notably, the China’s Accession Protocol to WTO (CAP), as ‘an integral part of the WTO Agreement for that newly acceded Member concerned’, allowed WTO members to sidestep some controversies related to China’s economic structure, especially in the field of trade remedies.¹⁵ Accordingly, WTO Members can resort to China’s commitments in the CAP and derive a process from normal regulations in WTO law when tackling special issues. For example, Article 15 of the CAP provides legal basis of discriminatory treatment when calculating dumping margins of China’s exports. However, as the provision prescribing the “non-market economy treatment” in CAP expired in 2016, China’s “non-market economy treatment” is again raising a controversy. Some experts insist that the CAP continues to justify the “non-market economy treatment” for China.¹⁶ And if not, China’s trading partners will have to resort to the WTO rules negotiated in the Uruguay Round, for example, Article VI of the

¹⁴ James J Nedumpara and Weihuan Zhou, ‘Introduction: Non-market Economies in the Global Trading System - The Special Case of China’ in James J Nedumpara and Weihuan Zhou (eds), *Non-Market Economies in the Global Trading System: The Special Case of China* (Springer Singapore 2018) <<https://www.springer.com/gp/book/9789811313301>> accessed 9 July 2020; Mark Wu, ‘The “China, Inc.” Challenge to Global Trade Governance’ (2016) 57 Harvard International Law Journal 261, 270.

Mark Wu has analysed six aspects relating to the China’s “uniqueness”, see Mark Wu, ‘The “China, Inc.” Challenge to Global Trade Governance’ (2016) 57 Harvard International Law Journal 261, 264.

¹⁵ See Xuewei Feng, ‘The Termination of the Grandfather Clause in China’s Accession Protocol and the Normal Value Construction After Fifteen Years of Accession’ in James J Nedumpara and Weihuan Zhou (eds), *Non-Market Economies in the Global Trading System: The Special Case of China* (Springer Singapore 2018) <<https://www.springer.com/gp/book/9789811313301>> accessed 9 July 2020. Stéphanie Noël and Weihuan Zhou, ‘EU’s New Anti-Dumping Methodology and The End of The Non-Market Economy Dispute?’ (2019) 14 Global Trade and Customs Journal <<https://papers.ssrn.com/abstract=3424435>> accessed 9 July 2020.

¹⁶ Bernard O’Connor, ‘Much Ado about Nothing: 2016, China and Market Economy Status’ (2015) 10 Global Trade and Customs Journal 176; Jorge Miranda, ‘More on Why Granting China Market Economy Status after December 2016 Is Contingent upon Whether China Has in Fact Transitioned into a Market Economy’ (2016) 11 Global Trade and Customs Journal 244; Terence P Stewart and others, ‘The Special Case of China: Why the Use of a Special Methodology Remains Applicable to China after 2016’ (2014) 9 Global Trade and Customs Journal 272.

GATT 1994.¹⁷ A question raised here is whether these blurry rules can specifically deal with China's special situation.

In particular, two issues are emblematic of WTO's dilemma in the context of "non-market economy".¹⁸ The first issue is the determination of an entity established by a government to serve as a "pass-through" vehicle for subsidies.¹⁹ With respect to China, is an entity with links to the state qualified to provide a subsidy under WTO rules? In the *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* Case, China filed a complaint at the WTO rebutting the US's affirmative determination of China's state – owned commercial banks (SOCBs) and state – owned enterprises (SOEs) being "public bodies", which were qualified to conduct subsidization under ASCM. The Panel sided with the US, but the Appellate Body held the opposite view (in respect of SOE), it declared that 'the precise contours and characteristics of a public body are bound to differ from entity to entity, State to State, and case to case'.²⁰

The WTO tribunal's decision clarifies only limited Chinese firms that may belong to "public bodies". And even for those confirmed "public body", such as SOCBs, there still has the controversy. According to the tribunal, the Bank of China (BOC) is a "public body" based on several factors such as state ownership; relevant Chinese commercial banking law; and risk management and analytical skill of SOCBs. For example, Article 34 of China's Commercial Banking Law stipulates that banks must 'carry out their loan business upon the needs of the national economy and the social

¹⁷ Edwin Vermulst, Juhi Dion Sud and Simon J Evenett, 'Normal Value in Anti-Dumping Proceedings against China Post-2016: Are Some Animals Less Equal than Others' (2016) 11 Global Trade and Customs Journal 212, 225; Stéphanie Noël and Weihuan Zhou, 'EU's New Anti-Dumping Methodology and The End of The Non-Market Economy Dispute?' (2019) 14 Global Trade and Customs Journal <<https://papers.ssrn.com/abstract=3424435>> accessed 9 July 2020.

¹⁸ See James J Nedumpara and Weihuan Zhou, 'Introduction: Non-market Economies in the Global Trading System - The Special Case of China' in James J Nedumpara and Weihuan Zhou (eds), *Non-Market Economies in the Global Trading System: The Special Case of China* (Springer Singapore 2018) <<https://www.springer.com/gp/book/9789811313301>> accessed 9 July 2020; Mark Wu, 'The "China, Inc." Challenge to Global Trade Governance' (2016) 57 Harvard International Law Journal 261.

¹⁹ See *ibid.*

²⁰ See Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011, at para 317.

development and under the guidance of State industrial policies’.²¹ According to the tribunal, the BOC is a “public body” because its governmental factor is formally acknowledged by Chinese law. Nonetheless, commentators remain sceptical of the tribunal’s arguments noting that ‘a lack of business flair, as illustrated by inadequate risk management and analytical skills and poor loan-making practices, has little to do with whether SOCBs are exercising government authority’ and also ‘Article 34 of the Commercial Banking Law is a very general statement and its implications to the SOCBs’ loan business are not clear’.²²

Compared with the SOCBs, many Chinese firms, especially the SOEs, may not have formal links with the state like the BOC. Potential issues may arise, for example, would State-owned Assets Supervision and Administration Commission (SASAC)'s ability to remove a firm’s top management suffice to render the firm a “public body”? For now, the Appellate Body is relying on a standard of “government authority” to evaluate a “public body” but without clarifying what is necessary to demonstrate such authority.²³ Nevertheless, the WTO cannot avoid these questions. Since the *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* Case, the “public body” issue has raised three disputes.²⁴ Even without China as the party at issue, there is still a high percentage that occurs. In the *United States – Countervailing Measures on Certain Hot-rolled Carbon Steel Flat Products from India* Case, the tribunal rejected the US argument that one can identify whether a firm is a

²¹ See Panel Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/R, adopted 22 October 2010.

²² Ming Du, ‘China’s State Capitalism and World Trade Law’ (2014) 63 *International & Comparative Law Quarterly* 409, 439.

²³ See Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011.

²⁴ Appellate Body Report, *United States – Countervailing Measures on Certain Hot-rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R, adopted 8 December 2014. Panel Report, *United States - Countervailing Duty Measures on Certain Products from China*, WT/DS437/ R, adopted 14 July 2014. Appellate Body Report, *United States - Countervailing Duty Measures on Certain Products from China*, WT/DS437/AB/RW, adopted 16 July 2019.

“public body” on account of whether the government can employ the resources of an entity that it controls as its own.²⁵

Another issue in front of the WTO is the “non-market economy treatment” of China in the anti-dumping investigation post-2016.²⁶ The CAP allows WTO Members to apply an alternative methodology to calculate the dumping margins on China’s products, and such “non-market economy treatment” is considered to inflate the normal value thus increasing the quantum of anti-dumping duties to be levied.²⁷ However, the provision prescribing the “non-market economy treatment” expired in 2016, vigorous debates followed on how to interpret the legal effect of such expiry.²⁸ Although from this research’s point of view, the CAP cannot justify the continuance of the “non-market economy treatment”, the interpretations of the CAP do not preclude WTO Members from applying the general rules set out in Article 2 of the WTO Anti-dumping Agreement (ADA) and Article VI of the GATT 1994. Based on the fact that a “particular market situation” and “in the ordinary course of trade” are arcane and ambiguous thresholds for special anti-dumping treatment in Article 2 of the ADA and Article VI of the GATT 1994, a question raised here is whether these rules can deal with China’s special economic structure. As a very creative practitioner in this regard, the EU has made revisions to its anti-dumping regulations by replacing the “non-market

²⁵ Appellate Body Report, *United States – Countervailing Measures on Certain Hot-rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R, adopted 8 December 2014, at para 4.27–4.29.

²⁶ James J Nedumpara and Weihuan Zhou, ‘Introduction: Non-market Economies in the Global Trading System - The Special Case of China’ in James J Nedumpara and Weihuan Zhou (eds), *Non-Market Economies in the Global Trading System: The Special Case of China* (Springer Singapore 2018) <<https://www.springer.com/gp/book/9789811313301>> accessed 9 July 2020; Mark Wu, ‘The “China, Inc.” Challenge to Global Trade Governance’ (2016) 57 *Harvard International Law Journal* 261, 270.

²⁷ See *ibid.*

²⁸ Researchers share different opinions on this issue. For example, Bernard O’Connor considers that after the expiry of subparagraph (a)(ii) of Article 15, the remaining provisions of Article 15 still apply, such as the chapeau of paragraph (a) and subparagraph (a)(i), allow WTO members to calculate dumping margins not based on domestic prices in China. See Barbara Barone and others, ‘Market Economy Status for China after 2016?’ (European Parliament 2016) <<http://bookshop.europa.eu/uri?target=EUB:NOTICE:QA0216255:EN:HTML>> accessed 10 July 2020; Bernard O’Connor, ‘Much Ado about Nothing: 2016, China and Market Economy Status’ (2015) 10 *Global Trade and Customs Journal* 176; Jorge Miranda, ‘More on Why Granting China Market Economy Status after December 2016 Is Contingent upon Whether China Has in Fact Transitioned into a Market Economy’ (2016) 11 *Global Trade and Customs Journal* 244; Terence P Stewart and others, ‘The Special Case of China: Why the Use of a Special Methodology Remains Applicable to China after 2016’ (2014) 9 *Global Trade and Customs Journal* 272.

Edwin Vermulst et al. insist that since 12 December 2016, WTO members can no longer use a surrogate country method or a similar methodology targeting China but must use Chinese domestic prices or costs. See Edwin Vermulst, Juhí Dion Sud and Simon J Evenett, ‘Normal Value in Anti-Dumping Proceedings against China Post-2016: Are Some Animals Less Equal than Others’ (2016) 11 *Global Trade and Customs Journal* 212, 225.

economy treatment” with a country-neutral methodology dealing with market distortions caused by a state intervention.²⁹ This is reflected in the *EU – Price Comparison Methodologies* Case where three major issues are included: (1) whether Article 15 of the CAP continues to allow the “non-market economy treatment” for China; (2) whether Article 2 of the ADA and Article VI of the GATT 1994 provide sufficient flexibility for a surrogate method to calculate dumping margins when confronting price distortions associated with government intervention; and (3) whether the revised EU anti-dumping regulations conform to WTO anti-dumping rules.³⁰ Despite the case being suspended on 14 June 2019 by the Panel, there is no doubt that the answers to these three issues should be explored in this research.³¹

The controversy over interpreting the WTO agreements in the context of “non-market economy” is further embodied by the issue of “double remedies” where the determination of subsidies in the countervailing investigation and the “non-market economy treatment” in the anti-dumping investigation are two triggers in the *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* Case.³² The “double remedy” issue is a special situation where a subsidization behaviour is offset by both anti-dumping duty and countervailing duty, which is prohibited but not thoroughly addressed by WTO law.³³ Regarding the implementation

²⁹ Edwin Vermulst, Juhi Dion Sud and Simon J Evenett, ‘Normal Value in Anti-Dumping Proceedings against China Post-2016: Are Some Animals Less Equal than Others’ (2016) 11 *Global Trade and Customs Journal* 212, 225; Stéphanie Noël and Weihuan Zhou, ‘EU’s New Anti-Dumping Methodology and The End of The Non-Market Economy Dispute?’ (2019) 14 *Global Trade and Customs Journal* <<https://papers.ssrn.com/abstract=3424435>> accessed 9 July 2020.

³⁰ See *European Union — Measures Related to Price Comparison Methodologies* (DS516). See also Weihuan Zhou and Delei Peng, ‘EU - Price Comparison Methodologies (DS516): Challenging the Non-Market Economy Methodology in Light of the Negotiating History of Article 15 of China’s WTO Accession Protocol’ (2018) 52 *Journal of World Trade* 505.

³¹ For unknown reason, on 7 May 2019, China asked the panel to suspend its proceedings in accordance with Article 12.12 of the DSU. And the panel granted China’s request on 14 June 2019. See www.wto.org/english/tratop_e/dispu_e/cases_e/ds516_e.htm.

³² Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011.

³³ The Appellate Body addressed the concept of “double remedy” in its report, according to the Appellate Body, “‘double remedies’ may arise when both countervailing duties and anti-dumping duties are imposed on the same imported products.” However, a simple combination of anti-dumping duty and countervailing duty may not lead to “double remedies”. Rather, “double remedy”, also referred to as “double counting”, refers to “circumstances in which the simultaneous application of anti-dumping and countervailing duties on the same imported products results, at least to some extent, in the offsetting of the same subsidization twice.” That is to say, the purpose of both duties is to offset the subsidy that is offered to the importing product, thus the imposition of two duties causes the subsidized measure amount to be offset twice. See Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011, at para 541. See

of countervailing duty, a potential controversy here is the determination of subsidy. The Agreement on Subsidies and Countervailing Measures (ASCM) stipulates that a “public body” is jointly referred to as a government whose behaviour could constitute the granting of subsidy but without clarifying what is necessary to identify the term of “public body”.³⁴ Therefore, it leaves a vacuum in the identification of an entity with links to the state, such as SOEs in China, and its qualification to provide a subsidy under the WTO rules.³⁵ With respect to the implementation of anti-dumping duty, a potential controversy relates to the justification of the “non-market economy treatment”. As analysed before, the expiry of the provisions in the CAP and ambiguous thresholds in the ADA and the GATT 1994 raise challenges to appropriate interpretations as embodied in the *EU – Price Comparison Methodologies Case*.³⁶

Notably, it is suspicious that the simultaneous application of anti-dumping and countervailing measures seldom occurs in one case. It is argued that there is a general situation of duty imposition where ‘more than two-thirds of all anti-subsidy investigations in the EU are paired with an anti-dumping investigation against the same non-EU producers’.³⁷ Since 2010, the US has conducted 142 trade remedy

also Brian D Kelly, ‘Market Economies and Concurrent Antidumping and Countervailing Duty Remedies’ (2014) 17 *Journal of International Economic Law* 105; Thomas J Prusa, ‘NMEs and the Double Remedy Problem’ (2017) 16 *World Trade Review* 619; Dukgeun Ahn and Jieun Lee, ‘Countervailing Duty against China: Opening a Pandora’s Box in the WTO System?’ (2011) 14 *Journal of International Economic Law* 329.

³⁴ Pursuant to Article 1 of the Agreement on Subsidies and Countervailing Measures, a subsidy refers to “a financial contribution by a government or any public body within the territory of a Member”. It then explains “financial contribution” in four forms as follows:

- (i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);
- (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);
- (iii) a government provides goods or services other than general infrastructure, or purchases goods;
- (iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments.

³⁵ Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011.

³⁶ See *European Union — Measures Related to Price Comparison Methodologies* (DS516) www.wto.org/english/tratop_e/dispu_e/cases_e/ds516_e.htm. See also Weihuan Zhou and Delei Peng, ‘EU - Price Comparison Methodologies (DS516): Challenging the Non-Market Economy Methodology in Light of the Negotiating History of Article 15 of China’s WTO Accession Protocol’ (2018) 52 *Journal of World Trade* 505.

³⁷ Besides, commentators also mention Jacob Viner who, in his seminal book on dumping, made the point that “in general, an export subsidy induces dumping, while a domestic subsidy does not,” which makes domestic subsidy more likely to raise a situation of “double remedy”. See Jorgen D Hansen and Jorgen UM Nielsen, ‘Subsidy-Induced Dumping’ (2014) 37 *World Economy* 654; Edwin Vermulst and Brian Gatta, ‘Concurrent Trade Defense Investigations in the EU, the EU’s New Anti-Subsidy Practice against China, and the Future of Both’ (2012) 11 *World Trade Review* 527.

investigations of China, with 74 anti-dumping and 66 anti-subsidy investigations respectively.³⁸ The impact of trade remedy measures shall neither be underestimated. Under the non-market economy methodology, ‘anti-dumping margins in US cases against China have averaged 154% as compared with an average of 49% for other targeted countries’.³⁹ There is no doubt that large anti-dumping margins’ influence on domestic industries will not be neglected by any country. As Jesse Kreier comments on the China’s anti-dumping investigations on US n-propanal exporters in July 2020:

[T]he 145 alleged subsidies include many of the same programs investigated in the n-propanal AD case and alleged in the parallel AD investigation. Thus, the issue whether government interventions are properly addressed by AD, CVD or both, once again presents itself.⁴⁰

As a remarkable issue in the *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* Case, the “double remedy” issue is inevitably discussed by experts.⁴¹ A generally accepted “breakthrough” on this issue relates to the “non-market economy treatment” from the anti-dumping dimension. One reason of this “breakthrough” lies in a “loophole” regulating the issue of “double remedies” in GATT 1994. Article VI:5 of GATT 1994 prohibits the “double remedy” issue originated from export subsidies, but it keeps silent on domestic subsidies.⁴² Why

³⁸ See China Trade Remedies Information under the supervision of China’s Department of Commerce, <http://cacs.mofcom.gov.cn/cacscms/view/statistics/ckajtj>.

³⁹ Thomas J Prusa, ‘NMEs and the Double Remedy Problem’ (2017) 16 World Trade Review 619, 621.

⁴⁰ See Zhiguo Yu and Jesse Kreier, ‘China and Distortions - Bis’ (*International Economic Law and Policy Blog*) <<https://ielp.worldtradelaw.net/2020/08/china-and-distortions-bis.html>> accessed 20 August 2020.

⁴¹ Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011. Research of “double remedies” see for example, Brian D Kelly, ‘Market Economies and Concurrent Antidumping and Countervailing Duty Remedies’ (2014) 17 Journal of International Economic Law 105; Prusa (n 5). Katarzyna Kaszubska, ‘Double Remedy: Beyond the Non-market economy status’ in James J Nedumpara and Weihuan Zhou (eds), *Non-Market Economies in the Global Trading System: The Special Case of China* (Springer Singapore 2018) <<https://www.springer.com/gp/book/9789811313301>> accessed 9 July 2020.

⁴² Pursuant to Article VI: 5 of the GATT 1994:

“No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization”.

It is clear that WTO law is aware that a subsidy may result in a misapplication of trade remedies and thus tries to prevent this situation, but it is suspicious why WTO law uses the specific term “export subsidy” rather than the general conception “subsidy”. The dispute settlement body in the *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* Case provides a potential explanation.

The Panel considered that “these terms are self-explanatory in their intention to limit the scope of the prohibition in Article VI:5 to situations involving export subsidies”. And “because the explicit prohibition in Article VI:5 is limited to potential ‘double remedies’ in respect of export subsidies, Members could not have intended to prohibit the

did Uruguay Round negotiators “skip” the “double remedy” issue by domestic subsidies? One of the concerns is that domestic subsidies are generally not increasing the dumping margin, thus not leading to related anti-dumping measures.⁴³ As analysed by the Appellate Body in the *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* Case, a domestic subsidy normally affects the domestic and export prices of a product in the same way and to the same extent.⁴⁴ Since any lowering of prices attributable to the subsidy will be reflected on both sides of the dumping margin calculation, the overall dumping margin will not be affected by subsidization.⁴⁵ However, under the “non-market economy treatment”, the surrogate price will replace the normal domestic price, thereby increasing the dumping margin and resulting in a high volume of anti-dumping duty.⁴⁶ The countervailing duty and anti-dumping duty then offset the domestic subsidy.

In response to this issue, calculating the “pass-through” rate and reduce the duplication of duties is proposed by experts.⁴⁷ “Pass-through” rate, in the context of “double remedy” issue, refers to the extent that a subsidy is passed through to the price and reflected in the calculation of dumping margin. Theoretically, a scientifically calculated “pass-through” rate could reduce the injury of “double remedy” issue by eliminating price discrimination under subsidization, and this is reflected in US GPX law.⁴⁸

imposition of ‘double remedies’ in respect of domestic subsidies in Articles 19.3 or 19.4 of the SCM Agreement, which are, on their face, silent on the issue of ‘double remedies’.”

The Appellate Body, however, disagreed with the Panel that the omission of domestic subsidy stipulated in Article VI refers to limit the scope of “double remedy” within export subsidy. It notes, rather, that Article VI:5 prohibits the concurrent application of anti-dumping and countervailing duties to compensate for the **same situation** of dumping or export subsidization.

⁴³ Brian D Kelly, ‘Market Economies and Concurrent Antidumping and Countervailing Duty Remedies’ (2014) 17 *Journal of International Economic Law* 105.

⁴⁴ Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011.

⁴⁵ See *ibid.*

⁴⁶ Ilaria Espa and Philip I Levy, ‘The Analogue Method Comes Unfastened - The Awkward Space between Market and Non-Market Economies in EC-Fasteners (Article 21.5)’ (2018) 17 *World Trade Review* 313.

⁴⁷ See for example, Thomas J Prusa and Edwin Vermulst, ‘United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China: Passing the Buck on Pass-Through’ (2013) 12 *World Trade Review* 197; Thomas J Prusa, ‘NMEs and the Double Remedy Problem’ (2017) 16 *World Trade Review* 619; Brian D Kelly, ‘Market Economies and Concurrent Antidumping and Countervailing Duty Remedies’ (2014) 17 *Journal of International Economic Law* 105.

⁴⁸ On March 6, 2012, US Congress enacted anti-dumping provisions (GPX Law), which provided the US Department of Commerce with a legal basis to apply anti-dumping duties and countervailing duties to China’s products; and through providing adjustments (by calculating pass-through rate) to anti-dumping duties to avoid the situation of “double remedies”. See Public Law 112–99, 112th Congress, 126 STAT. 265 (MAR. 13, 2012).

However, it is in practise difficult to calculate the influence of subsidy on a relevant price and separate it from anti-dumping duty. According to the *GPX Int'l Tire Corp. v. United States* Case, the US Department of Commerce (DOC) expressed that it did not have a method for identifying overlapping remedies, the Court also admitted that it is difficult for the Commerce to decide the degree and extent of potential “double remedy” issue.⁴⁹ Besides, the “pass-through” method belongs to a remedy behaviour, which means it aims to eliminate the injury of unfair trade remedy measures. Comparatively, a preventative method is preferential as it predicts the risk and prevents the existence of future injury by providing transparent regulations through the interpretation of law.

Accordingly, this research argues that it is requisite to interpret the WTO provisions prescribing the “non-market economy treatment” in the context of the “double remedy” issue. This research first argues that provisions of the CAP stipulating the “non-market economy treatment” are of significant importance in dealing with the issue of “double remedies”. Relating viewpoints stem from China’s economy status post-2016. In other words, whether WTO Members should grant China market economy status in the wake of the expiry of the provisions in the CAP.⁵⁰ The discussion then developed into a debate on the justification of the “non-market economy treatment” due to the expiry of the provisions in CAP. The proponents of a justifiable “non-market economy treatment” insist that the remaining provisions of the CAP still permit the continuance of special treatment.⁵¹ And opponents assert that WTO Members can not resort to the CAP for

⁴⁹ Based on the case, the Commerce explained that “it would not allow a constructed export price (‘CEP’) offset or a circumstances of sales (‘COS’) adjustment in this investigation because Commerce ‘cannot accurately determine the specific indirect selling expenses incurred on sales reflected in the surrogate financial statements’”. The Court, in its latter analysis, stated that “it is too difficult for Commerce to determine, using improved methodologies, and in the absence of new statutory tools, whether and to what degree double counting is occurring”. See *GPX Int'l Tire Corp. v. United States*, 715 F.Supp.2d 1337, 1345 (CIT 2010) (“GPX III”).

⁵⁰ Matthew R Nicely, ‘Time to Eliminate Outdated Non-Market Economy Methodologies’ (2014) 9 *Global Trade and Customs Journal* 160; Michael (II) Flynn, ‘China: A Market Economy Notes’ (2016) 48 *Georgetown Journal of International Law* 297; Mark Wu, ‘The “China, Inc.” Challenge to Global Trade Governance’ (2016) 57 *Harvard International Law Journal* 261.

⁵¹ See for example, Jorge Miranda, ‘More on Why Granting China Market Economy Status after December 2016 Is Contingent upon Whether China Has in Fact Transitioned into a Market Economy’ (2016) 11 *Global Trade and Customs Journal* 244; Bernard O’Connor, ‘Much Ado about Nothing: 2016, China and Market Economy Status’ (2015) 10 *Global Trade and Customs Journal* 176; Terence P Stewart and others, ‘The Special Case of China: Why the Use of a Special Methodology Remains Applicable to China after 2016’ (2014) 9 *Global Trade and Customs Journal* 272; Laurent Ruessmann and Jochen Beck, ‘2016 and the Application of an NME Methodology to Chinese Producers in Anti-Dumping Investigations’ (2014) 9 *Global Trade and Customs Journal* 457.

such treatment.⁵² This research, in chapter 5, argues that the expiry of provisions in the CAP does not necessarily refer to a transfer of China's economy status. Nevertheless, WTO Members cannot resort to the CAP to apply a discriminatory treatment. And such discriminatory treatment for China cannot be based on its special market status.

Apart from the CAP, another legal basis of the "non-market economy treatment" relates to the ADA and the GATT 1994. The EU 2017 anti-dumping regulation were enacted to deal with the dilemma that its "non-market economy" provisions of the 2016 regulation may not efficient in the wake of Article 15(a)(ii) CAP's expiry in December 2016.⁵³ It triggered a discussion on the EU's new anti-dumping provisions and their consistency with the thresholds for special treatment in the WTO anti-dumping rules. This research agrees with the viewpoint that the EU "country-neutral" approach may not conform to the WTO regulations.⁵⁴ It contends that to prevent the abuse of anti-dumping measures, it is crucial to carefully determine the normal value in the anti-dumping investigations. This research, in chapter 6, further concludes that when calculating dumping margin of either market or non-market economies, the primary choice in determining the normal value shall be based on the actual cost of production, even though such a cost is considered to be "distorted". When "non-market economy treatment" is necessary to construct the normal value, all factors related to the cost in that country, including "price distortions", should be considered 'as long as they reflect the prevailing conditions in the market of exportation'.

⁵² See for example, Jochem De Kok analysed China's Accession Protocol to the WTO and concluded WTO Members may 'no longer have resources to an NME methodology' based on the Protocol. See Jochem De Kok, 'The Future of EU Trade Defence Investigations against Imports from China' (2016) 19 *Journal of International Economic Law* 515; Yenkong Ngangjoh-Hodu and Tianzhu Han, 'China's Market Economy Dilemma and Its Interplay with EU Anti-Dumping Law' (2019) 27 *Asia Pacific Law Review* 102; Roberto Soprano, 'The Principle of Effectiveness in the Interpretation of the Protocol of Accession of China to the World Trade Organization: Market Economy Considerations in Anti-Dumping Investigations' (2019) 46 *Legal Issues of Economic Integration* 29; Weihuan Zhou, 'China's Litigation on Non-Market Economy Treatment at the WTO: A Preliminary Assessment' (2017) 5 *Chinese Journal of Comparative Law* 345; Vermulst, Sud and Evenett (n 20); Minyou Yu and Jian Guan, 'The Non-Market Economy Methodology Shall Be Terminated After 2016' (2017) 12 *Global Trade and Customs Journal* 16.

⁵³ Christian Tietje and Vinzenz Sacher, 'The New Anti-Dumping Methodology of the European Union – A Breach of WTO-Law?' (Social Science Research Network 2018) SSRN Scholarly Paper ID 3175742 13 <<https://papers.ssrn.com/abstract=3175742>> accessed 9 July 2020.

⁵⁴ See for example, Tietje and Sacher (n 55); Sherzod Shadikhodjaev, 'Non-Market Economies, Significant Market Distortions, and the 2017 EU Anti-Dumping Amendment' (2018) 21 *Journal of International Economic Law* 885, 887; Stéphanie Noël and Weihuan Zhou, 'EU's New Anti-Dumping Methodology and The End of The Non-Market Economy Dispute?' (2019) 14 *Global Trade and Customs Journal* <<https://papers.ssrn.com/abstract=3424435>> accessed 9 July 2020.

The significance of the subsidy determination has been neglected in the context of the “double remedy” issue. It is noticed that the subsidy determination constitutes an integral part of the “double remedy” issue in the *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* Case, but the “breakthrough” in the “double remedy” issue preferably relies on the side of anti-dumping measure.⁵⁵ The “public body” issue, as emblematic of subsidy determination, has limited interpretations. Experts rely on the Appellate Body’s blurry standard that is “government authority” without clarifying what is necessary to demonstrate such authority.⁵⁶ This research, in chapter 3, highlights the significance of the interpretation of the subsidy determination when preventing the issue of “double remedies” through analysing its rationale and development in the US domestic cases. Furthermore, being inspired by Mavroidis, Janow and Bhala, this research argues that the recent emerging negotiations of FTAs, especially the CPTPP, shed light on the interpretation of the “public body”.⁵⁷

Moreover, as one of the major disputes in the *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* Case, how to identify an entity as an extension of the state is a core question that should be answered by the WTO. Specifically, how to evaluate SOEs in China with links to the state and its qualification to provide subsidies under the WTO rules. Entities in China, especially SOEs, “are embedded in a network composed of dense and complex links with the state”.⁵⁸ Government agencies, for example SASAC, have centralised control over

⁵⁵ See for example, Dukgeun Ahn, ‘United States-Definitive Anti-Dumping and Countervailing Duties on Certain Products from China.’ (2011) 105 American Journal of International Law 761, 767. Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011, at para 317.

⁵⁶ See Ru Ding, “‘Public Body’ or Not: Chinese State-Owned Enterprise” (2014) 48 Journal of World Trade 167. Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011.

⁵⁷ Petros C Mavroidis and Merit E Janow, ‘Free Markets, State Involvement, and the WTO: Chinese State-Owned Enterprises in the Ring’ (2017) 16 World Trade Review 571; Raj Bhala, ‘TPP, American National Security and Chinese SOEs’ (2017) 16 World Trade Review 655.

⁵⁸ Li-Wen Lin, ‘A Network Anatomy of Chinese State-Owned Enterprises’ (2017) 16 World Trade Review 583.

SOEs,⁵⁹ which is potentially an overlap with the ambiguous interpretation of “public body”. It may raise the controversy that an SOE is potentially a “public body”, thus its behaviours are potentially countervailable. This research, in chapter 4, proposes criteria to identify a “public body”, which provide a reference for subsidy determination. It further highlights that the regulation and reform of SOEs in China are not guarantee those entities are distinguished from “public bodies”.

Conclusively, this research aims to prevent the abuse of trade remedies and maintain the function of the WTO through re-interpretation of the WTO trade remedies agreements, using the “double remedy” issue of China as a special case.

1.2 Research gap and its importance

The research gap can be illustrated in three points. First, significance of subsidy determination has been neglected in the context of “double remedy” issue. Second, criteria to determine a “public body” is ambiguous. Third, it is requisite to interpret the “non-market economy treatment” in the context of “double remedy” issue under the WTO agreements.

1.2.1 The “double remedy” issue is reflected from both anti-dumping and countervailing dimensions

Mentioning the issue of “double remedies”, a common “breakthrough” relates to the “non-market economy treatment” from the anti-dumping dimension, which leads to a delusion that the anti-dumping perspective is the only origin of “double remedy” issue.⁶⁰

⁵⁹ Mark Wu, ‘The “China, Inc.” Challenge to Global Trade Governance’ (2016) 57 Harvard International Law Journal 261.

⁶⁰ See for example, Dukgeun Ahn, ‘United States-Definitive Anti-Dumping and Countervailing Duties on Certain Products from China.’ (2011) 105 American Journal of International Law 761, 767. Katarzyna Kaszubska, ‘Double Remedy: Beyond the Non-market economy status’ in James J Nedumpara and Weihuan Zhou (eds), *Non-Market Economies in the Global Trading System: The Special Case of China* (Springer Singapore 2018)

One reason of this “breakthrough” lies in a “loophole” regulating the issue of “double remedies” in the GATT 1994. Article VI:5 of the GATT 1994 prohibits the “double remedy” issue originated from export subsidies, but it keeps silent on domestic subsidies.⁶¹ Why did Uruguay Round negotiators “skip” the “double remedy” issue by domestic subsidies? One of the concerns is that domestic subsidies are generally not increasing the dumping margin, thus not leading to related anti-dumping measures.⁶² As analysed by the Appellate Body in the *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* Case, domestic subsidy normally affects the domestic and export prices of a product in the same way and to the same extent.⁶³ Since any lowering of prices attributable to the subsidy will be reflected on both sides of the dumping margin calculation, the overall dumping margin will not be affected by subsidization.⁶⁴ However, under the “non-market economy treatment”, the surrogate price will replace the normal domestic price, thereby increasing the dumping margin and resulting in a high volume of anti-dumping duty.⁶⁵ The countervailing duty and anti-dumping duty then offset the domestic subsidy.

<<https://www.springer.com/gp/book/9789811313301>> accessed 9 July 2020. Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011, at para 317.

⁶¹ Pursuant to Article VI: 5 of the GATT 1994:

“No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization”.

It is clear that the WTO law has aware of the subsidy may result in a misapplication of trade remedies thus trying to prevent this situation, but it is suspicious why WTO law use specific “export subsidy” rather than general conception “subsidy”. The dispute settlement body, in *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* Case, provides potential explanations.

The Panel considered that “these terms are self-explanatory in their intention to limit the scope of the prohibition in Article VI:5 to situations involving export subsidies”. And “because the explicit prohibition in Article VI:5 is limited to potential ‘double remedies’ in respect of export subsidies, Members could not have intended to prohibit the imposition of ‘double remedies’ in respect of domestic subsidies in Articles 19.3 or 19.4 of the SCM Agreement, which are, on their face, silent on the issue of ‘double remedies’.”

The Appellate Body, however, disagree with the Panel that omission of domestic subsidy stipulated in Article VI refers to limit the scope of “double remedy” within export subsidy. It notes, rather, that Article VI:5 prohibits the concurrent application of anti-dumping and countervailing duties to compensate for the **same situation** of dumping or export subsidization.

⁶² Brian D Kelly, ‘Market Economies and Concurrent Antidumping and Countervailing Duty Remedies’ (2014) 17 *Journal of International Economic Law* 105.

⁶³ See Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011.

⁶⁴ See *ibid.*

⁶⁵ Ilaria Espa and Philip I Levy, ‘The Analogue Method Comes Unfastened - The Awkward Space between Market and Non-Market Economies in EC-Fasteners (Article 21.5)’ (2018) 17 *World Trade Review* 313.

However, the subsidy issue as an origin of the “double remedy” issue should attract more attention. The issue of “double remedies” did not come up overnight. Chapter 3 provides an analysis of “double remedy” issue from a national “countervailing case” into an international dispute. As Chapter 3 discusses, the first case addressing the issue of “double remedies” in US is the GPX case where the US Department of Commerce (DOC) for the first time applied countervailing measures to NMEs like China. The GPX cases reflect a historical development that US courts tried to regulate the countervailing disputes with anti-dumping provisions since the subsidy issue first appeared in a national court.⁶⁶

The importance to address subsidization as part of the “double remedy” issue is also highlighted by the WTO tribunals in the *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* Case, which analyses in chapter 2. One major concern analysed by the Appellate Body is the constitution of “double remedy” issue under circumstances of two subsidies.⁶⁷ With respect to the provisions prohibiting the issue of “double remedies”, the Appellate Body rebutted the Panel’s analysis that “these terms are self-explanatory in their intention to limit the scope of the prohibition in Article VI:5 to situations involving export subsidies”.⁶⁸ It noted, rather, that Article VI:5 prohibits the concurrent application of anti-dumping and

⁶⁶ GPX Cases have experienced several appeals, in order to identify different decisions in cases, the Court of International Trade followed the naming conventions used by the parties in *GPX International Tire Corp. v. United States*, 893 F.Supp.2d 1296, 1304-06 (CIT 2013) as follows:

GPX Int’l Tire Corp. v. United States, 587 F.Supp.2d 1278, 1291-92 (CIT 2008), reh’g denied, 593 F.Supp.2d 1389 (CIT 2008) (“GPX I”); *GPX Int’l Tire Corp. v. United States*, 645 F.Supp.2d 1231 (CIT 2009) (“GPX II”); *GPX Int’l Tire Corp. v. United States*, 715 F.Supp.2d 1337 (CIT 2010) (“GPX III”); *GPX Int’l Tire Corp. v. United States*, Slip Op. 10-112, 2010 WL 3835022 (CIT Oct. 1, 2010) (“GPX IV”); *GPX Int’l Tire Corp. v. United States*, 666 F.3d 732 (Fed.Cir.2011) (“GPX V”); *GPX Int’l Tire Corp. v. United States*, 678 F.3d 1308 (Fed.Cir.2012) (“GPX VI”); *GPX International Tire Corp. v. United States*, 893 F.Supp.2d 1296 (CIT 2013) (“GPX VII”), aff’d, 780 F.3d 1136 (Fed. Cir.2015); *GPX International Tire Corp. v. United States*, 942 F.Supp.2d 1343 (CIT 2013) (“GPX VIII”).

⁶⁷ Literally, under an export subsidy, a situation of “double remedy” may occur when such export subsidy will “result in a pro rata reduction in the export price of a product, but will not affect the price of domestic sales of that product. That is, the subsidy will lead to increased price discrimination and a higher margin of dumping. In such circumstances, the situation of subsidization and the situation of dumping are the ‘same situation’, and the application of concurrent duties would amount to the application of ‘double remedies’ to compensate for, or offset, that situation.”

In general, a domestic subsidy, however, will affect the domestic and export prices to the same extent, thus the subsidy will be reflected on both sides of the dumping margin calculation, so the overall dumping margin will not be affected by subsidization. See Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011, paras 568-569.

⁶⁸ See *ibid.*

countervailing duties to compensate for the “same situation of dumping or export subsidization”.⁶⁹ “Same situation” indicate the issue of “double remedies” under domestic subsidy should be under the guidance of the WTO law (specific analysis of “same situation” please see Chapter 2, Section 2.2.2). The Appellate Body further reaffirmed the illegality of “double remedy” issue by contending that it violated requirements in Article 19.3 of the ASCM that trade remedy duties shall be collected “in appropriate amounts”.⁷⁰ The tribunals’ attitudes on subsidies in the context of “double remedy” issue is thus obvious, which highlights the significance of the subsidy dimension. As commented by Xuewei Feng, ‘the right route and the applicable tool to offset such subsidization is the application of the SCM Agreement, and not the AD Agreement’.⁷¹

1.2.2 There are no clarified criteria to identify a “public body”

Regarding the research of “public body” issue, three points are of value to concern. First, when interpreting “public body”, experts rely on the Appellate Body’s report in the *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* Case – standard of “government authority” – without clarifying what is necessary to demonstrate such authority.⁷² For example, both Dukgeun and Ru discussed WTO tribunals’ analysis of the “public body” issue in the *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* Case.⁷³ Dukgeun gave an introductive description of tribunals’ analysis and Ru further classified “public body” by three categories based on the report of the Appellate Body.

⁶⁹ See *ibid.*

⁷⁰ See *ibid.* at para. 547.

⁷¹ See Xuewei Feng, ‘The Termination of the Grandfather Clause in China’s Accession Protocol and the Normal Value Construction After Fifteen Years of Accession’ in James J Nedumpara and Weihuan Zhou (eds), *Non-Market Economies in the Global Trading System: The Special Case of China* (Springer Singapore 2018) <<https://www.springer.com/gp/book/9789811313301>> accessed 9 July 2020.

⁷² See Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011.

⁷³ Dukgeun Ahn, ‘United States-Definitive Anti-Dumping and Countervailing Duties on Certain Products from China.’ (2011) 105 *American Journal of International Law* 761, 767; Ru Ding, ‘“Public Body” or Not: Chinese State-Owned Enterprise’ (2014) 48 *Journal of World Trade* 167.

Nevertheless, the criteria of “public body” are still vague. Since the *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* Case, the “public body” issue has raised three disputes.⁷⁴ Even before the *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* Case, there is one case addressing factors of a “public body”.⁷⁵ Therefore, this research argues in chapter 4, apart from the *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* Case, other cases are also relevant in identifying a “public body”.

Second, the assessment of SOEs in China in the context of the “public body” issue is necessary. Only when connecting with practical issue, the arcane and ambiguous term “public body” is more likely to be precise. Whether China’s SOEs belong to “public bodies” thus qualifying to conduct subsidies is one of major arguments in the *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* Case.⁷⁶ As the Appellate Body did not give a clear answer to this question, potential research is required in this regard. As highlighted by Wu, China has a unique economic structure, commercial entities in China has multiple connections with state or Party, which distinguishes with other economic structure. In this regard, existing research on China’s SOEs can be further explored in the context of the “public body” issue. For example, Ru summarised three approaches of “public body” determination from the *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* Case and applied them to assess China’s SOEs.⁷⁷ When evaluating SOEs in China, Ru mainly relied on Chinese Corporate Law. Comparatively,

⁷⁴ Appellate Body Report, *United States – Countervailing Measures on Certain Hot-rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R, adopted 8 December 2014. Panel Report, *United States – Countervailing Duty Measures on Certain Products from China*, WT/DS437/ R, adopted 14 July 2014. Appellate Body Report, *United States – Countervailing Duty Measures on Certain Products from China*, WT/DS437/AB/RW, adopted 16 July 2019.

⁷⁵ See Panel Report, *Korea – Measures Affecting Trade in Commercial Vessels*, WT/DS273/R, adopted 7 March 2005.

⁷⁶ See Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011, at paras 568-569.

⁷⁷ Ru Ding, “‘Public Body’ or Not: Chinese State-Owned Enterprise” (2014) 48 *Journal of World Trade* 167.

this research argues that more materials are available to evaluate China's SOEs. Especially regarding state intervention, the relationship between government and SOEs in China is more reflected in national law, to be specific, the Law of the People's Republic of China on the State-Owned Assets of Enterprises.⁷⁸ Concerning reform of SOEs in China, more details can be traced by the Guiding Opinions of the CPC Central Committee and the State Council on Deepening the Reform of State-owned Enterprises, such as an attempt at independent market player.⁷⁹ Those documents could provide detailed features of SOEs when analysing in the context of the "public body" issue.

Third, being inspired by Petros, Merit and Raj, the recent emerging negotiations of FTAs also shed light on the explanation of the "public body", which has not been discussed by experts. Petros and Merit, in their research, highlighted the lack of practices regarding the 'treatment of NMEs in the context of preferential trade agreements', which is also the case for "public body" interpretation.⁸⁰ They then, in Section four, concluded the contribution of SOE related rules stipulated in TPP.⁸¹ Raj discussed TPP in the context of national security. The research made the point that the regulation of SOE definition in TPP is a reflection enhancing national security.⁸² Although they did not directly address the referential meaning of preferential trade agreements as regards the "public body" issue, they do indicate that trade agreements, especially FTAs (Free Trade Agreements), are aware of the potential risk of SOEs and seek a solution to prevent further disputes within the legal regime of agreements. In fact, as discussed in Chapter 4, CPTPP (Comprehensive and Progressive Agreement

⁷⁸ The law is published by the Ministry of Justice of the People's Republic of China, http://www.moj.gov.cn/Department/content/2009-01/20/592_201254.html accessed 26 March 2020. See English version translated by lawinfochina.com, <http://en.pkulaw.cn/display.aspx?id=7195&lib=law> accessed 26 March 2020.

⁷⁹ The Guideline is published on the official website on the State Council of the People's Republic of China, http://www.gov.cn/zhengce/2015-09/13/content_2930440.htm accessed 26 March 2020. See English version translated by lawinfochina.com, <http://en.pkulaw.cn/display.aspx?cgid=26c39a43ea095fcebdfb&lib=law#> accessed 26 March 2020. The reform of SOE has several rounds which can be classified by different periods. More of previous reform see Weihuan Zhou, Henry Gao and Xue Bai, 'Building a Market Economy Through Wto-Inspired Reform of State-Owned Enterprises in China' (2019) 68 International & Comparative Law Quarterly 977.

⁸⁰ Petros C Mavroidis and Merit E Janow, 'Free Markets, State Involvement, and the WTO: Chinese State-Owned Enterprises in the Ring' (2017) 16 World Trade Review 571.

⁸¹ See *ibid.*

⁸² Raj Bhala, 'TPP, American National Security and Chinese SOEs' (2017) 16 World Trade Review 655.

for Trans-Pacific Partnership),⁸³ have a referential meaning in compliance with WTO provisions.⁸⁴ And those provisions reflect the latest understanding of concepts and trade rules by contracting parties, which also contain a practical reference when interpreting the “public body”.

1.2.3 Interpreting the “non-market economy treatment” in the context of “double remedy” issue under the WTO agreements

To tackle the “double remedy” issue from the anti-dumping dimension, a generally accepted thought is to calculate the “pass-through” rate and reduce the duplication of duties.⁸⁵ “Pass-through” rate, in the context of “double remedy” issue, refers to the extent that a subsidy is passed through to the price and reflected in the calculation of dumping margin. Theoretically, a scientifically calculated “pass-through” rate could reduce the injury of “double remedy” issue by eliminating the price discrimination under subsidization, and this is reflected in US GPX law.⁸⁶ However, it is in practice difficult to calculate the influence of subsidy on a relevant price and separate it from anti-dumping duty. According to the *GPX Int'l Tire Corp. v. United States* Case, the US Department of Commerce (DOC) expressed that it did not have a method for identifying overlapping remedies, the court also admitted that it is difficult for the Commerce to decide the degree and extent of potential “double remedy” issue.⁸⁷ Besides, the “pass-

⁸³ The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) aiming to be a free trade agreement is now involving 11 countries in the Asia-Pacific region, including New Zealand, Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, Peru, Singapore, and Viet Nam. Its predecessor is Trans-Pacific Partnership Agreement (TPP), which is a free trade agreement that would liberalize trade and investment between 12 Pacific-rim countries.

⁸⁴ Article 6.8 of the agreement clearly addresses that trade disputes between parties are governed by WTO rules, such as ADA (Anti-dumping Agreement) and ASCM (Agreement on Subsidy and Countervailing Measure).

⁸⁵ See for example, Brian D Kelly, ‘Market Economies and Concurrent Antidumping and Countervailing Duty Remedies’ (2014) 17 *Journal of International Economic Law* 105; Thomas J Prusa and Edwin Vermulst, ‘United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China: Passing the Buck on Pass-Through’ (2013) 12 *World Trade Review* 197; Thomas J Prusa, ‘NMEs and the Double Remedy Problem’ (2017) 16 *World Trade Review* 619.

⁸⁶ On March 6, 2012, US Congress enacted anti-dumping provisions (GPX Law), which provided US Department of Commerce with legal basis to apply anti-dumping duties and countervailing duties to China’s products; and through providing adjustments (by calculating pass-through rate) to anti-dumping duties to avoid the situation of “double remedies”. See Public Law 112–99, 112th Congress, 126 STAT. 265 (MAR. 13, 2012).

⁸⁷ Based on the case, the Commerce explained that “it would not allow a constructed export price (‘CEP’) offset or a circumstances of sales (‘COS’) adjustment in this investigation because Commerce ‘cannot accurately determine the specific indirect selling expenses incurred on sales reflected in the surrogate financial statements’”. The court, in its latter analysis, stated that “it is too difficult for Commerce to determine, using improved methodologies, and

through” method belongs to a remedy behaviour, which means it aims to eliminate the injury of unfair trade remedy measures. Comparatively, a preventative method is preferential as it predicts the risk and prevents the existence of future injury by providing transparent regulations through the interpretation of law.

Accordingly, this research argues that it is requisite to interpret the WTO provisions prescribing the “non-market economy treatment” in the context of the “double remedy” issue. This research first argues that provisions of the CAP stipulating the “non-market economy treatment” are of significant importance in dealing with the issue of “double remedies”. Relating viewpoints start from China’s economy status post-2016. In other words, whether WTO Members should grant China market economy status in the wake of the expiry of the provisions in CAP.⁸⁸ The discussion then evolved into a debate on the justification of the “non-market economy treatment” due to the expiry of the provisions in the CAP. The proponents of a justifiable the “non-market economy treatment” insisted that the remaining provisions of the CAP still permit the continuance of special treatment.⁸⁹ And opponents asserted that WTO Members can not resort to CAP for such treatment.⁹⁰ This research, in chapter 5, argues that the expiry of provisions in the CAP does not necessarily refers to a transfer of China’s economy status. Nevertheless, WTO Members cannot resort to the CAP to apply

in the absence of new statutory tools, whether and to what degree double counting is occurring”. See *GPX Int’l Tire Corp. v. United States*, 715 F.Supp.2d 1337, 1345 (CIT 2010) (“GPX III”).

⁸⁸ For example, Yong-Shik Lee, ‘Should China Be Granted Market Economy Status? In View of Recent Development’ (2017) 3 *China and WTO Review* 319.

⁸⁹ See for example, Jorge Miranda, ‘More on Why Granting China Market Economy Status after December 2016 Is Contingent upon Whether China Has in Fact Transitioned into a Market Economy’ (2016) 11 *Global Trade and Customs Journal* 244; Bernard O’Connor, ‘Much Ado about Nothing: 2016, China and Market Economy Status’ (2015) 10 *Global Trade and Customs Journal* 176; Terence P Stewart and others, ‘The Special Case of China: Why the Use of a Special Methodology Remains Applicable to China after 2016’ (2014) 9 *Global Trade and Customs Journal* 272; Laurent Ruessmann and Jochen Beck, ‘2016 and the Application of an NME Methodology to Chinese Producers in Anti-Dumping Investigations’ (2014) 9 *Global Trade and Customs Journal* 457.

⁹⁰ See for example, Jochem De Kok, ‘The Future of EU Trade Defence Investigations against Imports from China’ (2016) 19 *Journal of International Economic Law* 515; Yenkong Ngangjoh-Hodu and Tianzhu Han, ‘China’s Market Economy Dilemma and Its Interplay with EU Anti-Dumping Law’ (2019) 27 *Asia Pacific Law Review* 102; Roberto Soprano, ‘The Principle of Effectiveness in the Interpretation of the Protocol of Accession of China to the World Trade Organization: Market Economy Considerations in Anti-Dumping Investigations’ (2019) 46 *Legal Issues of Economic Integration* 29; Weihuan Zhou, ‘China’s Litigation on Non-Market Economy Treatment at the WTO: A Preliminary Assessment’ (2017) 5 *Chinese Journal of Comparative Law* 345; Edwin Vermulst, Juhí Dion Sud and Simon J Evenett, ‘Normal Value in Anti-Dumping Proceedings against China Post-2016: Are Some Animals Less Equal than Others’ (2016) 11 *Global Trade and Customs Journal* 212; Minyou Yu and Jian Guan, ‘The Non-Market Economy Methodology Shall Be Terminated After 2016’ (2017) 12 *Global Trade and Customs Journal* 16.

discriminatory treatment. And such discriminatory treatment on China cannot be based on its special market status.

Apart from the CAP, another legal basis of the “non-market economy treatment” relates to the ADA and the GATT 1994. The EU 2017 anti-dumping regulations were enacted to deal with the dilemma that provisions regulating the non-market economy in the 2016 regulation may not efficient in the wake of Article 15(a)(ii) CAP’s expiry in December 2016.⁹¹ It triggered discussions on the EU’s new anti-dumping provisions and their consistency with the thresholds for special treatment in the WTO anti-dumping rules. This research agrees with the viewpoint that the EU “country-neutral” approach may not conform to the WTO regulations.⁹² It further, in chapter 6, contends that it is crucial to carefully determine the normal value in the anti-dumping investigations. This research concludes that when calculating dumping margin of either market or non-market economies, the primary choice in determining the normal value shall be based on the actual cost of production, even though such a cost is considered to be “distorted”. When “non-market economy treatment” is necessary to construct the normal value, all factors related to the cost in that country, including “price distortions”, should be considered ‘as long as they reflect the prevailing conditions in the market of exportation’.

1.2.4 Conclusion

Conclusively speaking, when tackling the issue of “double remedies”, the anti-dumping and subsidy issues have equal research value, but existing research mainly focuses on

⁹¹ See Christian Tietje and Vinzenz Sacher, ‘The New Anti-Dumping Methodology of the European Union – A Breach of WTO-Law?’ (Social Science Research Network 2018) SSRN Scholarly Paper ID 3175742 13 <<https://papers.ssrn.com/abstract=3175742>> accessed 9 July 2020.

⁹² See for example, Tietje and Sacher (n55); Sherzod Shadikhodjaev, ‘Non-Market Economies, Significant Market Distortions, and the 2017 EU Anti-Dumping Amendment’ (2018) 21 *Journal of International Economic Law* 885, 887; Stéphanie Noël and Weihuan Zhou, ‘EU’s New Anti-Dumping Methodology and The End of The Non-Market Economy Dispute?’ (2019) 14 *Global Trade and Customs Journal* <<https://papers.ssrn.com/abstract=3424435>> accessed 9 July 2020.

the anti-dumping dimension. The significance of the subsidy determination should not be neglected but to be regarded as an integral part to analyse.

Concerning research from the subsidy determination, one major concern is there lack of clarified criteria in identifying a “public body”. The Appellate Body’s report in the *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, Case is not sufficient to interpret a “public body”, because the “government authority” standard does not clarify what is necessary to demonstrate such authority.⁹³ And in this regard, other cases are also relevant in identifying a “public body”. Moreover, the assessment of SOEs in China in the context of “public body” issue is necessary. Existing research on China’s SOEs can be further explored in the context of “public body” issue. Besides, the recent emerging negotiations of FTAs also shed light on the explanation of “public body”, which has not been discussed by experts.

Regarding the anti-dumping dimension, calculating the “pass-through” rate and reduce the duplication of duties is theoretically possible, but it is in practice difficult to calculate the influence of subsidy on relevant prices and separate it from anti-dumping duty. The “pass-through” method belongs to a remedy behaviour, which means it aims to eliminate the injury of unfair trade remedy measures. Comparatively, a preventative method is preferential as it predicts the risk and prevents the existence of future injury by providing transparent regulations through the interpretation of law. And for this research, a proposed approach is to clarify the “non-market economy treatment” under the WTO agreements, such as the CAP, the ADA, and the GATT 1994, thereby preventing the “double remedy” issue.

1.3 Research question and objectives

⁹³ See Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011.

The central research question which underpins this research is: how to deal with the issue of “double remedies” through re-interpretation of the WTO trade remedies agreements? In order to answer this question, this thesis examines five subsidiary questions:

- (a) What are the origins and rationale of the “double remedy” issue, and why does this issue relate to “non-market economies”?
- (b) Why is the subsidy determination an integral part of the “double remedy” issue?
- (c) What are appropriate interpretations of a “public body”, and how do they relate to SOEs in China?
- (d) What can be interpreted from the China’s Accession Protocol as regards the “non-market economy treatment”?
- (e) What can be interpreted from the ADA and GATT 1994 relating to the “non-market economy treatment”?

1.4 Research methodology

This research is mainly underpinned by the doctrinal analysis. This traditional legal methodology see law as ‘a self-contained system which is politically neutral and independent of other academic disciplines’.⁹⁴ It is the methodology that systematises the law and uses to analyse whether the vague or inconsistent law leads to the uncertainty of the applications. As the issue of “double remedies” requires appropriate interpretation on countervailing law and anti-dumping law, the central work of the research hinges on the analysis of WTO agreements and principles. In this regard, doctrinal methodology well fitted in analysing provisions, especially when relying on the Vienna Convention on the Law of Treaty (VCLT). Recalling the *United States - Standards for Reformulated and Conventional Gasoline* Case, the Appellate Body highlighted WTO law can be interpreted by the VCLT and recalled Article 31 of the

⁹⁴ See Caroline Morris and Cian C Murphy, *Getting a PhD in Law* (01 Edition, Hart Publishing 1943) 31.

VCLT that ‘A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’.⁹⁵ Relying on the VCLT, doctrinal methodology can provide comprehensive analysis on WTO agreements, i.e. interpretation of the “non-market economy treatment” in the CAP based on textual and contextual connections between sentences of Article 15, and interpretation of the “non-market economy treatment” in the ADA and the GATT 1994 based on ordinary meanings of the provisions.

Notably, the doctrinal analysis is not only applied to WTO agreements. It is also preferable in evaluating national regulations and the negotiations of recent FTAs. For example, the latest referential treaties, as an embodiment of trade globalization, reflected an aggregation of solutions to the latest trade disputes. As emblematic of FTAs, the CPTPP regulated SOE-related terminology, which sheds light on the identification of “public body”. Therefore, doctrinal analysis of FTAs as well as national legal system could support the interpretation of WTO rules. And such an interpretation could, in return, guide the implementation of WTO rules in practise. For this research, doctrinal analysis is mainly conducted on EU anti-dumping regulations, the CPTPP provisions and their consistency with WTO law.

1.4.1 Doctrinal analysis as the backbone of the research

The application of doctrinal methodology is the mainline of this research. The doctrinal analysis of the WTO regulations⁹⁶ and cases⁹⁷ demonstrates that the “non-market economy treatment” from the anti-dumping dimension is not the only origin of “double

⁹⁵ See Appellate Body Report, *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, at para. 17.

⁹⁶ WTO regulations, for example, General Agreement on Tariffs and Trade 1994 (GATT 1994); Agreements on Subsidies and Countervailing Measures (ASCM); Agreement on Implementation of Article VI of the GATT 1994 (Anti-dumping Agreement, ADA)

⁹⁷ For example, Appellate Body Report, *United States – Countervailing Measures on Certain Hot-rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R, adopted 8 December 2014. Panel Report, *United States - Countervailing Duty Measures on Certain Products from China*, WT/DS437/ R, adopted 14 July 2014. Appellate Body Report, *United States - Countervailing Duty Measures on Certain Products from China*, WT/DS437/AB/RW, adopted 16 July 2019.

remedy” issue, the ambiguous provisions of subsidy determination from the countervailing dimension also “contributes” to the result of trade disputes.

The ambiguous trade remedy provisions require appropriate interpretations. Concerning the subsidy determination, WTO countervailing agreements, in specific, the ASCM, serves as the main target of the doctrinal analysis. Article 1.1 (a)(1) of the ASCM has raised potential controversy on determination of an entity established by a government to serve as a “pass-through” vehicle for subsidies.⁹⁸ The vague expression of the ASCM could result in a confusion determining the subject of a subsidy behaviour (“public body”), thus causing a potential countervailing measure. Around the “public body” issue, analysis is based on the case law where WTO tribunals addressed the factors of a “public body”.⁹⁹

Moreover, treaties are of significant value for the doctrinal analysis. Provisions in FTAs, especially the CPTPP, have a referential function in compliance of the WTO provisions. For example, Article 6.8 of the agreement clearly addresses that trade disputes between parties are governed by WTO rules, such as the ADA and the ASCM. Evaluations on the CPTPP provisions in a doctrinal way could refer to the latest and practical understanding of concepts and trade rules by contracting parties under the WTO framework, which points out a way to interpret provisions consisting with WTO regulations.

The classification and assessment of an SOE is a specific problem of the “public body” issue where a doctrinal method is also necessary. The SOEs, especially the SOEs in China, have complicated relationship with the government, which are frequently analysed from a political or social perspective.¹⁰⁰ However, the assessment of SOEs can

⁹⁸ See *ibid.*

⁹⁹ See *ibid.*

¹⁰⁰ For example, Li-Wen Lin provided an anatomy of Chinese SOE. The research addressed that Chinese SOEs are embedded in a network composed of dense and complex links with the state, and such network may confront problems in the future. See Li-Wen Lin, ‘A Network Anatomy of Chinese State-Owned Enterprises’ (2017) 16 *World Trade Review* 583. See also Li-Wen Lin, ‘Reforming China’s State-Owned Enterprises: From Structure to

also be conducted from the legal aspect. For example, the relationship between the state and SOEs is indicated in national law where state plays a role as an investor.¹⁰¹ The SOEs in China is also experiencing a reform, which highlights an attempt of independent market player role under the instruction of Guiding Opinions of the CPC Central Committee and the State Council on Deepening the Reform of State-owned Enterprises.¹⁰² A doctrinal analysis based on these regulations will provide legal understanding on factors and features of SOE in China.

Concerning the anti-dumping dimension, the CAP, the ADA, and the GATT 1994 serve as main targets of the doctrinal analysis. The expiry of relevant provisions in the CAP has raised potential controversy over the “non-market economy treatment” and its three legal bases. In general, three sources, to different extent, permit WTO Members to apply special treatment calculating dumping margins and impose anti-dumping duty. The CAP directly and expressly stipulated such discriminatory treatment in its Article 15. Under the Protocol, WTO Members may calculate dumping margin through a method that not based on China’s practical price. Subparagraph (d) of Article 15 stipulates a deadline for this treatment, it states ‘in any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession’.¹⁰³ Then what should be the appropriate interpretation of the expire of Article 15: (a)(ii) becomes a key issue to special treatment discussed by experts.¹⁰⁴ Therefore, an attempt at

People’ (2017) 229 *China Quarterly* 107; Jianzhi Zhao, ‘Chinese State-Owned Companies, Misallocation and the Reform Policy’ (2019) 4 *Chinese Political Science Review* 28.

¹⁰¹ For example, Law of the People’s Republic of China on the State-Owned Assets of Enterprises Company Law of the People’s Republic of China.

¹⁰² Instructions of reform see also Recommendations for the Thirteenth Five-Year-Plan for Economic and Social Development of the People’s Republic of China, Recommendations on Deepening the Reform of State-Owned Enterprises.

¹⁰³ According to Article 15: (d):

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

¹⁰⁴ See for example, Jorge Miranda, ‘More on Why Granting China Market Economy Status after December 2016 Is Contingent upon Whether China Has in Fact Transitioned into a Market Economy’ (2016) 11 *Global Trade and Customs Journal* 244; Bernard O’Connor, ‘Much Ado about Nothing: 2016, China and Market Economy Status’ (2015) 10 *Global Trade and Customs Journal* 176; Jochem De Kok, ‘The Future of EU Trade Defence Investigations against Imports from China’ (2016) 19 *Journal of International Economic Law* 515; Yen Kong Ngangjoh-Hodu and

appropriate interpretation of special treatment has conducted by the doctrinal method.

Nonetheless, interpretations of the CAP do not preclude WTO Members from applying the general rules set out in Article 2 of ADA and Article VI of GATT 1994. Article VI: (b) of GATT1994 and Article 2.2 of ADA provide the general legal basis of the “non-market economy treatment” among WTO Members. However, to rely on these provisions, one of three thresholds should be complied: when there are no sales of the like product “in the ordinary course of trade”, “the particular market situation” or “low volume of the sales”. Yet WTO law does not provide further instructions in applying these standards, then how to interpret and explain them in a coherent way is significant to this part of analysis.

The second *Ad Note* to Article VI: 1 “euphemistically” allows Members to calculate dumping margin not based on a strict comparison with domestic prices. However, requirements to apply this provision are far stricter than that of other legal bases. Under the second *Ad Note*, the exporting country must have ‘a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the state’. Then how to understand the strict line of this note is one of concerns.

1.4.2 Doctrinal analysis with a historical dimension

The function of doctrinal analysis with a historical dimension is mainly embodied in three aspects. First, it is an efficient approach to identify the origin of “double remedy” issue. Although laws in the past may not represent a backward justice system,¹⁰⁵ the development of “double remedy” issue through US cases reflects loopholes in the US

Tianzhu Han, ‘China’s Market Economy Dilemma and Its Interplay with EU Anti-Dumping Law’ (2019) 27 Asia Pacific Law Review 102; Roberto Soprano, ‘The Principle of Effectiveness in the Interpretation of the Protocol of Accession of China to the World Trade Organization: Market Economy Considerations in Anti-Dumping Investigations’ (2019) 46 Legal Issues of Economic Integration 29.

¹⁰⁵ DJ Boorstin talked about the method in legal history, the article challenged the view that it is “necessary to adopt the categories of the modern ‘developed’ legal system as much of legal history has become a sort of legal embryology – a search for rudimentary forms of a ‘full-grown’ legal system”. The article argues that past laws are not always rudimentary through citing examples by Pollock and Maitland in their History of English Law before the Time of Edward I. See DJ Boorstin, ‘Tradition and Method in Legal History’ (1941) 54 Harvard Law Review 424, 428.

trade remedy statutes in the 1980s.¹⁰⁶ Analysis in a historical way provides a unique perspective to explain why the issue of “double remedies” is a long-lasting and complex problem. Based on the analysis, further suggestions could be made to prevent the “double remedy” issue at the national level before appealing to the WTO dispute settlement body, thus avoiding time and money being consumed for both parties at issue.

Second, it is also useful in reviewing the revision of EU basic anti-dumping regulation.¹⁰⁷ The advantage of a historical dimension is to present a “dynamic” development of EU’s attitudes to the “non-market economy treatment” in response to the China’s Accession Protocol and relevant case law.¹⁰⁸ Such “dynamic” development can provide resources for assessment by doctrinal analysis and serve two purposes. First, whether the revision of EU anti-dumping law could prevent the issue of “double remedies” or reduce the damage caused by it; and second, if the new law is consistent with the WTO trade remedy rules.

Furthermore, a historical perspective is applied in the analysis of preparatory work of WTO agreements as a supplement of interpreting WTO provisions stipulated in the VCLT. A historical view is helpful to reveal the concerns of signatories during the negotiation, and this is especially applicable to the “non-market economy treatment”

¹⁰⁶ The first case that can be linked to issue of “double remedies” in the US is the *Georgetown Steel Corp. v. United States* in 1983. The case indicated that a countervailing issue is regulated by an anti-dumping statute and a misunderstanding of jurisdiction between anti-dumping and countervailing law. See *Georgetown Steel Corp. v. United States*, 801 F.2d 1308,1317 (Fed. Cir. 1986).

¹⁰⁷ See Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union [2016] L176/21. Regulation (EU) 2017/2321 of the European Parliament and of the Council of 12 December 2017 on amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union [2017] L338/1.

¹⁰⁸ As China’s Accession Protocol stipulated a date for its NME treatment clause, then how to interpret the expiry of this clause will have a significant influence on trade activities connected with China. Case law indicates that “double remedies” is prohibited by WTO law, so how to bring coherence to the decision of the dispute settlement body becomes a topic for discussion among WTO Members. For example, in 2012, the US enacted GPX law, introducing the “adjustment of anti-dumping duty” to reduce the damage of “double remedy”. See Public Law 112–99, 112th Congress, 126 STAT. 265 (MAR. 13, 2012). For examples of case law, see Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011.

issue embodied in the China's Accession Protocol to the WTO. One of the examples put forward by the signatories to the Report of the Working Party on the Accession of China is the treatment of China's products in anti-dumping investigation due to China's special market situation.¹⁰⁹ Therefore, reviews of the preparatory work of WTO agreements allow a comprehensive evaluation seeking for the interpretation of the "non-market economy treatment".

1.4.3 Doctrinal analysis serving the conformity with WTO law

In order to reach an appropriate interpretation of WTO provisions, doctrinal analysis is also applied to assess the consistency between different regulations and WTO law. It mainly contains an evaluation of the EU anti-dumping regulation and WTO regulations, and an assessment of CPTPP provisions and WTO rules supported by WTO tribunal reports.

As a preferential agreement under negotiation, the CPTPP, as well as the EU anti-dumping regulation, is inherently connected with WTO rules, because they share same purpose that relates to the WTO law. The preamble to the GATT 1994 reflects its objectives as a result of the Tokyo Round of Multilateral Trade Negotiations, where 'expanding the production and exchange of goods' is one of the concerns.¹¹⁰ The promotion of the "production and exchange of goods" can be explained by WTO

¹⁰⁹ Paragraph 150 of Section IV: (13) of the working paper addresses the special situation of determining cost and price comparability concerning China, it provides that:

"Several members of the Working Party noted that China was continuing the process of transition towards a full market economy. Those members noted that under those circumstances, in the case of imports of Chinese origin into a WTO Member, special difficulties could exist in determining cost and price comparability in the context of anti-dumping investigations and countervailing duty investigations. Those members stated that in such cases, the importing WTO Member might find it necessary to take into account the possibility that a strict comparison with domestic costs and prices in China might not always be appropriate."

¹¹⁰ According to the preamble to GATT 1994, objectives of the Agreement include: 'raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods'.

fundamental principles. In the context of this research, “non-discrimination”, “predictable and transparent” and “more competitive” are three principles mainly relating to “double remedy” issue.¹¹¹ The “non-discrimination” principle refers to an attitude of treating products and services from its own territory or trade partners in the same manner (fairly and equally).¹¹² Concerning the anti-dumping issue, products from non-market economies have the right to receive the same treatment as those from market economies.¹¹³ The “predictable and transparent” principle means provisions are clearly regulated on trade barriers, the standards and thresholds ascertain trade barriers will not be applied arbitrarily, choice and lower prices via legal competition is preferable.¹¹⁴ This principle is applicable to the explanation of law in both the anti-dumping and countervailing areas, it emphasizes the necessity of interpretation and clarification of ambiguous trade remedy provisions. A predictable and transparent legal system can prevent the illegal imposition of trade remedy behaviours, thus reducing the occurrence of “double remedy” issue. The “more competitive” principle discourages unfair practices such as subsidies and dumping, it contends that the government’s response to those practices should be considered, especially those of additional duties, such as anti-dumping and countervailing duties.¹¹⁵ This principle clearly addresses the imposition of remedy duties being based on a cautious attitude by investigation. Therefore, the identification of a subsidy and application of non-market economy methodology should be prudently considered by the investigating authority. Based on the analysis of the objectives and fundamental principles of WTO agreements (relating to the research at issue), the purpose of WTO agreements is to expand the production

¹¹¹ There are six fundamental principles of WTO agreements, apart from three principles analysed in the main body of thesis, the other three are: “more open”, “more beneficial for less developed countries” and “protect the environment”. Based on the explanation of the WTO, the “more open” principle encourages trade by lowering trade barriers, such as reduced customs duties. “More beneficial for less developed countries” refers to giving flexibility and privileges to less developed countries adopting WTO provisions. The “protect the environment” principle indicating that environmental protection cannot be a shield for trade protectionism. See official website of the WTO, “understanding the WTO”, https://www.wto.org/english/thewto_e/whatis_e/what_stand_for_e.htm accessed 30 December 2019.

¹¹² See *ibid*.

¹¹³ However, in terms of dumping margin calculation, NME products suffered from different methodology with market economies.

¹¹⁴ See official website of the WTO, “understanding the WTO”, https://www.wto.org/english/thewto_e/whatis_e/what_stand_for_e.htm accessed 30 December 2019.

¹¹⁵ See *ibid*

and exchange of goods in a non-discriminatory market through predictable and transparent trade remedy provisions and cautious investigation of trade barriers.

The subsidiary agreements under the WTO regime, such as the ADA and the ASCM, serve the main purpose of the GATT 1994, with specific objectives in their fields. The Anti-dumping Agreement does not state the purpose in its content despite some vague expressions.¹¹⁶ Without a declaration of purpose in the ADA's text, the title of this agreement can provide a clue, namely, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994. The title expressly indicates that the purpose of the ADA relates to the implementation of Article VI of the GATT 1994. It is further supported by Article 1 of the ADA, where the article emphasizes the status of Article VI of the GATT 1994 in guiding anti-dumping measures.¹¹⁷ Thus it is necessary to seek the purpose indicated by Article VI of the GATT 1994. Looking through the structure of Article VI, it includes seven paragraphs, paragraphs one and two introduce the identification of dumping and a measure to offset dumping behaviour, paragraph three provides "instruction" on anti-subsidy measures, and paragraphs four to seven further specify the application of trade remedies. The purpose of Article VI is indicated by paragraphs one and three, where the provisions stipulate that behaviours of dumping and subsidy are not encouraged.¹¹⁸ Besides, Article VI is intended more to highlight a cautious attitude in the application of anti-remedy measures, which reflects the "more competitive" principle and that the imposition of remedy duties should be based on a cautious attitude via investigation. For example, there are three paragraphs to introduce the validity of anti-remedy measures, but four paragraphs to address the thresholds and conditions for those measures. Moreover, the tone addressing anti-

¹¹⁶ For example, first subparagraph of Article 2 begins with "for the purpose of this Agreement", but it does not continue to describe the content of purpose. The Article, rather, tend to explain a dumping behaviour.

¹¹⁷ Pursuant to Article 1 of ADA, 'an anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement'.

¹¹⁸ Paragraph one of ADA stipulates an attitude towards to dumping, it states that: 'dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned...' if it causes injury.

Paragraph three of ADA regulates an anti-subsidy measure, it states: 'countervailing duty shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed...'

remedy measures is clearly tougher.¹¹⁹ In this sense, the ADA and the ASCM serve the same purpose. Therefore, the purpose of the ADA and the ASCM is to identify trade remedy behaviours injuring national industries through cautious anti-remedy investigation, and to offset this behaviour by the prudent application of anti-remedy measures as stipulated in Article VI.

The purpose of EU anti-dumping regulation is clearly indicated in its 2016 publication.¹²⁰ Identical to the ADA, the title of the regulation provides a clue to its purpose, which is to protect domestic industries from dumping behaviour. Besides, its preamble has also embodied a cautious attitude in applying anti-remedy measures, for example, the usage of “expedient” to construct a normal value for dumping margin.¹²¹ The “features” of EU anti-dumping regulation correspond to the purposes of GATT 1994 and its subsidiary agreements.

In addition, the preamble to the EU anti-dumping regulation highlights its connection with WTO law. Paragraph 2 of the preamble readdresses the function of Article VI of GATT 1994.¹²² It then ascertains its role in compliance with WTO anti-dumping agreements in paragraph 3.¹²³ According to the preamble, the EU anti-dumping

¹¹⁹ With regard to dumping behaviour, Article VI use “condemn” to express its discouraging attitude. And only if such behaviour causes injury to a domestic industry “may” a contracting party levy anti-dumping measure. Concerning anti-remedy measures, Article VI clearly stipulates situations where anti-remedy measures are prohibited as in paragraphs three to six, for example, ‘no countervailing duty shall be levied on any product ...in excess of an amount equal to the estimated bounty or subsidy...’.

¹²⁰ Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union [2016] L176/2.

¹²¹ Paragraph 5 of the preamble addresses the determination of normal value under Article VI of GATT 1994, it stipulates ‘it is expedient to define the circumstances in which domestic sales may be considered to be made at a loss and may be disregarded, and in which recourse may be had to remaining sales, or to constructed normal value, or to sales to a third country’. According to the Oxford English Dictionary, “expedient” means ‘useful or politic as opposed to just or right’. It is more useful to interpret the word pursuant to the Cambridge Dictionary where “expedient” means ‘helpful or useful in the situation that now exists, although perhaps not the right thing to do morally or for the future’. Based on these explanations, the method recorded in paragraph 5 is only a temporary solution for a special situation, and such a method cannot properly be applied in the future. And this indicates a prudent attitude towards to anti-remedy investigation.

¹²² Paragraph 2 of the preamble states: ‘the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 contains detailed rules, relating in particular to the calculation of dumping, procedures for initiating and pursuing an investigation, including the establishment and treatment of the facts, the imposition of provisional measures, the imposition and collection of anti-dumping duties, the duration and review of anti-dumping measures and the public disclosure of information relating to anti-dumping investigations’.

¹²³ Paragraph 3 of the preamble addresses the role of EU anti-dumping regulation in compliance with WTO law, it states: ‘in order to ensure a proper and transparent application of the rules of the 1994 Anti-Dumping Agreement,

regulation is an interpretation of the anti-dumping provisions in GATT 1994 and ADA to the best extent possible by Union legislation.

The link between the CPTPP and the WTO agreements is embodied through the whole structure of its provisions. The preamble to the CPTPP lists 19 objectives serving its purposes. The third objective clearly and literally acknowledges rights and obligations under the WTO regime,¹²⁴ while others expressly match the objectives and fundamental principles of the WTO agreements. Concerning correspondence with WTO objectives, the first objective of the CPTPP relates to WTO law as stipulated in the preamble to the GATT 1994 from the perspectives of living standards, full employment and the liberalization of trade and investment;¹²⁵ and the 17th objective corresponds to the article mentioning “expanding the production and exchange of goods”.¹²⁶ With regard to fundamental WTO principles, the seventh objective proposes a predictable legal framework which fulfils the “predictable and transparent” principle of the WTO law.¹²⁷ Except for the preamble, the individual chapters of the CPTPP also reflect connections with WTO law. For example, the first article of Chapter 1 addresses the establishment of free trade area is based on WTO provisions, specifically, Article XXIV of the GATT 1994 and Article V of the GATS. Besides, Article 6.8 of the CPTPP stipulates that the application of anti-dumping and countervailing measure shall follow WTO trade remedy provisions.¹²⁸ Expressions in the CPTPP provisions prove that the CPTPP is based on WTO law and aims to promote WTO objectives in dealing with the latest trade disputes via rules specified under the WTO regime.

the language of that agreement should be reflected in Union legislation to the best extent possible’.

¹²⁴ The third objective of CPTPP states that: ‘build on their respective rights and obligations under Marrakesh Agreement Establishing the World Trade Organization’.

¹²⁵ The first objective of CPTPP is to ‘establish a comprehensive regional agreement that promotes economic integration to liberalise trade and investment, bring economic growth and social benefits, create new opportunities for workers and businesses, benefit consumers, reduce poverty and promote sustainable growth’.

¹²⁶ The 17th objective is to ‘contribute to the harmonious development and expansion of world trade and provide a catalyst to broader regional and international cooperation’.

¹²⁷ The seventh objective states that: ‘establish a predictable legal and commercial framework for trade and investment through mutually advantageous rules’.

¹²⁸ Paragraph 1 of Article 6.8 declares that each party retains its rights and obligations under WTO anti-dumping and countervailing law. And paragraph 2 further ensure no rights or obligations can be above those under WTO law.

Therefore, the EU anti-dumping regulations and the CPTPP reflect WTO rules and can be referential to them. As analysed above, the basic purpose and principles of WTO law include the promotion of a transparent trade remedy system and cautious investigation of trade barriers. Like its subsidiary agreements, the purpose of the ADA and the ASCM is to identify trade remedy behaviours injurious to national industries through cautious anti-remedy investigation, and offset such behaviours by prudent application of anti-remedy measures as stipulated in Article VI of the GATT 1994. Therefore, WTO law has a clear attitude towards trade remedies and responses. The EU anti-dumping regulation and the CPTPP are embodied as expansions of WTO rules at the national and regional levels. Regarding the anti-dumping issue, the revision to EU 2017 regulations¹²⁹ reflect a response to disputes relating to the legal basis of the “non-market economy treatment” under WTO law¹³⁰ at the national level, which is closely connected with anti-dumping provisions. For example, the 2017 regulations replace the concept of “non-market economy” by countries whose markets have a “significant distortion”. In accordance with the replacement, Article 2: 6a. (a) of the EU 2017 regulations provide a new method for calculating dumping margins for countries whose markets have “significant distortion”. And the following paragraph from Article 2: 6a. (b) defines the concept of “significant distortion” and provides standards for identification.

Concerning the subsidy issue, the CPTPP is an ideal example to analyse the application of WTO countervailing law at the regional level. Take the dispute of “public body” in the *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products* Case as an example,¹³¹ whether an SOE belongs to “public body” and how to regulate the SOEs under WTO law become an issue under countervailing law. The CPTPP, in its preamble, highlights the significant role of SOEs in trade activities and

¹²⁹ See Regulation (EU) 2017/2321 of the European Parliament and of the Council of 12 December 2017 on amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union.

¹³⁰ For example, the debatable interpretation of Article 15 of China’s Accessional Protocol to the WTO.

¹³¹ See Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011.

expresses the objective to regulate SOE behaviour through legal system.¹³² It then, in Chapter 17, provides provisions for SOEs and designated monopolies, where it also introduces a concept called “delegated authority”. The provisions stipulating “SOE”, “designated monopoly” and “delegated authority” provide a referential view for the interpretation of “public body” under the ASCM.

1.5 Research structure

Chapter 1 has introduced the background, research question, methodology, structure, and limitations of this research.

Chapter 2 has introduced the issue of “double remedies” as the embodiment of the abuse of trade remedies due to the ambiguity of the WTO trade remedies agreements. It analysed the rationale of the “double remedy” issue based on the provision regulating the “double remedy” issue in the WTO agreements and the two substantive issues that constitute the “double remedy” issue. The analysis has manifested that the absent provisions regulating the “double remedy” issue arising from the domestic subsidy is one rationale of the “double remedy” issue. Accordingly, it should be prohibited as long as it leads to duplication of duties, albeit the GATT 1995 only prohibit this issue in the case of the export subsidies. Above all, the chapter has further submitted that the ambiguous WTO trade remedies agreements require systematic and comprehensive countermeasures to the issue of “double remedies” where the interpretations of the legal basis of the non-market economy methodology and the “public body” identification criteria are major concerns.

Chapter 3 has further explored the rationale of the “double remedy” issue by tracing its origin at national level. The analysis of the non-market economy disputes at the US

¹³² The preamble to CPTPP stipulates: ‘state-owned enterprises can play a legitimate role in the diverse economies of the Parties, while recognising that the provision of unfair advantages to state-owned enterprises undermines fair and open trade and investment, and resolve to establish rules for state-owned enterprises that promote a level playing field with privately owned businesses, transparency and sound business practices’.

national court submitted that the “double remedy” issue has evolved from a single subsidy case into a compound dispute involving two trade remedy measures. The findings have further indicated that the ambiguity of countervailing law, especially the subsidy determination, is one rationale of the “double remedy” issue, which requires further interpretation. In addition, there is an asymmetric development of US trade remedy laws relates to the “non-market economy treatment”, which leads to a dilemma that the anti-dumping statute are frequently revised to regulate the countervailing disputes. The differences between the US anti-dumping statute and the WTO anti-dumping agreement have indicated a controversy over the “non-market economy treatment” in the future.

Chapter 4 has explored the solution of the “double remedy” issue based on analysing the topic of “public body” in countervailing investigations. It aims to prevent the abuse of trade remedies by seeking appropriate interpretations of the subsidy determination rules to provide predictable and transparent provisions of countervailing law. This chapter has conducted doctrinal analysis of the CPTPP regulations as well as the WTO countervailing provisions while taking the WTO case law as guidelines.¹³³ This chapter concluded by proposing criteria identifying the “public body”, which provides a reference for subsidy determination. In addition, this chapter has applied the “public body” criteria to assess China’s SOEs. The findings highlighted that SOEs in China, especially Chinese central SOEs (Yang Qi), are potentially “public bodies” when serving specific responsibility, for example, stabilizing supply and ensuring security of relevant industries through strictly following national macro-control measures. However, it may be impossible to identify the Yang Qi as a unified “public body” due to its diversified functions and responsibilities, further feedback and more evidence through questionnaires could help to refine the evaluation during the “public body” investigation.

¹³³ For landmark case laws see Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011. Appellate Body Report, *United States - Countervailing Duty Measures on Certain Products from China*, WT/DS437/AB/RW, adopted 16 July 2019.

Chapter 5 and 6 have explored the solution of the “double remedy” issue based on analysing the topic of “non-market economy treatment” in anti-dumping investigations. They aim to prevent the abuse of trade remedies by seeking appropriate interpretations of the WTO anti-dumping agreements regulating the “non-market economy treatment”. In specific, Chapter 5 has explored the interpretation of the first legal basis of the “non-market economy treatment” – the accession protocol to the WTO – under the WTO law. It showed that WTO Members cannot resort to the China’s Accession Protocol to the WTO when applying “the non-market economy treatment” for China’s exporters in the wake of the expiry of the provisions of Article 15. And especially, such discriminatory treatment for China cannot be based on its special market status. However, the interpretations of the CAP do not preclude WTO Members from applying the general rules set out in Article 2 of the ADA and Article VI of the GATT 1994.¹³⁴ As a very creative practitioner in this regard, the EU has made revisions to its anti-dumping regulations by replacing the non-market economy provisions with a country-neutral methodology dealing with market distortions caused by the state intervention.¹³⁵ Therefore, the relevant legal basis of the afore-mentioned issue regarding the EU anti-dumping regulations and WTO law has been evaluated in the following chapter.

Chapter 6 has explored the appropriate interpretation of another legal basis to the “non-market economy treatment” – Article 2 of the ADA and Article VI of the GATT 1994 – under the WTO law. In specific, it examined the revisions of the “non-market economy treatment” provisions in the EU anti-dumping regulations and their conformity with the WTO law. It concluded that, when conducting anti-dumping investigations of either market or non-market economies under the WTO legal system, the primary choice in determining a normal value shall be based on the actual cost of production “in the country of origin”, even though such cost is considered to be “distorted”. When the construction of a normal value is necessary, all factors related to the costs in that country,

¹³⁴ Zhou (n 54).

¹³⁵ Vermulst, Sud and Evenett (n 20) 224; Noël and Zhou (n 18).

including “price distortions” should be considered ‘as long as they reflect the prevailing conditions in the market of exportation’.

Chapter 7, as the concluding chapter, has provided a summary of recommendations to prevent the abuse of trade remedies. The chapter classified proposals from both countervailing and anti-dumping dimensions based on previous chapters.

1.6 Limitations of the thesis

Since this thesis aims to provide recommendations for dealing with the “double remedy” issue through doctrinal analysis, the focus of analysis lies in the legal area. However, it does not mean that the “double remedy” issue cannot be analysed through another discipline or perspective.

Compared with providing “predictable and transparent” legal interpretations to prevent the issue of “double remedies”, such an issue could also be considered from an economic perspective. As the issue of “double remedies” refers to overlapping and duplicated duties, how to reduce such “duplication” by an appropriate amount is the topic of “pass-through” method. In the context of “double remedy” issue, the “pass-through” rate refers to the extent that a subsidy is passed through to the price and reflected in the calculation of dumping margins. Theoretically, a scientifically calculated “pass-through” rate could reduce the injury of “double counting” by eliminating price discrimination under subsidization. For example, on March 6, 2012, US Congress enacted the anti-dumping provisions (GPX Law), which provided the US Department of Commerce with a legal basis to apply anti-dumping duties and countervailing duties to China’s products; and by making adjustments (calculating pass-through rates) to anti-dumping duties to avoid the situation of “double remedy” issue.¹³⁶

¹³⁶ See Public Law 112–99, 112th Congress, 126 STAT. 265 (MAR. 13, 2012). See Public Law 112–99, 112th Congress, 126 STAT. 265 (MAR. 13, 2012).

However, it is in practice difficult to calculate adjustments by evaluating the influence of subsidies on relevant prices. According to the *GPX Int'l Tire Corp. v. United States* Case, the US Department of Commerce expressed that it did not have a method for identifying overlapping remedies, the Court also admitted that it is difficult for Commerce to decide the degree and extent of potential “double remedy” issue.¹³⁷ In the *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* Case, one argument embodied in the US’s and China’s claims is whether there is a pass-through of a benefit by subsidy.¹³⁸ Despite the Appellate Body admitted the existence of “pass-through”, it works as evidence to illustrate the “double remedy” issue, the Appellate Body did or could not provide a further explanation confirming the amount of “pass-through” rate.¹³⁹ Besides, Prusa and Vermulst, in their article, emphasized the view that ‘economists have repeatedly found that pass-through will not typically be symmetric across destination markets’, and there are various factors that can affect the determination of pass-through.¹⁴⁰

Therefore, research on the determination of “pass-through” rate through economic analysis or law and economy is possible, but it is overly data-demanding and does not correspond to the doctrinal analysis in this research.

Recognizing a non-market economy as a market economy or granting a market economy status was one alternative to settle the issue of “double remedies”. For example, Ngangjoh-Hodu and Han argue for China’s market economy status in the context of the Accession Protocol to the WTO.¹⁴¹ It was an alternative because it is

¹³⁷ Based on the case, the Commerce explained that “it would not allow a constructed export price (‘CEP’) offset or a circumstances of sales (‘COS’) adjustment in this investigation because Commerce ‘cannot accurately determine the specific indirect selling expenses incurred on sales reflected in the surrogate financial statements’”. The court, in its latter analysis, stated that “it is too difficult for Commerce to determine, using improved methodologies, and in the absence of new statutory tools, whether and to what degree double counting is occurring”. See *GPX Int'l Tire Corp. v. United States*, 715 F.Supp.2d 1337, 1345 (CIT 2010) (“GPX III”).

¹³⁸ Panel Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/R, adopted 22 October 2010, at para. 12.7.

¹³⁹ Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011, at paras. 261 and 541.

¹⁴⁰ Prusa and Vermulst (n 49) 214; Prusa (n 5) 625; Kelly (n 45) 109.

¹⁴¹ Ngangjoh-Hodu and Han (n 54).

generally considered that discriminatory treatment will not or seldomly be applied to market economies. However, following the recent development of “non-market economy treatment”, especially when China found non-market conditions exist in the US energy and petrochemical sector and accordingly changes its method in calculating the dumping margin, the “non-market economy treatment” is potentially available for all WTO members. Therefore, it is more like a legal issue rather than an identification of economic status in front of the table of negotiations.

The issue of “double remedies” is a topic that may relate to various disciplines. And the research is mainly an exploration from the perspective of legal analysis. It is hoped that this research will prompt debates in a multi-disciplinary sphere and provide inspiration for further research.

1.7 Original contribution of the research and its significance

This research originally contributes to the solution of “double remedy” issue. Those proposals also generally forbid the application of trade remedy measures relating to the “non-market economy” issues that are inconsistent with the WTO agreements.

1.7.1 This research has provided an original method to prevent the “double remedy” issue under the WTO legal system

The first contribution of this research is that it provided an original method to prevent the “double remedy” issue under the WTO legal system. As discussed in the Section 1.2, the general solution of the “double remedy” issue, either according to the WTO DSB or the researchers, focuses on damage offsetting.¹⁴² It is a consideration to reduce the damage by calculating incorrect trade remedy duties. This research, however,

¹⁴² See for example, Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011. Thomas J Prusa and Edwin Vermulst, ‘United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China: Passing the Buck on Pass-Through’ (2013) 12 World Trade Review 197.

emphasises that relevant trade remedy measures should be forbidden to avert the “double remedy” issue, because they are potentially inconsistent with the WTO law. Accordingly, this research proposes to prevent the “double remedy” issue before the abusive trade remedy measures that are potentially being implemented. It provides proposals from both anti-dumping and countervailing perspectives to clarify the procedure of trade remedy investigations by appropriately re-interpreting the WTO trade remedy agreements, which provides a new dimension to solve this problem.

1.7.2 This research has identified the ambiguous provisions of the ASCM as one significant rationale of the “double remedy” issue and provided corresponding solutions

Identifying the ambiguous provisions of the ASCM as one significant rationale of the “double remedy” issue and providing corresponding solutions is also one contribution. The existing research discussing the “double remedy” issue are mainly focusing on anti-dumping dimension. For example, the articles of Dukgeun Ahn and Katarzyna Kaszubska lead to the conclusion that the calculating methodology in anti-dumping investigation is the major rationale of the “double remedy” issue.¹⁴³ Comparatively, this research, in Chapter 2 and Chapter 3 have demonstrated that the vague countervailing law not only lead to countervailing dispute, but also result in the “double remedy” issue, which refutes the opinion that the dumping margin calculation is the only or major rationale of the “double remedy” issue. This research then in Chapter 4 discussed how to identify a subsidy in detail and proposed specific criteria to define the “public body”, which provides proposals to regulate countervailing measures.

1.7.3 The findings of this research have important implications for a broad range of research both within and outside the “double remedy” issue

¹⁴³ Dukgeun Ahn, ‘United States-Definitive Anti-Dumping and Countervailing Duties on Certain Products from China.’ (2011) 105 American Journal of International Law 761, 767. Katarzyna Kaszubska, ‘Double Remedy: Beyond the Non-market economy status’ in James J Nedumpara and Weihuan Zhou (eds), *Non-Market Economies in the Global Trading System: The Special Case of China* (Springer Singapore 2018) <<https://www.springer.com/gp/book/9789811313301>> accessed 9 July 2020.

The findings of this research not only apply to the specific “double remedy” issue, but also contribute to the solution of general controversy over the trade remedy applications. As analysed in Chapter 2, the rationale of the “double remedy” issue contains both anti-dumping and countervailing aspects as reflected in the *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* Case.¹⁴⁴ Accordingly, the findings of this research also help to prevent the disputes arising from, for example, the issue of determination of subsidies in subsidy investigations or the issue of “non-market economy treatment” in anti-dumping investigations.

Specifically, to avert the abuse of countervailing measures, this research submits that the potential subsidization behaviour, especially by a “public body”, in the anti-subsidy investigations should be conscientiously evaluated. Accordingly, this research contributes substantially on the clarification of term “public body”. It provides the specific criteria to define the “public body” by the doctrinal analysis of WTO tribunal reports and international treaties, which provides predictability to identify a subsidy.

To avoid the abuse of anti-dumping measures, this research contends that it is crucial to carefully determine the normal value in the anti-dumping investigations. This research further demonstrates that when calculating dumping margin of either market or non-market economies, the primary choice in determining the normal value shall be based on the actual cost of production, even though such a cost is considered to be “distorted”. When the “non-market economy treatment” is necessary to construct the normal value, all factors related to the cost in that country, including “price distortions”, should be considered ‘as long as they reflect the prevailing conditions in the market of exportation’.

¹⁴⁴ Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011.

In addition, this research does more than only identify the trade remedy issue of China. While China is one of the major targets of the “double remedy” issue, the recent development has demonstrated all WTO members, such as the US and the EU, are potential targets of “non-market economy treatment”.¹⁴⁵ Accordingly, this research has implications on dispute settlement over all WTO members relating to this issue.

1.8 Conclusion

The main function of this chapter is to provide an introduction to the research, which works as a preamble for subsequent chapters. The priority, as discussed in this chapter, is to seek solutions preventing the abuse of trade remedies due to the blurry WTO provisions. Through re-interpretation of the countervailing and anti-dumping law, it responds to the WTO’s dilemma clarifying the controversy over trade remedies applications in the context of “non-market economy”. The suggestions it provides could shed light on a bigger picture of good international economic governance and increasing the predictability and stability of the WTO dispute settlement and the remedies. Although the research cannot cover each discipline relating to the issue of “double remedy”, it can provide references in the legal area and encourage new endeavours.

¹⁴⁵ On 17th July 2020, the Ministry of Commerce of the PRC (MOFCOM) published its preliminary determination on the imposition of antidumping duties on imported propanol from the United States. Accordingly, China found that non-market economy conditions exist in the US energy and petrochemical sector. Besides, China has initiated another anti-dumping investigation involving NME allegations of Australia’s products. See Henry Gao, ‘The US Is Now Officially a Non-Market Economy, According to China’ (*International Economic Law and Policy Blog*) <<https://ielp.worldtradelaw.net/2020/07/the-us-is-now-officially-a-non-market-economy-according-to-china-.html>> accessed 10 July 2020; Zhiguo Yu and Sandeep Thomas, ‘The US Is Now a “Non-Market Economy” – Anti-Dumping Ruling by China’ (*International Economic Law and Policy Blog*) <https://ielp.worldtradelaw.net/2020/07/the-us-is-now-a-non-market-economy-anti-dumping-ruling-by-china.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+ielpblog+%28International+Economic+Law+and+Policy+Blog%29> accessed 10 July 2020; Zhiguo Yu and Jesse Kreier, ‘China and Distortions - Bis’ (*International Economic Law and Policy Blog*) <<https://ielp.worldtradelaw.net/2020/08/china-and-distortions-bis.html>> accessed 20 August 2020. The ruling is available only on the Chinese webpage of MOFCOM. Direct link to the ruling <http://images.mofcom.gov.cn/trb/202007/20200717145528534.pdf>.

Chapter 2: Introduction to the “double remedy” issue

This chapter has introduced the issue of “double remedies” as the embodiment of the abuse of trade remedies due to the ambiguity of the WTO trade remedies agreements. It analysed the rationale of the “double remedy” issue based on the provision regulating the “double remedy” issue in the WTO agreements and the two substantive issues that constitute the “double remedy” issue. The analysis has manifested that the absent provisions regulating the “double remedy” issue arising from the domestic subsidy is one rationale of the “double remedy” issue. Accordingly, it should be prohibited as long as it leads to duplication of duties, albeit the GATT 1995 only prohibit this issue in the case of the export subsidies. Above all, the chapter has further submitted that the ambiguous WTO trade remedies agreements require systematic and comprehensive countermeasures to the issue of “double remedies” where the interpretations of the legal basis of the non-market economy methodology and the “public body” identification criteria are major concerns.

2.1 An issue of “double counting” by the application of anti-dumping duty and countervailing duty

As discussed in Chapter 1 of this research, the “double remedy” issue is emblematic of controversy over trade remedies applications in the context of “non-market economy” and a microcosm of dilemma that the WTO has confronted. It not only reflects the controversy over normal value construction in anti-dumping investigation, but also embodies the debates on determination of subsidy in countervailing investigations. Following the announcement on 17th July 2020 by the Ministry of Commerce of the PRC (MOFCOM) in its anti-dumping investigation that non-market conditions exist in the US energy and petrochemical sector and ‘accordingly swapped out US exporters’ costs in calculating the dumping margin, the “double remedy” issue has been

highlighted again.¹⁴⁶ As Jesse Kreier comments on the China's anti-dumping investigations on US n-propanal exporters:

[T]he 145 alleged subsidies include many of the same programs investigated in the n-propanal AD case and alleged in the parallel AD investigation. Thus, the issue whether government interventions are properly addressed by AD, CVD or both, once again presents itself.¹⁴⁷

The concept of “double remedy” issue is addressed by the WTO tribunals in the *United States-Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* Case where the Appellate Body summarized the issue as a situation where both anti-dumping and countervailing duties are applied to the same product, resulting in a subsidization being offset twice.¹⁴⁸ In essence, the issue of “double remedies” may arise when both countervailing duties and anti-dumping duties are imposed on the same imported products. Noticeably, the terminology does not simply refer to the fact that the two duties are imposed on the same product. Rather, the simultaneous application of both duties results in offsetting of the same subsidization twice, which is also referred to as “double counting”.¹⁴⁹

As will be discussed in detail in the following section, the issue of “double remedies” is more likely to occur when the export price is affected by subsidies of “non-market economies” in the trade remedies investigations by so called “non-market economy methodology” or “non-market economy treatment”.¹⁵⁰ When calculating the dumping

¹⁴⁶ Henry Gao, ‘The US Is Now Officially a Non-Market Economy, According to China’ (*International Economic Law and Policy Blog*) <<https://ielp.worldtradelaw.net/2020/07/the-us-is-now-officially-a-non-market-economy-according-to-china-.html>> accessed 10 July 2020; Zhiguo Yu and Sandeep Thomas, ‘The US Is Now a “Non-Market Economy” – Anti-Dumping Ruling by China’ (*International Economic Law and Policy Blog*) <https://ielp.worldtradelaw.net/2020/07/the-us-is-now-a-non-market-economy-anti-dumping-ruling-by-china.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+ielpblog+%28International+Economic+Law+and+Policy+Blog%29> accessed 10 July 2020. The ruling is available only on the Chinese webpage of MOFCOM. Direct link to the ruling <http://images.mofcom.gov.cn/trb/202007/20200717145528534.pdf>.

¹⁴⁷ See Zhiguo Yu and Jesse Kreier, ‘China and Distortions - Bis’ (*International Economic Law and Policy Blog*) <<https://ielp.worldtradelaw.net/2020/08/china-and-distortions-bis.html>> accessed 20 August 2020.

¹⁴⁸ See Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011, para 541.

¹⁴⁹ See *ibid.*

¹⁵⁰ See Thomas J Prusa, ‘NMEs and the Double Remedy Problem’ (2017) 16 *World Trade Review* 619; Brian D Kelly, ‘Market Economies and Concurrent Antidumping and Countervailing Duty Remedies’ (2014) 17 *Journal of International Economic Law* 105.

margin of “non-market economies”, the investigating authorities of the trade remedies are required to compare the product’s normal with its export price. However, the actual normal values of the “non-market economies” are replaced by the surrogate data, because the actual market data in the “non-market economies” are considered unreliable.¹⁵¹ Therefore, the dumping margins are based on comparisons between the product's constructed normal value (which does not reflect the influence of subsidies) and the product's actual export price (which is presumably lower than it would otherwise have been under the influence of subsidy). The result of an asymmetric comparison is thus generally higher than would otherwise be the case, which leads to the implementation of trade remedies.¹⁵² In this sense, although the issue is triggered by a subsidy, a dumping behaviour might also be involved because of price discrimination.

As the Panel explained, the dumping margin calculated by the “non-market economy treatment” ‘reflects not only price discrimination by the investigated producer between the domestic and export markets (“dumping”), but also ‘economic distortions that affect the producer's costs of production’, including specific subsidies to the investigated producer of the relevant product in respect of that product.¹⁵³ An anti-dumping duty calculated based on the “non-market economy treatment” may, therefore, “remedy” or “offset” a domestic subsidy, to the extent that such subsidy has contributed to a lowering of the export price.¹⁵⁴ Put differently, a countervailing duty levied on a subsidy behaviour, at meanwhile, an anti-dumping measure implemented on the same product because the subsidization lowered the export price and lead to price discrimination. Accordingly, the concurrent imposition of anti-dumping duty and countervailing duty may result in a subsidy being offset twice.¹⁵⁵

¹⁵¹ See Panel Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/R, adopted 22 October 2010, at para. 14.68.

¹⁵² See *ibid.* at paras 14.69 and 14.72.

¹⁵³ See *ibid.* at para. 14.69.

¹⁵⁴ See *ibid.* at para. 14.70.

¹⁵⁵ Double remedies may also arise in the context of domestic subsidies granted within market economies when anti-dumping and countervailing duties are concurrently imposed on the same products and a constructed, or third-country normal value is used in the anti-dumping investigation.

2.2 Regulation and rationale of “double remedy” issue within the WTO framework

Article VI of the GATT 1994, the ASCM (Agreements on Subsidies and Countervailing Measures), the ADA (Anti-dumping Agreements) and the AP (Accession Protocols to WTO), to different extent, regulate the trade remedies. However, the regulations on “double remedy” issue are ambiguous. Although the “double remedy” issue raised by the export subsidies are clearly prohibited by the WTO law, no further guidance is provided relating to the prevention of this issue, nor an elimination of its injuries, which leaves loopholes in this regard. Besides, the WTO law regulating the issue of “double remedies” arising from domestic subsidy is absent, but, as analysed by the Appellate Body, this does not mean “double remedy” issue arising by domestic subsidy is allowed under WTO law.¹⁵⁶ In contrary, the “double remedy” issue shall be prohibited as long as it leads to a duplication of duties.

2.2.1 The “double remedy” issue arising from the export subsidies are prohibited by the GATT 1994 without further instructions

Table 1 Illustration of the “double remedy” issue under an export subsidy

Export subsidy
↓
Reduction in export price
↓
Export price < Domestic price (normal value)
↓
Injury to domestic industry of importing country
↓

¹⁵⁶ See Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011, at para. 567.

Anti-dumping duty (damage caused by price discrimination)

+

Countervailing duty (injury caused by subsidy)
--

Table 1 illustrates that the “double remedy” issue may occur under the export subsidies. For the dumping margins calculation, the investigating authorities are required to compare the product’s normal value with its export price. In general, the normal value is the domestic price that does not affected by the export subsidies. In contrast, the export price is presumably lower than it would otherwise have been under the influence of the subsidy. The result is thus based on an asymmetric comparison and is generally higher than would otherwise be the case. Therefore, an anti-dumping duty may be applied according to the enlarged dumping margin. Meanwhile, an anti-subsidy duty might be implemented based on the link between the injury and the subsidy. Both of the remedy remedies thus offset the same injury caused originally by the export subsidy.

The issue of “double remedies” in the case of the export subsidies is prohibited by Article VI: 5 of GATT 1994 as follows:

No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization.

Two requirements are addressed by this provision. First, both the anti-dumping duty and the countervailing duty are implemented on one product due to the adverse effects caused by the export subsidization. Second, both the trade remedies compensate the same case of dumping or subsidization. The two points together constitute a situation of “double counting”. In this sense, the concurrent application of anti-dumping and countervailing duties to the same product may not lead to “double remedy” issue,

“double counting” only exists when the same situation is compensated for twice.¹⁵⁷ Accordingly, Article VI: 5 of the GATT 1994 clearly prohibits “double counting” due to the export subsidization.

However, Article VI does not provide further instructions on regulating this issue. Specifically, the provision neither addresses how to prevent the “double counting” from the trade remedies investigations, nor mentions what is an appropriate way to reduce the damages caused by the “double remedy” issue. The provision indicates the law has noticed that a potential risk may arise when both anti-dumping and countervailing measures are applied to the same product resulting in a duplication of duties under the export subsidy; however, it does not provide any substantial references on this matter.

2.2.2 WTO law regulating the “double remedy” issue arising from the domestic subsidy should not be left lacking

Article VI:5 of the GATT 1994 prohibits the issue of “double remedies” due to application of the export subsidies, but it keeps silent on domestic subsidies. Why did Uruguay Round negotiators “skip” the “double remedy” issue by the domestic subsidy? One of the concerns is that domestic subsidies are generally not increasing the dumping margin, thus not leading to the related anti-dumping measures.¹⁵⁸

Table 2 Illustration of the domestic subsidy under a general situation

(General situation)
Domestic subsidy
↓
Reduction in export price and domestic price
↓
Export price = Domestic price

¹⁵⁷ See *ibid*, at para. 541.

¹⁵⁸ Kelly (n 45).

↓
 Injury to domestic industry of importing country
 ↓
 Countervailing duty (injury caused by subsidy)

As illustrated in Table 2, in general, a domestic subsidy will not lead to the duplication of duties. When the investigating authorities calculate the dumping margin by comparing the normal value with the export price, both the normal value (usually the domestic price) and the export price will be affected by the domestic subsidy in the same way and to the same extent. Since any lowering of prices attributable to the subsidy will be reflected on both sides of the dumping margin calculation, the overall dumping margin will not be affected by the subsidization. As a result, a countervailing measure might be applied based on the domestic subsidy and its injury to the domestic industry of the importing country, but the dumping margin will not lead to an anti-dumping measure. In this sense, only the countervailing duty offsets the subsidization. This is the general case of the domestic subsidy of most market economies in the trade remedies investigations.

Table 3 Illustration of the “double remedy” issue under the domestic subsidy

Domestic subsidy
 ↓
 Reduction in export price, surrogate price (third market economy country or constructed normal value)
 ↓
 Export price < Domestic price (surrogate price not being affected by domestic subsidy of exporting country)
 ↓
 Injury to domestic industry of importing country

↓

Anti-dumping duty (injury caused by price discrimination)

+

Countervailing duty (injury caused by subsidy)

However, the situation changes when confronting “non-market economies”. For dumping margin calculation, the investigating authorities compare the product’s normal value with the product’s export price. The normal value is replaced by the domestic price from a third market economy or constructed by the investigating authorities, thus could not reflect the influence of the domestic subsidy. Meanwhile, the export price is presumably lower than it would otherwise have been under the influence of subsidy. The result, thus, comes from a comparison between an unsubsidized price and a subsidized price. Therefore, the dumping margin is based on an asymmetric comparison and is generally higher than would otherwise be the case. In this sense, a situation of “double counting” as illustrated by Table 1 occurs.

In contrast with the regulation of the export subsidies, the WTO law does not provide rules for the domestic subsidies. In the *United States-Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* Case, the Panel relied on Article VI: 5 of the GATT 1994 as contextual support for its finding that Article 19.3 and 19.4 of the ASCM do not address the issue of “double remedies”. The Panel considered that ‘these terms are self-explanatory in their intention to limit the scope of the prohibition in Article VI: 5 to situations involving export subsidy’.¹⁵⁹ The Panel considered that, because the explicit prohibition in Article VI:5 is limited to potential “double remedy” issue in respect of export subsidies, Members could not have intended to prohibit the issue of “double remedies” in respect of domestic subsidies in Articles 19.3 or 19.4 of

¹⁵⁹ See Panel Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/R, adopted 22 October 2010, at para. 14.117.

the ASCM.¹⁶⁰

However, the issue of “double remedies” under domestic subsidy shall not be left blank and interpreted as absent based on WTO law. According to the Appellate Body, when interpreting Article VI of the GATT 1994, ‘omissions in different contexts may have different meanings’¹⁶¹ and the phrase ‘same situation: is central to an understanding of the rationale underpinning the prohibition contained in Article VI:5’.¹⁶² The “same situation” is explained by the Appellate Body as being where an export subsidy result in a pro-rata reduction in the export price of a product, but does not affect the price of domestic sales of that product, thus the situation of subsidization and the situation of dumping are the “same situation”.¹⁶³ The “same situation” here, then, refers to the determination of subsidization and dumping by investigation relying simply on export subsidy.

What’s more, the “same situation” may have a further interpretation based on the rationale of “double remedy” issue. Since the export subsidy leads to the implementation of an anti-dumping measure and a countervailing measure, which leads to a duplication of duties, then the “same situation” could also refer to any situation that has the same effect as “double counting”. In other words, it is not the “export” or “import” subsidy that violates the law, but rather the “double remedy” issue itself is inconsistent with Article VI: 5 of the GATT 1994. In any case, the issue of “double remedies” under domestic subsidy should be under the guidance of WTO law.

The Appellate Body further reaffirmed the illegality of “double remedy” issue by contending that it violated requirements in Article 19.3 of the ASCM.¹⁶⁴ Article 19.3 of the ASCM requires that the countervailing duty shall be levied ‘in the appropriate

¹⁶⁰ See *ibid* at para. 14.118.

¹⁶¹ See Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011, at para. 567.

¹⁶² See *ibid*.

¹⁶³ See *ibid*. at para. 568.

¹⁶⁴ See *ibid*. at para. 582.

amounts in each case'. According to the Panel, "the imposition of anti-dumping duties calculated under an NME methodology has no impact on whether the amount of the concurrent countervailing duty collected is 'appropriate' or not".¹⁶⁵ However, the Appellate Body disagrees with the Panel's analysis that Article 19.3 of the ASCM does not address the issue of "double remedies". In contrast, the Appellate Body contends that the evaluation of the amount of the countervailing duty cannot ignore anti-dumping duty imposed on the same product to offset the same subsidization.¹⁶⁶ Therefore, the amount of the countervailing duty cannot be "appropriate" without having regard to anti-dumping duty connected with the same subsidization. In this regard, the Appellate Body finds that the imposition of "double remedies" based on "non-market economy treatment" is inconsistent with Article 19.3 of the ASCM.¹⁶⁷

2.3 Two elements reflected by the "double remedy" issue

The "double remedy" issue in the context of "non-market economy treatment" is represented by two subsidiary issues: the non-market economy methodology in the anti-dumping investigation and the subsidy determination in the countervailing investigation. Regarding the non-market economy methodology, WTO Members can resort to three legal bases for special treatment, which calls for interpretation on applying of such treatment. Concerning the subsidy determination, a more precise interpretation of the "public body" is required to provide criteria in assessing entities such as the SOEs in China.

2.3.1 The non-market economy methodology

The "non-market economy treatment" in the anti-dumping investigation, also called the non-market economy methodology, relates to the discriminatory determination of the

¹⁶⁵ See *ibid.* at para. 583.

¹⁶⁶ See *ibid.* at para. 582.

¹⁶⁷ See *ibid.* at para. 583

dumping margins, albeit the term “non-market economy” is nowhere defined in any GATT or WTO agreements.¹⁶⁸ In general, the determination of dumping margins is based on a comparison between the export price and the normal value (normally domestic price in investigated country). The discriminatory use of surrogate method in anti-dumping investigation based on the market economy conditions is generally considered ‘a violation of the non-discrimination obligation’ and is a ‘derogation from the WTO obligations’.¹⁶⁹ However, discriminatory treatment is allowed but may not for a sustained position due to the specific circumstances of the investigated country, which generally targets on non-market economies.¹⁷⁰

2.3.1.1 The general method of dumping margin calculation

Article VI: 1(a) of the GATT 1994 and Article 2.1 of the ADA stipulate a general method for dumping margin calculation. Pertaining to Article VI: 1(a) of the GATT 1994:

For the purposes of this Article, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another

(a) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country...

Article 2.1 of the ADA has a similar expression. It provides:

For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

¹⁶⁸ See James J. Nedumpara and Archana Subramanian, ‘China’s Long March to Market Economy Status: An Analysis of China’s WTO Protocol of Accession and Member Practices’ in James J Nedumpara and Weihuan Zhou (eds), *Non-Market Economies in the Global Trading System: The Special Case of China* (Springer Singapore 2018) <<https://www.springer.com/gp/book/9789811313301>> accessed 9 July 2020.

¹⁶⁹ See *ibid.*

¹⁷⁰ See *ibid.*

Accordingly, a dumping margin should be calculated based on a comparison between the normal value and the export price. Recalling the rationale constituting the issue of “double remedies”, this calculation method will not lead to “double counting”, because a subsidy will affect the price of the products of domestic and export markets in the same way and to the same extent. Any lowering of prices attributable to the subsidy will be reflected on both sides of the dumping margin calculation, so the overall dumping margin will not be affected by the subsidization.

2.3.1.2 Legal basis of the non-market economy methodology

Three sources, to different extents, permit WTO Members to apply special treatment when calculating dumping margins and impose anti-dumping duty. The Accessional Protocol to the WTO, especially for China (the CAP), directly and expressly stipulated such discriminatory treatment in Article 15:

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

...

(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.

The Accession Protocol to the WTO stipulates specific obligations for contracting parties when joining the WTO. For China, the CAP provides WTO members with the possibility to derogate from the requirements in Article VI: 1(a) of the GATT 1994 and Article 2.1 of the ADA, thus calculating dumping margins in a discriminatory manner,

which has frequently been cited in international disputes.¹⁷¹

Notably, subparagraph (d) of Article 15 stipulates a deadline for this treatment, it states ‘in any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession’.¹⁷² Some experts believe such expiry indicates a continuance of the non-market economy methodology and China has to meet the market economy requirements regulated by WTO Members to forbid the use of such treatment.¹⁷³ And some insist China may not be ‘subjected to the special/analogue country methodology which deviates from the normal value calculation in Article 2 ADA’.¹⁷⁴ Thus what should be the appropriate interpretation of the expiry of Article 15: (a)(ii) becomes a key issue for special treatment, which is analysed in Chapter 5.

¹⁷¹ See for example, Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011. Appellate Body Report, *European Communities - Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, 15 July 2011. Appellate Body Report, *United States - Countervailing Duty Measures on Certain Products from China*, WT/DS437/AB/RW, adopted 16 July 2019.

¹⁷² According to Article 15: (d):

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

¹⁷³ See for example, Jorge Miranda, ‘More on Why Granting China Market Economy Status after December 2016 Is Contingent upon Whether China Has in Fact Transitioned into a Market Economy’ (2016) 11 *Global Trade and Customs Journal* 244; Bernard O’Connor, ‘Much Ado about Nothing: 2016, China and Market Economy Status’ (2015) 10 *Global Trade and Customs Journal* 176; Terence P Stewart and others, ‘The Special Case of China: Why the Use of a Special Methodology Remains Applicable to China after 2016’ (2014) 9 *Global Trade and Customs Journal* 272; Laurent Ruessmann and Jochen Beck, ‘2016 and the Application of an NME Methodology to Chinese Producers in Anti-Dumping Investigations’ (2014) 9 *Global Trade and Customs Journal* 457.

¹⁷⁴ See Edwin Vermulst, Juhi Dion Sud and Simon J Evenett, ‘Normal Value in Anti-Dumping Proceedings against China Post-2016: Are Some Animals Less Equal than Others’ (2016) 11 *Global Trade and Customs Journal* 212, 215.

Jochem De Kok analysed China’s Accession Protocol to the WTO and concluded WTO Members may ‘no longer have resources to an NME methodology’ based on the Protocol. See Jochem De Kok, ‘The Future of EU Trade Defence Investigations against Imports from China’ (2016) 19 *Journal of International Economic Law* 515; Yen Kong Ngangjoh-Hodu and Tianzhu Han, ‘China’s Market Economy Dilemma and Its Interplay with EU Anti-Dumping Law’ (2019) 27 *Asia Pacific Law Review* 102; Roberto Soprano, ‘The Principle of Effectiveness in the Interpretation of the Protocol of Accession of China to the World Trade Organization: Market Economy Considerations in Anti-Dumping Investigations’ (2019) 46 *Legal Issues of Economic Integration* 29. Weihuan Zhou and Delei Peng, ‘EU - Price Comparison Methodologies (DS516): Challenging the Non-Market Economy Methodology in Light of the Negotiating History of Article 15 of China’s WTO Accession Protocol’ (2018) 52 *Journal of World Trade* 505.

Some researchers, such as Weihuan Zhou, insist WTO members may continue to label China as an NME but whatever this label may entail, it no longer justifies the application of the NME methodology. See Weihuan Zhou, ‘China’s Litigation on Non-Market Economy Treatment at the WTO: A Preliminary Assessment’ (2017) 5 *Chinese Journal of Comparative Law* 345. Minyou Yu and Jian Guan, ‘The Non-Market Economy Methodology Shall Be Terminated After 2016’ (2017) 12 *Global Trade and Customs Journal* 16.

Another legal basis with rigorous thresholds is the second *Ad Note* to Article VI: 1 of the GATT 1994, it provides that:

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

The requirements to apply this provision are far stricter than those of other legal bases. The Appellate Body in the *Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China* Case pointed out that the second *Ad Note* stipulates a strict rule when identifying an exporting country under its context. Specifically, the non-market economy methodology is applicable to a country when it reflects a ‘complete or substantially complete monopoly of trade’ and the ‘fixing of all prices by the State’, and it is not ‘applicable to lesser forms of NMEs that do not fulfil both conditions’.¹⁷⁵ Although WTO provisions do not provide a list of countries which fulfils the standards of the second *Ad Note*, it is difficult to find a country which could satisfy such strict requirements.¹⁷⁶ As concluded by commentators, ‘no country today would fall within this narrowly defined category’.¹⁷⁷

Comparatively, Article VI: (b) of the GATT 1994 and Article 2.2 of the ADA provide

¹⁷⁵ See Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, 15 July 2011, at para. 290.

The Report interprets the rules when applying the Second *Ad Note* to Article VI: 1 as follows:

We observe that the second *Ad Note* to Article VI:1 refers to a "country which has a complete or substantially complete monopoly of its trade" and "where all domestic prices are fixed by the State". This appears to describe a certain type of NME, where the State monopolizes trade and sets all domestic prices. The second *Ad Note* to Article VI:1 would thus not on its face be applicable to lesser forms of NMEs that do not fulfil both conditions, that is, the complete or substantially complete monopoly of trade and the fixing of all prices by the State.

¹⁷⁶ Prusa (n 5) 623.

¹⁷⁷ See Sherzod Shadikhodjaev, ‘Non-Market Economies, Significant Market Distortions, and the 2017 EU Anti-Dumping Amendment’ (2018) 21 *Journal of International Economic Law* 885, 889; Weihuan Zhou, Henry Gao and Xue Bai, ‘Building a Market Economy Through Wto-Inspired Reform of State-Owned Enterprises in China’ (2019) 68 *International & Comparative Law Quarterly* 977, 1008; Weihuan Zhou, ‘China’s Litigation on Non-Market Economy Treatment at the WTO: A Preliminary Assessment’ (2017) 5 *Chinese Journal of Comparative Law* 345.

general legal basis for the alternative treatments among WTO Members. Based on Article VI of the GATT 1994:

[A] product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another

(a) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or,

(b) in the absence of such domestic price, is less than either

(i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or

(ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.

Article VI: 1(b) of the GATT 1994 stipulates two alternatives for dumping margin calculation “in the absence of domestic price”. One is to take the highest comparable price to any third country, and the other is to construct a normal value by cost of production and reasonable additions.

Article 2.2 of the ADA provides a similar method:

When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.

Compared with Article VI: 1(b) of the GATT 1994, the ADA provides an explanation of a situation “absence of such domestic price”. Pursuant to Article 2.2, “absence of such domestic price” refers to (1) when there are no sales of the like product “in the ordinary course of trade”, (2) “the particular market situation” or (3) “low volume of

the sales”.

Accordingly, if the CAP and the second *Ad Note* to Article VI: 1 of GATT 1994 could not continue to justify the “non-market economy treatment” to China. Then the last choice for proponents of special treatment relies on Article VI: 1(b) of the GATT 1994 and Article 2.2 of the ADA. A potential controversy may raise here due to ambiguous stipulation of three thresholds on the situation “absence of such domestic price”. An emblematic example is the EU’s practise in revising its basic anti-dumping regulation.¹⁷⁸ Further interpretations of these thresholds are explored in Chapter 5 and 6 of this research.

2.3.2 The subsidy determination

The subsidy determination is embodied by the “public body” issue where an entity is established by the government to serve as a “pass-through” vehicle for subsidies. In general, the implementation of countervailing duty is based on subsidized behaviour, and the subject of the subsidization is the government. However, Article 1.1 of the ASCM (Agreement on Subsidy and Countervailing Measure) stipulates another possible subject which is the “public body”. The relevant texts read as follows:

For the purpose of this Agreement, a subsidy shall be deemed to exist if:
 (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as “government”) ...

The description of Article 1.1 indicates that the “public body” is jointly referred to as a government that qualifies to provide a subsidy. Therefore, if an entity is considered as a “public body”, then its commercial behaviour is potentially regarded as subsidization, thus suffering from countervailing measures, which is a starting point of the “double remedy” issue. However, the necessary details and instructions are absent on

¹⁷⁸ EU 2017 Anti-dumping Regulation is enacted to deal with a dilemma that NME provisions of 2016 Regulation may not be efficient in the wake of Article 15(a)(ii) CAP’s expiration in December 2016.

identifying a “public body” based on the ASCM, which leaves loopholes in determination of subsidy.

In the *United States-Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* Case, one major debate is whether China’s SOEs and SOCBs belong to “public bodies” and whether their behaviours comply with countervailing law.¹⁷⁹ In other words, does an entity with link to state qualifies to provide a subsidy under WTO rules? China filed a complaint at the WTO rebutting US’s affirmative determination of China’s state-owned banks and SOEs being “public bodies”, which were qualified to conduct subsidization under ASCM. The Panel sided with the US, but the Appellate Body held the opposite view (in respect of SOE), it declared that ‘the precise contours and characteristics of a “public body” are bound to differ from entity to entity, State to State, and case to case’.¹⁸⁰

The WTO tribunal’s decision clarifies only limited Chinese firms that may belong to “public bodies”. And even for those confirmed “public bodies”, such as the SOCBs, there still has the controversy. According to the tribunal, the BOC is a “public body” based on several factors such as state ownership; relevant Chinese commercial banking law; and risk management and analytical skill of the SOCBs. For example, Article 34 of China’s Commercial Banking Law stipulates that banks must ‘carry out their loan business upon the needs of the national economy and the social development and under the guidance of State industrial policies’.¹⁸¹ According to the tribunal, the BOC is a “public body” because its governmental factor is formally acknowledged by Chinese law. Nonetheless, commentators remain sceptical of the tribunal’s arguments noting that ‘a lack of business flair, as illustrated by inadequate risk management and analytical

¹⁷⁹ See Panel Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/R, adopted 22 October 2010. Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011.

¹⁸⁰ See Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011, at para. 317.

¹⁸¹ See Panel Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/R, adopted 22 October 2010.

skills and poor loan-making practices, has little to do with whether the SOCBs are exercising government authority’ and also ‘Article 34 of the Commercial Banking Law is a very general statement and its implications to the SOCBs’ loan business are not clear’.¹⁸²

Compared with the SOCBs, many Chinese firms, especially the SOEs, may not have formal links with the state like the BOC. Potential controversy may arise, for example, would SASAC's ability to remove the firm's top management suffice to render the firm a “public body”? For now, the Appellate Body is relying on a standard of “government authority” to evaluate a “public body” but without clarifying what is necessary to demonstrate such authority.¹⁸³ Nevertheless, the WTO cannot avoid these questions. Since the *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* Case, the “public body” issue has raised three disputes.¹⁸⁴ Even without China as a party at issue, there is still a high percentage that occurs. For example, in the *United States – Countervailing Measures on Certain Hot-rolled Carbon Steel Flat Products from India* Case, the tribunal rejected the US argument that one can identify whether a firm is a “public body” on account of whether the government can employ the resources of an entity that it controls as its own.¹⁸⁵

Therefore, WTO provisions on identifying the “public body” is still blurry, and more precise methodologies thus have to be developed through further interpretation of WTO agreements, which is explored in Chapter 4 of this research.¹⁸⁶ This is significantly

¹⁸² Ming Du, ‘China’s State Capitalism and World Trade Law’ (2014) 63 *International & Comparative Law Quarterly* 409, 439.

¹⁸³ See Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011.

¹⁸⁴ Appellate Body Report, *United States – Countervailing Measures on Certain Hot-rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R, adopted 8 December 2014. P Panel Report, *United States - Countervailing Duty Measures on Certain Products from China*, WT/DS437/ R, adopted 14 July 2014. Appellate Body Report, *United States - Countervailing Duty Measures on Certain Products from China*, WT/DS437/AB/RW, adopted 16 July 2019.

¹⁸⁵ Appellate Body Report, *United States – Countervailing Measures on Certain Hot-rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R, adopted 8 December 2014. At paras. 4.27 – 4.29.

¹⁸⁶ See *ibid*.

urgent because the “public body” issue not only results in disputes relating to countervailing measures for the SOEs, but may also jointly lead to the issue of “double remedies” in the *United States-Definitive Anti-Dumping and Countervailing Duties on Certain Products from China Case*.¹⁸⁷

2.4 Conclusion

The rationale of the “double remedy” issue includes both overall and subsidiary dimensions. From the overall dimension, the WTO regulations on the “double remedy” issue are ambiguous. Although the “double remedy” issue raised by export subsidies are clearly prohibited by WTO law, no further guidance is provided relating to prevention of this issue, nor an elimination of its injuries, which leaves loopholes in this regard. Besides, the WTO law regulating the “double remedy” issue arising from the domestic subsidy is absent, but, as analysed by the Appellate Body, this does not mean “double remedy” issue arising by domestic subsidies are allowed under WTO law.¹⁸⁸ In contrary, “double remedy” issue shall be prohibited as long as it leads to a duplication of duties.

From the subsidiary dimension, the “double remedy” issue in the context of “non-market economy treatment” is represented by two subsidiary issues: the non-market economy methodology in the anti-dumping investigation and the subsidy determination in the countervailing investigation. Regarding non-market economy methodology, WTO Members can resort to three legal bases for special treatment, which calls for interpretation on applying of such treatment. Concerning the subsidy determination, a more precise interpretation of the “public body” is required to provide criteria in assessing entities such as the SOEs in China.

¹⁸⁷ See Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011.

¹⁸⁸ See *ibid*, at para. 567.

Conclusively, the findings of this chapter submit that the ambiguous WTO trade remedies agreements have raised the issue of “double remedies”. This is further demonstrated by the analysis of the US national statutes and cases in the next Chapter. Accordingly, systematic and comprehensive countermeasures to the “double remedy” issue are required where the interpretations of the legal basis of the non-market economy methodology and “public body” identification criteria are major concerns.

Chapter 3: “From nothing to something” – the evolution of the “double remedy” issue reflected in the US

This chapter has explored the rationale of the “double remedy” issue by tracing its origin at the national level. The analysis of the non-market economy disputes at the US national court submitted that the “double remedy” issue has evolved from a single subsidy case into a compound dispute involving two trade remedy measures. The findings have further indicated that the ambiguity of countervailing law, especially the subsidy determination, is one rationale of the “double remedy” issue, which requires further interpretation. In addition, there is an asymmetric development of US trade remedy laws relates to the “non-market economy treatment”, which leads to a dilemma that the anti-dumping statute are frequently revised to regulate the countervailing disputes. The differences between the US anti-dumping statute and the WTO anti-dumping agreement have indicated a controversy over the “non-market economy treatment” in the future.

3.1 Introduction

As discussed in Chapter 2 of this research, the “double remedy” issue is one major dispute confronted by the WTO dispute settlement body in the *United States-Definitive Anti-Dumping and Countervailing Duties on Certain Products from China Case*.¹⁸⁹ In fact, before appealing to the WTO dispute settlement body, a series of cases have already been raised between China and US around the “double remedy” issue in front of the domestic courts of the US since 2007.¹⁹⁰ However, the decisions of the courts provide neither consensus between the US and China nor substantial references to resolve the “double remedy” issue. Therefore, the two parties are seeking for settlement by the WTO.

¹⁸⁹ See Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011.

¹⁹⁰ See for example the *GPX Int'l Tire Corp. v. United States*, 645 F.Supp.2d 1231 (CIT 2009).

Nevertheless, the discussion of the trade remedies cases and law in the US scenario serves two significant purposes. First, it directly answers two subsidiary questions as has been listed in Section 1.3 of this research: what are the origins of the “double remedy” issue; and why is the subsidy determination an integral part of the “double remedy” issue. It reinforces the arguments in Chapter 2 of this research that the ambiguity of countervailing law is one origin of the “double remedy” issue. In addition, it specifically submits and demonstrates that one breakthrough to resolve such issue relates to the determination of a subsidy in the context of “non-market economies”. That is distinguished with a common “breakthrough” from anti-dumping perspective as discussed in Section 1.2 of this research.

Second, the discussion in the US scenario reflects the problem of domestic regulations of individual WTO members when the WTO law is ambiguous on regulating trade remedies investigations of “non-market economies”. And those problems have set the directions for digging solutions in the following chapters. For example, the analysis of the *Georgetown Steel Corp. v. United States* Case has indicated the lack of clear criteria of subsidy determination, which requires interpretation of the WTO countervailing rules (that is the subject of Chapter 4 of this research).¹⁹¹ Correspondingly, the analysis of US anti-dumping statute has manifested the trade remedies regulation of US may not comply with WTO anti-dumping agreements, which requires further interpretation of the WTO anti-dumping rules to provide references to WTO members (that is the subject of Chapter 6 of this research).

Therefore, the discussion of the trade remedies cases and law in the US scenario is requisite and significant. It traces the origin of the “double remedy” issue and clarifies the direction to resolve it.

3.2 The US anti-dumping statute

¹⁹¹ See *Georgetown Steel Corp. v. United States*, 801 F.2d 1308,1311 (Fed. Cir. 1986).

The US anti-dumping statute has a long history of development, and so as its non-market economy provisions. Two major approaches have been established to deal with non-market economy related issues during development of the US anti-dumping statute. However, the “non-market economy treatment” reflects a potential risk that raises anti-dumping measures, which may not comply with the ADA and the purpose of US anti-dumping rules. First, it focuses more on economy status than fair price comparability, which ‘usually results in a higher dumping margin for NME products than would exist if any of the standard methodologies were applied’ and has been ‘severely criticized due to the seemingly unpredictable and arbitrary dumping margins’.¹⁹² Second, the authority may have excessive discretion in investigation, especially, for the determination of the non-market economy status, which may lead to uncertainty in the anti-dumping investigation. Besides, an increase of anti-dumping measures may potentially lead to the “double remedy” issue when compound with countervailing measures.

3.2.1 Purpose of the US anti-dumping statute

Dumping is the sale of foreign merchandise in the United States at less than fair value or below the cost of production.¹⁹³ The US anti-dumping law provides for the rules of dumping determination and the imposition of anti-dumping duties. If the investigating authority determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value; and if, by reason of the imports or sales of that merchandise, the establishment of an industry in the United States is

¹⁹² See Robert H Lantz, ‘The Search for Consistency: Treatment of Nonmarket Economies in Transition Under United States Antidumping and Countervailing Duty Laws’ (1995) 10 American University International Law Review 993, 1006; Jane M Smith, ‘U.S. Trade Remedy Laws and Nonmarket Economies: A Legal Overview’ (Congressional Research Service 2013) RL33976 <<https://fas.org/sgp/crs/misc/RL33976.pdf>> accessed 10 July 2020.

¹⁹³ See *ibid.*

materially retarded, then an anti-dumping measure might be implemented.¹⁹⁴ Generally, an anti-dumping duty shall be equal to the amount by which the normal value of the merchandise exceeds the export price of the merchandise.¹⁹⁵ Anti-dumping duty here aims to prevent unfair dumping behaviour rather than punish the foreign company.¹⁹⁶

In this sense, the purpose of the US anti-dumping statute is to ensure the ‘fair pricing of imports from abroad, thereby levelling the playing field between foreign and US manufacturers’.¹⁹⁷ The focus of the law is to allow fair competition between foreign firms and US national manufactures. Therefore, the calculation of dumping margins requires the investigating authority to seek factual prices of the dumped product, which could precisely offset dumping behaviour. This is also indicated in Article 2.2 of ADA, where the Agreement requires the a “proper comparison” shall be determined for the margin of dumping.

3.2.2 Development of the “non-market economy treatment” in the US anti-dumping statute

The US anti-dumping statute has a long history, and so as its special provisions targeting countries with special economic structure (in general the non-market economy provisions). Since the end of the Second World War, many countries have attempted to promote international trade and eliminate non-tariff barriers. Article VI of the General Agreement on Tariffs and Trade (GATT), adopted in 1947, condemns dumping as an unfair trade practice and permits GATT members to enact AD duties. As a signatory to GATT and the Anti-Dumping Code, the United States has implemented AD statutes

¹⁹⁴ See Tariff Act of 1930, 19 U.S. Code § 1673; also see Joseph AJr Laroski, ‘NMES: A Love Story - Nonmarket and Market Economy Status under U.S. Antidumping Law’ (1999) 30 *Law and Policy in International Business* 369, 371.

¹⁹⁵ See Tariff Act of 1930, 19 U.S. Code § 1673e.

¹⁹⁶ Robert H Lantz, ‘The Search for Consistency: Treatment of Nonmarket Economies in Transition Under United States Antidumping and Countervailing Duty Laws’ (1995) 10 *American University International Law Review* 993, 996.

¹⁹⁷ Joseph AJr Laroski, ‘NMES: A Love Story - Nonmarket and Market Economy Status under U.S. Antidumping Law’ (1999) 30 *Law and Policy in International Business* 369, 372.

consistent with these agreements.¹⁹⁸

The United States Congress first promulgated AD statutes as part of the Revenue Act of 1916.¹⁹⁹ Section 801 of the Act provides for the assessment of dumping behaviour: (1) articles at a price substantially less than actual market value or whole-sale price of such articles, and (2) such action be done with the intent of destroying or injuring an industry in the United States.²⁰⁰ Congress replaced almost all of the 1916 Act when it enacted the Antidumping Act of 1921,²⁰¹ where concepts such as “injury determinations, purchase price, foreign market value” and the structure of two agency administrations were introduced.²⁰² Comparatively, regulating anti-dumping issues related to NMEs is difficult because normally markets in NMEs do not follow the market rules of supply and demand, thus both the Revenue Act of 1916 and the Anti-Dumping Act of 1921 do not provide provisions especially for the calculation of normal value for NMEs, making determinations of fair market value uncertain.²⁰³

The first non-market economy clause appeared in the 1974 Trade Act, triggered by the *Bicycles from Czechoslovakia* Case where a “surrogate country” approach was introduced by the Department of Treasury.²⁰⁴ According to the *Bicycles from Czechoslovakia* Case, the home market price in Czechoslovakia could not be considered a normal value because of its non-market economy status. Therefore, under the “surrogate country” approach, the home market value was substituted by a third “non-state-controlled economy country.”²⁰⁵ This approach is adopted and codified by

¹⁹⁸ See Lantz (n 190) 999 ;also see 19 U.S. Code § 1673 notes, “Effective Date of 1994 Amendment”, which provides that: ‘Amendment by Pub. L. 103–465 effective, except as otherwise provided, on the date on which the WTO Agreement enters into force with respect to the United States [Jan. 1, 1995], and applicable with respect to investigations, reviews, and inquiries initiated and petitions filed under specified provisions of this chapter after such date, see section 291 of Pub. L. 103–465, set out as a note under section 1671 of this title.’

¹⁹⁹ See Revenue Act of 1916, Ch. 463, § 801, 39 Stat. 756, 798 (1916), 15 U.S.C. § 72 (1994).

²⁰⁰ See *ibid.*

²⁰¹ See Antidumping Act of 1921, Ch. 14, tit. II, 42 Stat. 11-15, 19 U.S.C. § 160 (repealed 1979) (current version at 19 U.S.C. § 1673 (1994)).

²⁰² Laroski (n 191) 372.

²⁰³ Lantz (n 190) 999.

²⁰⁴ See Department of Commerce, *Bicycles From Czechoslovakia*, 25 FED.REG. 6,657 (1960).

²⁰⁵ See *Bicycles From Czechoslovakia*, *supra* note 11.

Congress in the Trade of Act of 1974.²⁰⁶ While it solved the application problem of the anti-dumping statute, other problems can arise, for example, the “surrogate” methodology may confront difficulties when there is no appropriate surrogate country.²⁰⁷

To deal with this problem, another methodology was introduced when the Department of Treasury was confronted with a dumping investigation involving electric Golf cars from Poland.²⁰⁸ The new approach, namely, “factors of production” approach, enabled the investigating authority to consider the amount of each factor input of the manufacturer at issue taken from a market economy country at a comparable stage of economic development.²⁰⁹ In the 1979 Trade Act, Congress included this approach in the Act as an alternative for when a “surrogate country” approach is unavailable.²¹⁰ And in the 1988 Act, the “factors of production” approach replaced the “surrogate country” approach as the preferred method when the investigating authority finds that a discriminatory treatment is required for NMEs.²¹¹

The “surrogate” methodology and “factors of production” approach have similar expressions to Article 2.2 of the ADA, but they are, to some extent, differentiated from the regulations of ADA and the purpose of US anti-dumping statute. Article 2.2 of the ADA provides two methods to determine normal value under special circumstances. Normal value, under the first method, shall be determined by a ‘comparable price of the like product when exported to an appropriate third country’. Compared with the “surrogate” methodology, the ADA does not address the nature of the analogous country, rather, it focuses on whether the substitute can permit a “proper comparison” (or a “fair

²⁰⁶ See Trade Act of 1974, P.L. 93-618, § 321, 88 Stat. 1978, 2047 (1975).

²⁰⁷ Lantz (n 190) 1002.

²⁰⁸ See Department of Commerce, *Electric Golf Cars From Poland*, 40 FED. REG. 25,497 (1975).

²⁰⁹ See *ibid.*

²¹⁰ See Trade Agreements Act of 1979, P.L. 96-39, § 773, 93 Stat. 144, 186 (1979) (codified and amended at 19 U.S.C. § 1677e).

²¹¹ See Omnibus Trade and Competitiveness Act of 1988, P.L. 100-418, 102 Stat. 1107 (1988). 19 U.S.C. § 1677b (c).

comparison”),²¹² which shares the same purpose of the US anti-dumping statute, as mentioned in Section 3.1.1. Article 2.2 of the ADA further provided three situations explaining when “a proper comparison” is not available: no sales of the like product “in the ordinary course of trade”, “the particular market situation” or “low volume of the sales”. The three situations have illustrated three main problems that the authority may confront in anti-dumping investigation. The attitude of WTO rules is thus more problem-based and relates to specific situation where a proper comparison is not permitted. In this regard, the “surrogate” methodology may not be able to precisely reflect the factual price in the exporting country, because the focus seems to be on evaluating the country’s economic status rather than ascertaining the normal value that is closest to the real situation. It thus no doubt that the approach has been ‘severely criticized due to the seemingly unpredictable and arbitrary dumping margins’.²¹³

The second method of the ADA proposes the construction of normal value by considering different factors, such as the cost of production, which share similar expressions to the US “factors of production” approach. However, the “factors of production” approach insists that those factors are collected from a market economy country. Similarly, this approach is intended to focus more on economic status rather than reflected real data for dumping margin calculation. In other words, if the ADA indicates that the factors collected can enable a “proper comparison”, then the economic status of the country does not constitute a problem. However, the “factors of production” approach tends to express that factors from a market economy country are mandatory no matter whether those factors can reflect the real situation of the exporting country. Therefore, the results of the dumping margin may differ based on the different foci of

²¹² According to Article 2.4 of ADA, the dumping margin shall be calculated by a fair comparison. See also Thomas J Prusa and Edwin A Vermulst, ‘United States - Certain Methodologies and Their Application to Anti-Dumping Proceedings Involving China: Nails in the Coffin of Unfair Dumping Margin Calculation Methodologies’ (2019) 18 World Trade Review 287.

²¹³ See Lantz (n 190) 1003; also see Moushami Joshi, ‘Shifting Sands: The Evolution and Future Course of U.S. Anti-dumping Law and Practise Against China and Vietnam’ in James J Nedumpara and Weihuan Zhou (eds), *Non-Market Economies in the Global Trading System: The Special Case of China* (Springer Singapore 2018) <<https://www.springer.com/gp/book/9789811313301>> accessed 9 July 2020.

those methods.

In fact, the differences between the ADA and the US anti-dumping statute indicates a controversy over the “non-market economy treatment” in the future and requires further interpretation of the WTO anti-dumping agreements, which is analysed in detail in Chapter 6 of this research. As analysed in Chapter 6, when conducting anti-dumping investigation on a country with special market situation by “the non-market economy treatment” under WTO legal system, the first choice determining normal value shall base on actual costs of production “in the country of origin”, even though such cost is considered to be “distorted” in a non-market economy. When a construction of normal value is necessary, “price distortions” should be considered ‘as long as they reflect the prevailing conditions in the market of exportation’. As one commentator said, ‘factors of production approach usually results in a higher dumping margin for NME products than would exist if any of the standard methodologies were applied’.²¹⁴

Notably, the US non-market economy provisions also provide the DOC with significant discretion in determining whether a foreign country is a non-market economy, thus applying a special treatment. The definition of a non-market economy was first included in the Omnibus Trade and Competitiveness Act of 1988.²¹⁵ The definition of non-market economy comes with a set of standards that the DOC can take into consideration when determining whether a specific country is a non-market economy. Pursuant to the 1988 Act, a non-market economy under the US anti-dumping law means any foreign country where ‘the administering authority determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such a country do not reflect the fair value of the merchandise.’²¹⁶ According to the statute, the

²¹⁴ Lantz (n 190) 1006; Jane M Smith, ‘U.S. Trade Remedy Laws and Nonmarket Economies: A Legal Overview’ (Congressional Research Service 2013) RL33976 <<https://fas.org/sgp/crs/misc/RL33976.pdf>> accessed 10 July 2020.

²¹⁵ See Omnibus Trade and Competitiveness Act of 1988, P.L. 100-418, 102 Stat. 1107 (1988).

²¹⁶ 19 U.S.C. § 1677(18) (A), definition of NME and its determination standards are codified at 19 U.S.C. § 1677(18). To determine an NME, the investigating authority needs to evaluate:

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

determination of non-market economy status may be made “with respect to any foreign country at any time”, and remains effective until expressly revoked by the DOC.²¹⁷ Moreover, DOC’s determinations are not subject to judicial review in any antidumping investigation.²¹⁸ Therefore, there are no efficient restrictions on DOC decisions, nor an appeal procedure to challenge a determination, thus leaving problems with the transparency of assessment.

3.3 The US countervailing statute

There is an asymmetric development of US trade remedy laws relates to the “non-market economy treatment”, which leads to a dilemma that the anti-dumping statute are frequently revised to regulate the countervailing disputes. Analysis of the non-market economy disputes at the US national court submits that the “double remedy” issue has evolved from a single subsidy case into a compound dispute involving two trade remedy measures. The findings further indicate that the ambiguity of countervailing law is one rationale of the “double remedy” issue, which requires further interpretation.

3.3.1 Purpose of the US countervailing statute

countries;

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

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

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

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

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

²¹⁷ See 19 U.S.C. § 1677(18) (C). See also Jane M Smith, ‘U.S. Trade Remedy Laws and Nonmarket Economies: A Legal Overview’ (Congressional Research Service 2013) RL33976 <<https://fas.org/sgp/crs/misc/RL33976.pdf>> accessed 10 July 2020.

²¹⁸ See 19 U.S.C. § 1677(18) (D). See also Jane M Smith, ‘U.S. Trade Remedy Laws and Nonmarket Economies: A Legal Overview’ (Congressional Research Service 2013) RL33976 <<https://fas.org/sgp/crs/misc/RL33976.pdf>> accessed 10 July 2020.

A subsidy is defined as ‘a payment by the government (or possibly some individuals) which forms a wedge between the price consumers pay and the cost incurred by producers, such that price is less than marginal cost’.²¹⁹ If the investigating authority determines that the government of a country is providing a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold for importation, into the United States, which results in a material injury to US industry, then a comparable countervailing duty shall be levied.²²⁰

The countervailing duty statute is established to regulate subsidization behaviour. As a trade remedy statute, it shares the same purpose of the anti-dumping statute that counteract unfair trade behaviours and focuses on levelling the playing field between foreign and US manufacturers. Specifically, US countervailing law seeks: (1) to protect (the establishment of) domestic industry; (2) to prevent subsidized imports into the US; and (3) to avoid unfair policies from foreign countries against US exporters.²²¹

3.3.2 Dilemma of the US countervailing statute and cases of non-market economy

Analysis of the *Georgetown* Case and the *GPX* Case have proved that subsidization behaviour is one origin of the “double remedy” issue. Subsidy-related cases embodied common problems including ambiguity of countervailing law, abusive application of anti-dumping law and excessive discretion of investigating authority. Compared with proliferated development of anti-dumping statute, the US countervailing statute is seemingly being neglected. The asymmetric development of US trade remedy law on non-market economy disputes leads to a dilemma that the anti-dumping statute is frequently revised to regulate the countervailing issue. As a result, when the issue of “double remedies” first occurred, there is no efficient method to deal with it.

²¹⁹ David W Pearce (ed), *The MIT Dictionary of Modern Economics* (4th Revised edition, MIT Press 1992) 115.

²²⁰ See 19 U.S. Code § 1671.

²²¹ The US trade remedy statutes shall share similar function and purpose in protecting its domestic industry and maintain fair competition in the domestic market. See Laroski (n 191) 371.

3.3.2.1 *Georgetown Steel Corp. v. United States Case*

The *Georgetown Steel Corp. v. United States Case* is a landmark case dealing with the applicability of the countervailing statute to a non-market economy in a US national court.²²² This case reflects problems at the national level, including the ambiguity of countervailing provisions, the potential risk of excessive discretion, and the abusive application of the anti-dumping statute, which calls for interpretation of subsidy provisions.

In November 1983, two US steel companies²²³ filed CVD petitions with the DOC alleging that carbon steel wire rod imported into the United States from Czechoslovakia and Poland was “subsidized”, and therefore subject to countervailing duties under Section 303.²²⁴ The DOC determined the section 303 was inapplicable to Czechoslovakia and Poland due to their NME status. On appeal, the CIT (Court of International Trade) reversed the DOC’s ruling and held that ‘the only purpose of the countervailing duty law [was] to extract the subsidies contained in merchandise entering the commerce of the United States in order to protect domestic industry from their effect ... [and that] its effectiveness [was] clearly intended to be complete and without exception’.²²⁵ While the carbon steel wire rod case was pending, three chemical companies filed petitions to the DOC that the Soviet Union and the German Democratic Republic had provided “subsidies” for potash imported into the United States. The DOC dismissed these complaints based on its decision in the Polish wire rod investigation, i.e. that Section 303 was inapplicable to these countries.²²⁶ The CAFC (Court of

²²² The first attempt to apply countervailing measures to an NME was in 1983. However, the petition was withdrawn before the case was established. See *Initiation of Countervailing Duty Investigations; Textiles, Apparel, and Related Products from the People’s Republic of China*, 48 US Federal Register 46600 (Department of Commerce, 13 October 1983), as cited in Dukgeun Ahn and Jieun Lee, ‘Countervailing Duty against China: Opening a Pandora’s Box in the WTO System?’ (2011) 14 *Journal of International Economic Law* 329.

²²³ Georgetown Steel Corporation, Raritan River Steel Company, and Atlantic Steel Company (collectively, Georgetown Steel), and Continental Steel Corporation (Continental Steel). See *Georgetown Steel Corp. v. United States*, 801 F.2d 1308,1311 (Fed. Cir. 1986).

²²⁴ See Section 303 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1303 (1982).

²²⁵ See *Continental Steel Corp. v. United States*, 614 F.Supp. 548, 553 (1985), as cited in *Georgetown Steel Corp. v. United States*, 801 F.2d 1308,1311 (Fed. Cir. 1986).

²²⁶ See *ibid*.

Appeals for the Federal Circuit) consolidated the two cases aforementioned and addressed the levying of countervailing duties on non-market economies.

3.3.2.1.1 Lack of necessary interpretation of subsidy determination

At the beginning of the case, the court's analysis was impeded by ambiguous subsidy provisions. In addressing the levying of countervailing duties, the court began by identifying a subsidized behaviour. Pertaining to the content of Section 303 of the Tariff Act of 1930, the court was required to answer whether the term "bounty" and "grant" could be applied to a non-market economy, but found out that this could not be answered by the statute's plain language. The court then attempted to find answers from three correlative aspects: the purpose of the countervailing statute; the nature of a non-market economy; and the actions in Congress's choice of dealing with non-market economy affairs through the anti-dumping law or the countervailing law (the last aspect is mainly analysed in the next section).

According to the court, the purpose of countervailing law is to regulate "unfair competition" between market economies, as the special market of non-market economies is distinguished from market economies, thus the countervailing measure could not apply to non-market economies. Concerning the purpose of the countervailing statute, the court referred to the statement of the Supreme Court on the 1897 Act in *Zenith*: 'the countervailing duty was intended to offset the unfair competitive advantage that foreign producers would otherwise enjoy from export subsidies paid by their governments'.²²⁷ As the court analysed, the US firms compete with foreign sellers under the same market pressures and constraints, resources flow to the most profitable and efficient uses by the principle of market forces of supply and demand. A government subsidy on sales to the US could provide a foreign producer with advantages it otherwise it could not achieve by itself. Therefore, such behaviour will distort market competition, result in the misallocation of resources, and affect the

²²⁷ See *ibid*, 801 F.2d 1308,1316.

market forces of supply and demand. Accordingly, it is the “unfair competition” resulting from foreign subsidies that the countervailing statute aims to regulate.

However, the court believed that domestic market of a non-market economy does not permit an environment for “competition”, thus economic incentives and benefits only take effect within the domestic market of the non-market economy.²²⁸ Although for market economy countries, the purpose of a countervailing duty law is to eliminate unfair competition, it is a different situation in the context of non-market economies. The court agreed with the DOC’s decision in the potash case and wire rod case that in a non-market economy, resources are not allocated by the market but by a central plan through various layers of distribution, thus not reflecting the market value of the merchandise.²²⁹ Since central planners control the prices, investment decisions, money and credit, the running of the non-market environment is distorted. Therefore, there is no “unfair competition” as defined in the countervailing duty law. A producer in a non-market economy can be regarded as a government instrument. The economic incentives the state provides are more like an instrument to promote central plan objectives than unfair competition factor in a market economy. As the Court stated: ‘even if one were to label these incentives as a “subsidy”, in the loosest sense of the term, the governments of those nonmarket economies would in effect be subsidizing themselves’.²³⁰ Therefore, as discussed by the Court, the special characteristics of a non-market economy, which is unhealthy demand and supply links under the guidance of a central plan, distort the market. However, the purpose of countervailing law revealed by Section 303 is to standardize economic activities based on a healthy market, thus it may not apply to a non-market economy.

One point that should be highlighted here is that the ambiguity of subsidy determination constitutes a loophole in this case. If there were clear regulations to identify a subsidized

²²⁸ See *ibid*, 801 F.2d 1308, 1316.

²²⁹ See *ibid*, 801 F.2d 1308, 1315.

²³⁰ See *ibid*, 801 F.2d 1308, 1317.

behaviour in this case, with explanations of “bounty” and “grant” under Section 303 of the Tariff Act of 1930, then the court would not be trapped in discussions of other aspects. Notably, the discussions only served as an attempt to interpret the subsidy determination, because they did not directly answer the question at issue, which was whether behaviours of defendants belong to the term “bounty” and “grant”, thus could justify a countervailing measure to a non-market economy. In other words, the ambiguity of countervailing law may potentially have misled the analysis of the court on the non-market economy issue. Therefore, as the case arose from a subsidization behaviour, it corresponded to the Supreme Court’s interpretation of countervailing law’s purpose, which it is to ‘offset the unfair competitive advantage that enjoys from export subsidies paid by their governments’.²³¹ In this regard, countervailing law is inevitable to regulate this issue and interpretations of the subsidy determination provisions is required.

It is also important to notice that the blurry provisions in countervailing statute and the explanation by the court may lead to excessive discretion. In addressing the issue that there are no clear provisions to reference, the court referred to the statement of the DOC in Polish wire road case, in which the DOC stated that both the administrative agency and the court should seek to ‘discern dispositive legislative intent by “projecting as well as it could how the legislature would have dealt with the concrete situation if it had spoken”’.²³² Based on the statement, not only the Court, but also the DOC, may “interpret” the legislative intent of Congress. Besides, there do not have any specific standards to interpret such intention, the only guideline is ‘how the legislature would have dealt with the concrete situation if it had spoken’. Therefore, the DOC may interpret the terms of provision if the interpretation fulfils the DOC’s “imagination” of Congress’s legislative intention, which seems to give the DOC judicial power. The excessive discretion raised by ambiguous countervailing statute, jointly with discretion

²³¹ See *ibid*, 801 F.2d 1308, 1316.

²³² See *Asahi Chemical Industry Co. Ltd. v. United States*, 548 F.Supp. 1261, 4 CIT 120, 124 (1982) (quoting from *District of Columbia v. Orleans*, 406 F.2d 957, 958 (D.C.Cir.1968))." 49 Fed.Reg. 19377 (1984), as cited in *Georgetown Steel Corp. v. United States*, 801 F.2d 1308,1315 (Fed. Cir. 1986).

of NME determination in anti-dumping statute, may lead to uncertainty on implementation of countervailing and anti-dumping measures, thus bring risk of “double remedy” issue. In this regard, interpretation of countervailing law is also necessary.

3.3.2.1.2 The abusive application of the anti-dumping statute

As a case of subsidy issue, the court confusingly tried to regulate it within the anti-dumping framework. The rationale that subsidization behaviour is under the governance of anti-dumping law is indicated by the court’s analysis in interpreting Congress’s intention. First, the Court asserted that Congress intended to tackle the non-market economy issues within the framework of antidumping law, because Congress is continually amending the old anti-dumping provisions and enacting new anti-dumping law on the non-market economies.²³³ The Court believed that through the development and improvement of antidumping provisions, the problem could be measured comprehensively. For example, according to the Court, Congress amended the Trade Act of 1974²³⁴, enacting a special “surrogate country” method to determine whether imports from a non-market economy were being dumped in the United States. In the Trade Agreements of 1979²³⁵, like the Trade Act of 1974, Congress re-enacted the special antidumping provisions applicable to state-controlled economies, which targeted at new issue.

However, the revisions and new provisions in the Trade Act 1974 and Trade Act 1979 regulate the calculation of normal value, which belongs to anti-dumping treatment. Even though they were created and drafted to deal for specific issues connected with a

²³³ See *ibid*, 801 F.2d 1308, 1316.

²³⁴ See Pub.L. No. 93-618, 88 Stat. 1978 (1975), Congress amended the antidumping law, 19 U.S.C. §§ 160-171 (1976) (repealed 1979) (current version at 19 U.S.C. §§ 1673-1673i (1982)) (which was first enacted in 1921, Antidumping Act, 1921, ch. 14, §§ 201-212, 42 Stat. 11-15), as cited in *Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1317 (Fed. Cir. 1986).

²³⁵ Congress re-enacted the special surrogate country antidumping provisions applicable to State-controlled economies that it had previously authorized in the 1974 Act. Pub.L. No. 96-39, title I, § 101, 93 Stat. 182, as cited in *Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1317 (Fed. Cir. 1986).

non-market economy, they were originally a methodology to deal with price discrimination in dumping. An issue that relates to the unfair advantage brought about by subsidy comes under the scope of countervailing law, which cannot be mixed with the anti-dumping law.

Second, the court believed Congress did not intend to regulate the subsidy issue relating to a non-market economy because countervailing provisions have been revised many times, and there is no indication of a problem with non-market economies.²³⁶ The court pointed out that after revising the Section 303 six times, there were no significant changes on the issue of the non-market economies, the countervailing statute merely prescribe the method for determining the existence of a subsidy, and leaves it to each country to determine the particular method it uses to deal with the problem, which indicates the Congress had no intention to change the meaning or scope of the provision.

However, it is unpersuasive that there is a causal link between the application of law and the revision of law by Congress. The application of law refers to picking the right rules to deal with a corresponding issue. Comparatively, the revision of law shall improve the predictability and transparency of law. In this regard, revision of laws should facilitate the application of law rather than impede it. Regarding this case, the revision of law shall promote explanations of the “bounty” and “grant” under Section 303 of the Tariff Act of 1930 as noticed by the Court. Congress’s neglect on the revision of the countervailing statute does not necessarily mean such an issue should be governed by an anti-dumping statute. It could rather imply that Congress did not notice the necessity of revision. Overall, an interpretation of subsidy determination provisions is required to regulate subsidy behaviour. As countervailing and anti-dumping statutes govern different fields, a subsidy action cannot be regarded as a dumping behaviour as well.

²³⁶ See *ibid*, 801 F.2d 1308, 1316.

3.3.2.2 *GPX Intern. Tire Corp. v. U.S. Case*

In the *GPX* Cases, the DOC has first time applied the countervailing measures to the so called non-market economies like China, and for the first time “double counting” was raised in a trade remedy dispute. The *GPX* Cases reflect same problems with that of the *Georgetown* Case including the ambiguity of countervailing law, the abusive application of anti-dumping law and the excessive discretion of investigating authority, which calls for interpretation of the subsidy provisions.²³⁷

On June 18, 2007, 24 years after the *Georgetown* Case, Titan²³⁸ filed petitions seeking the implementation of anti-dumping and countervailing measures on certain pneumatic OTR tyres from China. DOC selected three Chinese producers/ exporters of OTR tyres as mandatory respondents²³⁹ under investigation.²⁴⁰ On September 5, 2008, the ITC published an affirmative injury determination based on investigations by the DOC. As a response, on September 9, GPX²⁴¹ filed three complains with the CIT, contesting the determination of countervailing and anti-dumping duty. This was the first *GPX* case (GPX I),²⁴² which started series of *GPX* cases on the issue of “double counting”.

²³⁷ The countervailing law in the *Georgetown* Case was subject to 19 USC. §1303, based on Section 303 of the Tariff Act of 1930. And it was then revised and governed by 19 USC. §1677, which is more consistent with ASCM. See Dukgeun Ahn and Jieun Lee, ‘Countervailing Duty against China: Opening a Pandora’s Box in the WTO System?’ (2011) 14 Journal of International Economic Law 329.

²³⁸ Manufacture of OTR tyres in the United States.

²³⁹ Starbright, TUTRIC, and Guizhou Tire Co., Ltd.

²⁴⁰ See *GPX Int’l Tire Corp. v. United States*, 645 F.Supp.2d 1231,1236 (Ct. Int’l Trade 2009).

²⁴¹ A domestic importer of OTR tires and wholly owns Chinese producer Starbright.

²⁴² See *GPX Int’l Tire Corp. v. United States*, 587 F.Supp.2d 1278, 1291-92 (CIT 2008), reh’g denied, 593 F.Supp.2d 1389 (CIT 2008).

GPX cases have experienced several appeals, in order to identify different decisions in cases, the Court of International Trade followed the naming conventions used by the parties in *GPX International Tire Corp. v. United States*, 893 F.Supp.2d 1296, 1304-06 (CIT 2013) as follows:

GPX Int’l Tire Corp. v. United States, 645 F.Supp.2d 1231 (CIT 2009) (“GPX II”);

GPX Int’l Tire Corp. v. United States, 715 F.Supp.2d 1337 (CIT 2010) (“GPX III”);

GPX Int’l Tire Corp. v. United States, Slip Op. 10-112, 2010 WL 3835022 (CIT Oct. 1, 2010) (“GPX IV”);

GPX Int’l Tire Corp. v. United States, 666 F.3d 732 (Fed.Cir.2011) (“GPX V”);

GPX Int’l Tire Corp. v. United States, 678 F.3d 1308 (Fed.Cir.2012) (“GPX VI”);

GPX International Tire Corp. v. United States, 893 F.Supp.2d 1296 (CIT 2013) (“GPX VII”), aff’d, 780 F.3d 1136 (Fed. Cir.2015);

GPX International Tire Corp. v. United States, 942 F.Supp.2d 1343 (CIT 2013) (“GPX VIII”).

However, the Court of Appeal, Federal Circuit follows another system as follows:

GPX Int’l Tire Corp. v. United States, 666 F.3d 732 (Fed.Cir.2011) (“GPX I”);

GPX Int’l Tire Corp. v. United States, 678 F.3d 1308 (Fed.Cir.2012) (“GPX II”);

GPX Int’l Tire Corp. v. United States, 780 F.3d 1136 (Fed.Cir.2015) (“GPX III”).

Here, in order to clarify the various appeals, this article applies the naming system of CIT.

3.3.2.2.1 The potential risk of “double counting”

The *GPX* Case (GPX I) was the first case to deal with the imposition of both anti-dumping and countervailing duties at the US national level. Despite GPX I mainly dealt with calculation of injuries by dumping and subsidization, it did reflect two points. One point can be extracted in GPX I is the court admitted simultaneous implementation of anti-dumping and countervailing duties may lead to “double counting” and China’s specific economic structure is one trigger. Although the court seemed to believe that the law concerning CVD measures have not changed since the *Georgetown* Case,²⁴³ the DOC took steps to apply countervailing duty to China because the conclusion of the *Georgetown* Case was flawed, and the economic situation in China is neither a Soviet-union central plan type nor a completely market economy. Here, China’s special economic structure was beginning to bring challenges on ambiguous provisions of countervailing law.

Another point embodied here is two trade remedy measures contribute to “double remedy” issue, which may contrary with trade remedy law and calls for appropriate interpretations. In the case, the Court noticed that there was a potential risk of “double counting”. According to the Court, the DOC may apply the non-market economy methodology for the levying of anti-dumping duty with “fine-tuned” adjustment, and at the same time impose countervailing duty to the same industry in China. And such behaviour in the future may raise further issues or disputes, for example, it may ‘directly conflict with the statute’ or it being ‘fundamentally unfair and thus an unreasonable interpretation or abusive application of the statute’.²⁴⁴

²⁴³ According to the court: “in any way relevant to this issue and, from 1986 to 2007, apparently Commerce accepted that the NME procedures specified in the AD laws were intended by Congress to cover the ground of the unfair trade remedies for NMEs”. See 19 U.S.C. §§ 1671, 1677(5), *GPX Int’l Tire Corp. v. United States*, 587 F.Supp.2d 1278, 1291-92 (CIT 2008) at 1290.

²⁴⁴ See *ibid*.

Notably, the Court admitted simultaneously implementation of anti-dumping and countervailing duties may lead to “double counting”. However, the court did not provide any analysis or discussion of this issue, neither did it make suggestions to improve or adjust this method after the case. The court reasoned that ‘success on these issues will not prevent the irreparable harm alleged by the plaintiffs’.²⁴⁵ One debatable point here is that the Court, as a judicial organ, is obliged to supervise and review whether the behaviour of DOC has complied with national provisions. In a situation where the Court was obviously aware of the potential risk on violation of a statute, but it neglected it and did not provide any suggestion or caution, which may lead to a dispute in the future. This may indicate an inefficiency of the supervisory mechanism.

3.3.2.2.2 The “double remedy” issue: the ambiguity of countervailing law and the abusive application of anti-dumping law

Compared with GPX I, GPX II formally addressed the issue of “double remedies”. Three points can be extracted by GPX II relating to the “double remedy” issue. First, subsidization behaviour is one origin of the “double remedy” issue. The Court agreed with GPX that the dual imposition of antidumping and countervailing duties has high potential for the issue of “double remedies”.²⁴⁶ As GPX argued, “double counting” possibly occurred when the DOC imposed a countervailing remedy to offset a government subsidy, but then compared a subsidy-free constructed normal value²⁴⁷ with the original subsidized export price to calculate the dumping margin.²⁴⁸ As noted by Commerce, domestic subsidies may presumably lower the price of relevant goods in both the home and US markets, thus having no influence on dumping margin. However, when a subsidy affected export price is being compared with a subsidy-free

²⁴⁵ See *ibid.*

²⁴⁶ See *GPX Int'l Tire Corp. v. United States*, 645 F.Supp.2d 1231,1241 (Ct. Int'l Trade 2009).

²⁴⁷ The domestic prices in NME countries may be regarded as unreliable for the laws of some countries because the market in NME countries are disordered and confused. Thus, while calculate dumping margins, the authorities in some ME countries will compare a constructed domestic price with an export price. See 19 U.S. CFR § 351.405, 19 U.S. Code § 1677b (c) (1) (a), 19 U.S. Code § 1677 (18).

²⁴⁸ See *GPX Int'l Tire Corp. v. United States*, 645 F.Supp.2d 1231,1241 (Ct. Int'l Trade 2009).

constructed normal value, this will very well result in the issue of “double remedies”.²⁴⁹

Second, there is abusive application of anti-dumping law on subsidy-related dispute due to ambiguous countervailing statute. The court held that, as the *Georgetown Case* recognized, the ambiguous statute provided the DOC with discretion in whether to apply countervailing measures simultaneously with anti-dumping measures. As a result, the subsidization behaviour of a non-market economy was addressed through an anti-dumping methodology. It should be admitted that regulating all non-market economy issues by anti-dumping law would be helpful to deal with “double remedy” issue. According to the *Georgetown Case*, the ‘AD laws were intended by Congress to cover the ground of the unfair trade remedies for NMEs’,²⁵⁰ thus a subsidy issue will only trigger anti-dumping measures, so a situation of implementation by anti-dumping and countervailing duty will not occur. However, this may contradict the purpose of countervailing law. As analysed in Section 3.2.1, countervailing law is established not only for subsidy identification, but also to counteract unfair trade behaviour and level the playing field between foreign and US manufacturers. A subsidy-related trade dispute should fall within the scope of countervailing law and be offset by countervailing measures. There is no need to enact countervailing law if a subsidy dispute can be regulated within anti-dumping law. Therefore, appropriate interpretation of countervailing statute is required to identify a subsidization behaviour and prevent abusive application of anti-dumping law. The issue of “double remedies”, in this sense, results from a subsidy dispute due to the ambiguous countervailing law where anti-dumping law “compulsorily” involved in. As commented by Xuewei Feng, ‘the right route and the applicable tool to offset such subsidization’ is the application of subsidy regulations, and not the anti-dumping regulations.²⁵¹

²⁴⁹ See *ibid.*

²⁵⁰ See what the Court cited in *GPX Int'l Tire Corp. v. United States*, 587 F.Supp.2d 1278, 1291-92 (CIT 2008) at 1290.

²⁵¹ See Xuewei Feng, ‘The Termination of the Grandfather Clause in China’s Accession Protocol and the Normal Value Construction After Fifteen Years of Accession’ in James J Nedumpara and Weihuan Zhou (eds), *Non-Market Economies in the Global Trading System: The Special Case of China* (Springer Singapore 2018) <<https://www.springer.com/gp/book/9789811313301>> accessed 9 July 2020.

A call for the interpretation of countervailing law can be further supported by the difficulty in dealing with the issue of “double remedies” through anti-dumping rules in practice. In GPX II, the Court stated that : ‘if there is a substantial potential for double counting, and it is too difficult for Commerce to determine whether, and to what degree double counting is occurring, Commerce should refrain from imposing CVDs on NME goods until it is prepared to address this problem through improved methodologies or new statutory tools’.²⁵² The decision of the Court indicated there may not exist a reasonable method to deal with the problem of “double counting” by calculation. Upon remand, Commerce expressed that it did not have a method for identifying overlapping remedies, as the Court stated, as ‘it is too difficult for Commerce to determine, using improved methodologies and in the absence of new statutory tools, whether and to what degree double counting is occurring’.²⁵³ The court again, in GPX III, required Commerce to forgo the bestowing of both duties, for the reason that such behaviour was contrary to law and rendered the countervailing investigation and resulting duties meaningless.²⁵⁴ In GPX IV, under protest from Commerce, the Court issued a final judgement sustaining the determination in GPX III.²⁵⁵

Notably, the ambiguity of countervailing statute may lead to excessive discretion of the investigating authority. In GPX II, when addressing whether imposing countervailing duties on products from China is legally permitted, or if Congress intends to interpret countervailing provisions available to NMEs, the court made clear that if the statutory language of countervailing law was ambiguous, the Court only need to determine whether the interpretation of relevant provisions by the DOC is reasonable. Because the Court ‘is looking at Commerce’s new interpretation ... , it does not matter whether Commerce’s new interpretation of the statutes conflicts with its old interpretation’.²⁵⁶

²⁵² The new methodology refers to offset of countervailing duty by adjustment of anti-dumping duty. See *GPX Int’l Tire Corp. v. United States*, 645 F.Supp.2d 1231,1243 (Ct. Int’l Trade 2009).

²⁵³ See *GPX Int’l Tire Corp. v. United States*, 715 F.Supp.2d 1337,1345 (Ct. Int’l Trade 2010).

²⁵⁴ See *ibid*, 715 F.Supp.2d 1337, 1354.

²⁵⁵ See *GPX Int’l Tire Corp. v. United States*, Slip Op. 10-112, 2010 WL 3835022 (CIT Oct. 1, 2010) (“GPX IV”).

²⁵⁶ See *GPX Int’l Tire Corp. v. United States*, 645 F.Supp.2d 1231,1238 (Ct. Int’l Trade 2009).

However, the Court should not rely on the interpretation of countervailing provisions by Commerce when no statute provides references to this issue, because the Court is responsible to interpret the law when its provisions are blurry and supervise the behaviour of the investigating authority applying the law. Moreover, it is suspicious that the Court regarded the Congress's silence as an indication that it never 'anticipated the countervailing law would be applied' to a non-market economy. As the first case which "officially" included the application of anti-dumping and countervailing measures, the silence of Congress is more likely to indicate it did not notice the issue. In GPX I, though the Court already noticed a potential risk might arise with the implementation of both duties, it chose to keep silent on this issue because of the "irrelevance" to the case itself. Therefore, it is reasonable to assume that Congress had not realized the importance of this issue when, In GPX II, the legal issue of "double counting" for the first time arose. In this situation, it is the Court's responsibility, as a judicial organ, to decide whether relevant law applies to the problem based on references in GPX I.

3.3.2.3 Subsequent legislation after the GPX case: an old method with a new appearance

The US enacted new legislation to regulate the issue of "double remedies" following the *GPX* Case, but it reflected same issues in that Case: the ambiguity of countervailing law and abusive application of anti-dumping law. As a response to disputes raised in the *GPX* Case, on March 6, 2012, US Congress enacted GPX legislation regulating the imposition of countervailing duties on NMEs and the issue of "double counting".²⁵⁷ The GPX legislation has two sections, the first section provides the US DOC with a legal basis to apply countervailing duties to non-market economies; the second section encourages eliminating the issue of "double remedies" through adjustments to anti-dumping methodology.

²⁵⁷ See Public Law 112–99, 112th Congress, 126 STAT. 265 (MAR. 13, 2012).

Two points can be extracted from the GPX legislation. First, although the new legislation authorises countervailing measures for non-market economies, it does not address the interpretation of provisions, especially subsidy determination. It is undeniable that the GPX legislation is a step forward in US trade remedy law, because it is an attempt to deal with the issue of “double remedies” through national legislation. In particular, the authorization to apply countervailing duty to non-market economies directly confronts the subsidy-related issue as an origin of the “double remedy” issue. However, it is the ambiguous statute on subsidy determination which provides excessive discretion to authority and results in a potential risk of the “double remedy” issue as discussed by the Court in GPX II.²⁵⁸ Both the *Georgetown* Case and the *GPX* Case prove that transparent countervailing law with appropriate interpretation is required to identify subsidization behaviour and prevent abusive application of anti-dumping law. In this regard, the interpretation of countervailing provisions is not embodied in new legislation.

Second, the new legislation is still trying to regulate “double remedy” issue within the anti-dumping law. The second section of GPX legislation encourages eliminating the issue of “double remedies” through adjustments of anti-dumping methodology. However, dealing with “double counting” through adjustment by anti-dumping methodology has been proved difficult to implement in practices. As discussed in last section, the Court, in GPX II, indicated there did not exist a reasonable method to deal with the problem of “double counting” through adjustments.²⁵⁹ The following judgements also proved adjustments by anti-dumping methodology is difficult to conduct in practise. As the Court stated, in GPX III, ‘it is too difficult for Commerce to determine, using improved methodologies and in the absence of new statutory tools, whether and to what degree double counting is occurring’.²⁶⁰ In practise, as described by Katarzyna Kaszubska, ‘the investigating authority continues to focus the pass-

²⁵⁸ See the court cited in *GPX Int'l Tire Corp. v. United States*, 587 F.Supp.2d 1278, 1290 (Ct. Int'l Trade 2008 2008).

²⁵⁹ See *GPX Int'l Tire Corp. v. United States*, 645 F.Supp.2d 1231, 1241 (Ct. Int'l Trade 2009).

²⁶⁰ See *GPX Int'l Tire Corp. v. United States*, 715 F.Supp.2d 1337, 1345 (Ct. Int'l Trade 2010).

through analysis primarily on NME input subsidies that affect variable costs. The adjustments to the dumping margin are made mainly for the value of raw materials or additional input provided by the state, rather than other types of government assistance'.²⁶¹ Therefore, the new legislation still reflect abusive application of anti-dumping law and may not be an efficient reference for solving the “double remedy” issue.

3.4 Conclusion

The US anti-dumping statute has a long history of development, and so as its non-market economy provisions. Two major approaches were established to deal with the non-market economy related issues during development of the US anti-dumping statute. However, the non-market economy treatment reflects a potential risk that raises the anti-dumping measures, which may not comply with the ADA and the purpose of US anti-dumping rules. In fact, the differences between the ADA and the US anti-dumping statute indicates a controversy over the “non-market economy treatment” in the future and requires further interpretation of the WTO anti-dumping agreements, which is analysed in detail in Chapter 6 of this research.

Comparatively, there is an asymmetric development of US trade remedy laws relates to the “non-market economy treatment”, which leads to a dilemma that the anti-dumping statute are frequently revised to regulate the countervailing disputes. Analysis of the non-market economy disputes at the US national court submits that the “double remedy” issue has evolved from a single subsidy case into a compound dispute involving two trade remedy measures. The findings further indicate that the ambiguity of countervailing law, especially the subsidy determination, is one rationale of the “double remedy” issue, which requires further interpretation, which is discussed in next chapter

²⁶¹ Katarzyna Kaszubska, ‘Double Remedy: Beyond the Non-market economy status’ in James J Nedumpara and Weihuan Zhou (eds), *Non-Market Economies in the Global Trading System: The Special Case of China* (Springer Singapore 2018) <<https://www.springer.com/gp/book/9789811313301>> accessed 9 July 2020.

of this research.

Chapter 4: The “public body” issue: the approaches and China case

This chapter has explored the solution of the “double remedy” issue based on analysing the topic of “public body” in countervailing investigations. It aims to prevent the abuse of trade remedies by seeking appropriate interpretations of the subsidy determination rules to provide predictable and transparent provisions of countervailing law. This chapter has conducted doctrinal analysis of the CPTPP regulations as well as the WTO countervailing provisions while taking the WTO case law as guidelines.²⁶² This chapter concluded by proposing criteria identifying the “public body”, which provides a reference for subsidy determination.

In addition, this chapter has applied the “public body” criteria to assess China’s SOEs. The findings highlighted that SOEs in China, especially Chinese central SOEs (Yang Qi), are potentially “public bodies” when serving specific responsibility, for example, stabilizing supply and ensuring security of relevant industries through strictly following national macro-control measures. However, it may be impossible to identify the Yang Qi as a unified “public body” due to its diversified functions and responsibilities, further feedback and more evidence through questionnaires could help to refine the evaluation during the “public body” investigation.

4.1 A call for resolution to the “public body” issue

As discussed in Chapter 2 and Chapter 3 of this research, the ambiguity of WTO countervailing regulation is one major origin of the “double remedy” issue. Chapter 3 has further indicated that the lack of clear standards of subsidy determination requires interpretation of the WTO countervailing rules. Therefore, in order to prevent the abuse of trade remedies from countervailing perspective, it is requisite to clarify the criteria

²⁶² For landmark case laws see Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011. Appellate Body Report, *United States - Countervailing Duty Measures on Certain Products from China*, WT/DS437/AB/RW, adopted 16 July 2019.

of subsidy determination through interpretation of WTO countervailing rules. And that requisition is the third subsidiary question of this research as has been listed in Section 1.3 and the subject of this chapter.

The determination of subsidy is concretized by the “public body” issue in the *United States-Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* Case.²⁶³ In general, the implementation of countervailing measure is based on subsidized behaviour, and the subject of subsidization is the government. However, Article 1.1 of the ASCM (Agreement on Subsidy and Countervailing Measure) stipulates another possible subject which is the “public body”. The relevant text reads as follows:

For the purpose of this Agreement, a subsidy shall be deemed to exist if:
 (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as “government”) ...

According to the ASCM, a “public body” is jointly referred to as government that qualifies to make a subsidy. Therefore, if an entity is considered as a “public body”, then its commercial behaviour is potentially regarded as subsidization, thus suffering from countervailing measures, which is a rationale of the potential “double remedy” issue. However, the necessary details and instructions are absent for identifying “public body” based on the ASCM, which leaves loopholes in the determination of subsidy.

In the *United States-Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* Case, one major debate is whether China’s SOEs and SOCBs belongs to “public bodies” and whether their behaviours comply with countervailing law.²⁶⁴ In other words, does an entity with link to state qualifies to provide a subsidy under WTO rules? China filed a complaint at the WTO rebutting US’s affirmative

²⁶³ See Panel Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/R, adopted 22 October 2010. Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011.

²⁶⁴ See *ibid.*

determination of China's state-owned banks and SOEs being "public bodies", which were qualified to conduct subsidization under the ASCM. The Panel sided with the US, but the Appellate Body held the opposite view (in respect of SOE), it declared that 'the precise contours and characteristics of a "public body" are bound to differ from entity to entity, State to State, and case to case'.²⁶⁵

The WTO tribunals' decision clarifies only limited Chinese firms may belong to "public bodies". And even for those identified "public bodies", such as the SOCBs, there still has the controversy. According to the tribunal, the BOC is a "public body" based on several factors such as state ownership; relevant Chinese commercial banking law; and risk management and analytical skill of SOCBs. For example, Article 34 of China's Commercial Banking Law stipulates that banks must 'carry out their loan business upon the needs of the national economy and the social development and under the guidance of State industrial policies'.²⁶⁶ According to the tribunal, the BOC is a "public body" because its governmental factor is formally acknowledged by Chinese law. Nonetheless, commentators remain sceptical of the tribunal's arguments noting that 'a lack of business flair, as illustrated by inadequate risk management and analytical skills and poor loan-making practices, has little to do with whether SOCBs are exercising government authority' and that 'Article 34 of the Commercial Banking Law is a very general statement and its implications to the SOCBs' loan business are not clear'.²⁶⁷

Compared with the SOCBs, many Chinese firms, especially SOEs, may not have formal links with the state like the BOC. Potential controversy may arise, for example, would SASAC's ability to remove the firm's top management suffice to render the firm a "public body"? For now, the Appellate Body is relying on the standard of "government

²⁶⁵ See Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011, at para. 317.

²⁶⁶ See Panel Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/R, adopted 22 October 2010.

²⁶⁷ See Ming Du, 'China's State Capitalism and World Trade Law' (2014) 63 *International & Comparative Law Quarterly* 409, 439; Jochem De Kok, 'The Future of EU Trade Defence Investigations against Imports from China' (2016) 19 *Journal of International Economic Law* 515.

authority” to evaluate a “public body” but does not clarify what is necessary to demonstrate such authority.²⁶⁸ Nevertheless, the WTO cannot avoid these questions. Since the *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* Case, the “public body” issue has raised three disputes.²⁶⁹ Even without China as party at issue, there still a high percentage that occurs. For example, in the *United States – Countervailing Measures on Certain Hot-rolled Carbon Steel Flat Products from India* Case, the tribunal rejected the US’ argument that one can identify whether a firm is a “public body” on account of whether the government can employ the resources of an entity that it controls as its own.²⁷⁰

Therefore, WTO provisions on identifying the “public body” is still blurry, and more precise methodologies thus have to be developed through further interpretation of WTO agreements.²⁷¹ This is significantly urgent because the “public body” issue not only results in disputes relating to countervailing measures for the SOEs, but may also jointly lead to the issue of “double remedies” in the *United States-Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* Case.²⁷²

4.2 Potential approaches to define the “public body” raised in WTO cases

There are three main cases that discussing the “public body” within the WTO dispute settlement system. First is the *Korea - Measures Affecting Trade in Commercial Vessels* Case where “control of government” is recognised as one crucial factor of a “public

²⁶⁸ See Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011.

²⁶⁹ Appellate Body Report, *United States – Countervailing Measures on Certain Hot-rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R, adopted 8 December 2014. Panel Report *United States - Countervailing Duty Measures on Certain Products from China*, WT/DS437/ R, adopted 14 July 2014. Appellate Body Report, *United States - Countervailing Duty Measures on Certain Products from China*, WT/DS437/AB/RW, adopted 16 July 2019.

²⁷⁰ Appellate Body Report, *United States – Countervailing Measures on Certain Hot-rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R, adopted 8 December 2014, at paras 4.27 – 4.29.

²⁷¹ See *ibid.*

²⁷² See Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011.

body”.²⁷³ In addition, commercial principle and public policy objective may not qualify as factors to determine the “public body”. Then, in the *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* Case, the “public body” is defined as an entity that possesses, exercises or is vested with governmental authority.²⁷⁴ “Control of government” as proposed in the *Korea - Measures Affecting Trade in Commercial Vessels* Case may be of relevance but relies on certain circumstances. Despite the “governmental authority” provides a clue for identifying a “public body”, the Appellate Body did not clarify what is necessary to demonstrate such authority, thus more criteria shall be provided to prevent excessive discretion by appropriate interpretations. The determination of a “public body” is further improved in the *United States - Countervailing Duty Measures on Certain Products from China* Case, where it focuses on ‘whether the entity itself possesses the core characteristics and functions’ that constitute a “public body”, and follows a principle to ‘avoid focusing exclusively or unduly on any single characteristic without affording due consideration to others that may be relevant’.²⁷⁵ In this regard, state intervention, as well as ‘the scope and content of government policies relating to the sector in which the investigated entity operates’, could also be regarded as evidence to determine “public body”.

4.2.1 The Korea – Measures Affecting Trade in Commercial Vessels Case

One crucial factor of a “public body”, as analysed by the Panel in *Korea – Measures Affecting Trade in Commercial Vessels* Case, is the control of government.²⁷⁶ To prove government control in that Case, as mentioned by the Panel, evidence might include: state ownership (primary evidence); the role of President of the corporation at issue as

²⁷³ See P Panel Report, *Korea - Measures Affecting Trade in Commercial Vessels*, WT/DS273/R, adopted 7 March 2005.

²⁷⁴ See Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011.

²⁷⁵ See Appellate Body Report, *United States - Countervailing Duty Measures on Certain Products from China*, WT/DS437/AB/RW, adopted 16 July 2019.

²⁷⁶ See Panel Report, *Korea - Measures Affecting Trade in Commercial Vessels*, WT/DS273/R, adopted 7 March 2005.

a government appointee, and a description of the corporation at issue as an “agent”.²⁷⁷

The criteria for “public body” identification as summarised by the Panel may be of limited reference. One fundamental reason is that such criteria are mainly based on a specific case. As KEIM, the entity under investigation, is a SOCB in Korea, the criteria are based on an analysis of this financial entity, so they may not be able to represent SOEs at the international level. Regarding the “agent” standard, in this case, Korea described KEIM as an “agent”, while in another case, such a phrase may be changed, for example, “authority”. So, should the description of “authority” be regarded as one criterion? In addition, the criteria are blurry to some extent. For example, in this case, KEXIM is 100 per cent owned by GOK or other bodies in Korea, while in another case the ownership might be 80 per cent. Therefore, as primary evidence of governmental control, how should the percentage of ownership as a threshold of government control be evaluated?

Notably, two factors may not qualify as factors to determine a “public body” in two arguments of Korea. First, according to Korea, ‘an entity will not constitute a ‘public body’ if it engages in market activities on commercial terms’,²⁷⁸ which is based on a “benefit test”.²⁷⁹ The Panel disagreed with Korea, because such an approach would lead to the conclusion that an entity can be both a public and a private body based on ‘how that entity was conducting itself in the market’.²⁸⁰ The Panel asserted that ‘the question whether an entity is “public body” should not depend on an examination of whether that entity acts pursuant to commercial principles’ because of the ‘uncertainty surrounding such issues’.²⁸¹ It explained this “uncertainty” with examples: ‘how one would determine whether or not an entity was engaging in a “general practice of lending on a commercial basis”’. Would this only be the case if 100 per cent of total lending was

²⁷⁷ See *ibid.*, at paras 7.50-7.54.

²⁷⁸ See *ibid.* at para. 7.44.

²⁷⁹ A “benefit test” assesses a “‘financial contribution’ only confers a ‘benefit’ if it was made available on terms more favourable than the recipient could have obtained on the market”. See *ibid.*

²⁸⁰ See *ibid.* at para. 7.45.

²⁸¹ See *ibid.* at paras 7.44-7.46.

on a commercial basis, or would 80 per cent suffice? And how would one determine that the lending is on a “commercial basis” without looking at the sort of factors envisaged in a ‘benefit’ analysis?’.²⁸² It concluded that ‘Korea's approach would blur the clear distinction between public and private bodies, and introduce complex considerations of benefit into the initial filtering process’.²⁸³

Second, the Panel disagreed with Korea’s claim that “public body” is associated with an entity that acts in an “official capacity”. The reason lies in the identification of such “official capacity” and the entity’s obligation to pursue a public policy objective, for example ‘a police officer patrolling a football match as part of his/her police work does not cease to act in an official capacity simply because the home football club is required to pay a market rate for that service’.²⁸⁴

4.2.2 The *United States-Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* Case

The factors of a “public body” are further discussed by the *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* Case.²⁸⁵ According to the Appellate Body, a “public body” is generally an entity that possesses, exercises or is vested with governmental authority.²⁸⁶ “Control of government” as proposed in the *Korea - Measures Affecting Trade in Commercial Vessels* Case may of relevance but rely on certain circumstances. Despite “governmental authority” provides a clue for identifying a “public body”, the Appellate Body did not clarify what is necessary to demonstrate such authority, thus more criteria shall be provided to prevent excessive discretion through appropriate interpretations.

²⁸² See *ibid.*

²⁸³ See *ibid* at para 7.49.

²⁸⁴ See *ibid* at para 7.48.

²⁸⁵ See Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011.

²⁸⁶ See *ibid.*

The table below illustrates three approaches that describe a “public body” argued by each party.²⁸⁷

Approach	Basic idea	Illustration of standards/scenarios
Government Ownership Approach (proposed by the US)	Government controls entity through ownership.	Majority ownership rule.
Governmental Function Approach (proposed by China)	Entity performs governmental functions.	Entity exercises authority vested in it by the government for the purpose of performing functions of a governmental character.
Governmental Authority Approach (proposed by AB)	Entity that possesses, exercises or is vested with governmental authority	<ol style="list-style-type: none"> 1. A state or other legal instrument expressly vests authority in the entity concerned; 2. Entity is exercising governmental functions may serve as evidence, particularly where such evidence points to a sustained and systematic practice; 3. A government exercises meaningful control over an entity in certain circumstances. (Formal indicia of government control are manifold, and there is evidence that such control has been exercised in a meaningful way.)

4.2.2.1 The government ownership approach

The government ownership approach is proposed by the US and maintains that a “public body” is an entity that government controls through an ownership interest or majority -state-share of that entity.²⁸⁸ The Panel endorsed this approach by concluding

²⁸⁷ The three approaches are also analysed by Ru Ding. See Ru Ding, “‘Public Body’ or Not: Chinese State-Owned Enterprise’ (2014) 48 Journal of World Trade 167, 173.

²⁸⁸ See Panel Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/R, adopted 22 October 2010, at para. 8.40.

that a “public body” is an entity controlled by a government, thus government ownership is highly relevant evidence of government control.²⁸⁹

One problem with this approach is that the government’s ownership is not persuasive to distinguish a “public body” from a “private body”. Based on the dictionary definition, “private”, under Article 1.1 of the ASCM, refer to an individual rather than a state or public body, thus an SOE with a majority state share belongs to a public body.²⁹⁰ However, the Appellate Body stated ‘actions of state-owned corporate entities are prima facie private, and thus presumptively not attributable to a Member under Article 1.1 of the SCM Agreement’.²⁹¹ As a result, a “public body” can be both public and private, thus government ownership to identify a “public body” is questionable.

Another problem with this approach relates to the purpose of the ASCM. It is recognized by at least one expert that the goal of the ASCM is to ‘balance the disciplines over both subsidies and countervailing measures’.²⁹² And the government ownership approach may lead to more countervailing measures due to its vague regulation of ownership, which is contrary to the goal of the ASCM. Specifically, whether a level or proportion of state ownership meets the standard of a “public body” depends on the determination of the investigating authority, and relevant criteria are blurry. Thus, it potentially allows all SOEs with majority -government-ownership to be classified “public bodies”, resulting in protectionism through imposing countervailing measures on the products of all competing foreign SOEs.²⁹³ The Appellate Body in its report clearly stated that ‘the mere fact that a government is the majority shareholder of an entity does not demonstrate that the government exercises meaningful control over the conduct of that entity’.²⁹⁴ Accordingly, the Appellate Body noticed that government

²⁸⁹ See *ibid.* at para. 8.134.

²⁹⁰ Ding (n 74) 174.

²⁹¹ See *ibid.*

²⁹² See *ibid.*

²⁹³ See *ibid.*

²⁹⁴ See Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011, at para. 318.

ownership is not persuasive to define a “public body”, and this method may lead to an abusive application of countervailing measures for SOEs. Therefore, the government ownership approach may not qualify as a standard to identify a “public body”.

4.2.2.2 The governmental function approach

The governmental function approach is proposed by China and maintains that a “public body” is an ‘entity which exercises powers vested in it by a government for the purpose of performing functions of a governmental character’.²⁹⁵ Compared with the government ownership approach, an SOE with a majority -state -share is a “public body” under the government ownership approach, but may not be under the governmental function approach if it does not perform a governmental function.²⁹⁶ The higher threshold limits the abusive use of countervailing measures against SOE-related transaction.²⁹⁷

One issue of this approach is to define government function, and it is difficult to distinguish a behaviour exercising a governmental function from the private behaviour of a company. Article 1.1 of the ASCM provides four examples of financial contributions by a government or “public body”, which can be determined as subsidy. One may argue that, under the governmental function approach, the four examples can also be regarded as behaviours with a governmental function.²⁹⁸ However, those examples are applied to determine a subsidy rather than a “public body”. If they serve to identify a “public body”, then the third example ‘provides goods or services other than general infrastructure, or purchases goods’ potentially ‘classifies all company transactions as functions with a governmental character’.²⁹⁹ As commented by one expert, ‘it is almost impossible and impractical to distinguish governmental from

²⁹⁵ See Panel Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/R, adopted 22 October 2010, at para. 8.50.

²⁹⁶ Ding (n 74) 174.

²⁹⁷ See *ibid.*

²⁹⁸ See *ibid.*

²⁹⁹ See *ibid.*

private only through the functions or the activities of a certain entity’.³⁰⁰

4.2.2.3 The governmental authority approach

The governmental authority approach considers a “public body” is an entity that possesses, exercises or is vested with governmental authority.³⁰¹ The governmental function approach and governmental authority approach are very similar, they both consider the close relationship between the entity and government behaviour. However, the delegation of governmental authority cannot be simply regarded as conduct equating to a governmental function. To explain governmental authority, the Appellate Body gave the example of where ‘a statute or other legal instrument expressly vests authority in the entity’.³⁰² Thus, one possible delegation of governmental authority can be illustrated that an entity is granted governmental authority by law. Moreover, the Appellate Body expressly provided two scenarios to illustrate the delegation of governmental authority, one is an entity exercising governmental functions, where such evidence points to a sustained and systematic practice. This scenario also indicates the difference between governmental function and the delegation of governmental authority. An entity behaviour may have a government function on one occasion, but this may not equate to delegation of governmental authority. Only when such behaviour indicates a long-term process and systematic practice, can it be proven to be governmental authority. Another scenario is related to meaningful control by the government. When there is evidence that “formal indicia of government control are manifold”, and that such control has been exercised in a meaningful way, then the entity may exercise governmental authority.³⁰³

Despite governmental authority provides a clue for identifying a “public body”, the

³⁰⁰ See *ibid.*

³⁰¹ See Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011, at para 317.

³⁰² See *ibid.*, at para 318.

³⁰³ See *ibid.*

Appellate Body did not clarify what is necessary to demonstrate such authority. As the standard to determine the delegation of governmental authority is not specific, “public body” identification may vary from case to case, ‘just as no two governments are exactly alike, the precise contours and characteristics of a public body are bound to differ from entity to entity, State to State, and case to case’.³⁰⁴ And ‘the same entity may possess certain features suggesting it is a public body, and others that suggest that it is a private body’.³⁰⁵ Therefore, features of the entity are not able to constitute evidence to identify a “public body”, further information is also necessary relating to the status or behaviour of the entity.

However, the ambiguous conclusion of WTO tribunal in determining “public body” may lead to excessive discretion as analysed in Chapter 3, which further result in an abusive implementation of countervailing measures. For example, as mentioned by Ding, one issue of this approach is that it leaves some SOEs as non-public and non-private bodies.³⁰⁶ The Appellate Body in its report referred to the Oxford English Dictionary’s definition of “private” as a business owned by an individual rather than the state or a public body.³⁰⁷ Thus, SOE’s do not fall within such a definition of “private” because the state is always their shareholder. Meanwhile, SOEs may not be public bodies if there is no evidence showing they exercise or are vested with governmental authority. Therefore, “vacuum” is established and SOEs in such a “vacuum” belongs to neither public nor private bodies. Therefore, even though identification of “public body” is conducted on a case-by-case basis, more criteria shall be provided to prevent excessive discretion through appropriate interpretations.

4.2.3 A complement of the “public body” determination by *the United States – Countervailing Duty Measures on Certain Products from China Case*

³⁰⁴ See *ibid*, at para. 317.

³⁰⁵ See *ibid*, at para. 318.

³⁰⁶ Ding (n 74) 174.

³⁰⁷ See Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011, at para. 292.

WTO tribunals, in the *United States - Countervailing Duty Measures on Certain Products from China* Case, as a supplement of the *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* Case,³⁰⁸ recalled and further addressed the determination of “public body” under Article 1.1(a)(1) of the ASCM.³⁰⁹ Accordingly, the determination of the “public body” shall focus on ‘whether the entity itself possesses the core characteristics and functions’ that constitute a “public body”, and follow a principle to ‘avoid focusing exclusively or unduly on any single characteristic without affording due consideration to others that may be relevant’. In this regard, state intervention, as well as ‘the scope and content of government policies relating to the sector in which the investigated entity operates’, can also be regarded as evidence of “public body” determination.

WTO tribunal, in the *United States - Countervailing Duty Measures on Certain Products from Chin* Case, did not provide specific factor of a “public body”, its analysis is rather based on the “governmental authority”, in particular, with its two scenarios. Recalling the two scenarios discussed in the last Section: (1) An entity exercising governmental functions may serve as evidence, particularly where such evidence points to a sustained and systematic practice; (2) A government exercise meaningful control over an entity in certain circumstances. (Formal indicia of government control are manifold, and there is evidence that such control has been exercised in a meaningful way.) The first argument clarified by the Panel is that the legal standard for “public body” determinations does not ‘require a particular degree or nature of connection in all cases between an identified government function and the particular financial contribution at issue’.³¹⁰ It then reinforced the importance of a “case-by-case approach” in the investigation, based on the view that the situation of Members varies. Therefore, there may not be a unified legal standard to evaluate the nature of a behaviour

³⁰⁸ See *ibid.*

³⁰⁹ See Appellate Body Report, *United States - Countervailing Duty Measures on Certain Products from China*, WT/DS437/AB/RW, adopted 16 July 2019.

³¹⁰ See *ibid.*, at para. 5.56.

performing as a governmental function.

The Appellate Body, agreeing with the Panel, pointed out that the “public body” identification shall base on ‘whether the entity itself possesses the core characteristics and functions’ that constitute a “public body”, and the conduct of the entity only serves as subsidiary evidence to answer that question.³¹¹ According to the Appellate Body, the authority may not need to focus on every instance of conduct in which the entity engages. Assessment of the entity’s conduct might be only one piece of evidence that the authority needs to seek, other evidence, such as the ‘entity’s relationship with the government’, and ‘the legal and economic environment prevailing in the country in which the investigated entity operates’ are also of relevance.³¹²

Another issue analysed by the Panel concerns China’s claim that ‘an entity must necessarily be found to have been “meaningful controlled” by the government in the specific conduct at issue’ under Article 1.1 (a)(1) of the ASCM. A “case-by-case” approach is also applicable here, pursuant to the analysis of the Panel, as the existence of “meaningful control” is “inherently specific to particular circumstances”.³¹³ And in this particular case related to China, quoting Appellate Body Report, *US – Carbon Steel (India)*, the assessment of “meaningful control” shall be based on ‘the core characteristics and functions of the relevant entity, its relationship with the government, and the legal and economic environment prevailing in the country in which the investigated entity operates’.³¹⁴ Besides, state intervention, which is a key factor to evaluate an entity’s behaviour in the Public Bodies Memorandum,³¹⁵ was also

³¹¹ See *ibid*, at para. 5.101.

³¹² See *ibid*, at para. 5.96.

³¹³ See *ibid*, at para. 5.66.

³¹⁴ See *ibid*, at para. 5.66.

³¹⁵ USDOC Memorandum dated 18 May 2012 for Section 129 Determination of the Countervailing Duty Investigation of Circular Welded Carbon Quality Steel Pipe; Light-Walled Rectangular Pipe and Tube; Laminated Woven Sacks; and Off-the-Road Tires from the People's Republic of China: An Analysis of Public Bodies in the People's Republic of China in Accordance with the WTO Appellate Body's Findings in WTO DS379; and USDOC Memorandum dated 18 May 2012 on the relevance of the Chinese Communist Party for the limited purpose of determining whether particular enterprises should be considered to be "public bodies" within the context of a countervailing duty investigation. See *ibid* at p. 4.

addressed by the Panel as potential evidence ‘relevant to establishing that an entity possesses, exercises, or is vested with governmental authority’.³¹⁶

The Appellate Body shared the same opinion as the Panel but analysed more in depth. According to the Appellate Body, an investigation of specific conduct is only required to assess the second clause of Article 1.1(a)(1)(iv) of the ASCM, where a private body is carrying out a function that has been “entrusted” to it or “directed” by the government when engaging in one of the conducts under subparagraphs (i)-(iii).³¹⁷ The second clause of Article 1.1(a)(1)(iv) of ASCM is applied here to evaluate whether a conduct belongs to entrustment or direction by a government. And the clause itself is not used to identify a “public body”.³¹⁸ In other words, a conduct under subparagraphs (i)-(iii) by a “public body” may constitute a subsidy. A conduct under subparagraphs (i)-(iii) by a private body may not constitute a subsidy unless it is entrusted or directed by a government. And the investigation of a specific conduct is to prove such entrustment or direction. Therefore, the investigation of an entity’s conduct is of limited value in evaluating “public body”.

The Appellate Body further highlighted one principle when determining a “public body”: ‘avoid focusing exclusively or unduly on any single characteristic without affording due consideration to others that may be relevant’.³¹⁹ For example, reasoned

³¹⁶ The Panel observed that “the Public Bodies Memorandum focuses on the GOC’s interventions in firm behaviour and market outcomes, with particular emphasis on governmental influence over SIEs through commercial incentives and benefits, industrial policies, and supervisory control.” See *ibid* at para 5.67.

³¹⁷ Relevant provisions of ASCM:

1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:

(a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as “government”), i.e. where:

(i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);
(ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);

(iii) a government provides goods or services other than general infrastructure, or purchases goods;

(iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments;

³¹⁸ See Appellate Body Report, *United States - Countervailing Duty Measures on Certain Products from China*, WT/DS437/AB/RW, adopted 16 July 2019, at para 5.103.

³¹⁹ See *ibid*, at para. 5.97.

the Appellate Body, the state's "meaningful control" and "government ownership" may be relevant evidence of "public body" determination, but if solely based on a single characteristic without due consideration, this may potentially 'conflate the evidentiary elements for public body determination and the definition of a public body'.³²⁰

In addition, when addressing the diverse circumstances identifying a "public body", the Appellate Body mentioned one piece of evidence, quoting Appellate Body Report, in the *US – Carbon Steel (India)* Case, which is distinguished with the circumstances provided in the *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* Case.³²¹ 'The scope and content of government policies relating to the sector in which the investigated entity operates' could also be regarded as evidence of "public body" determination. And this could complement the "governmental authority" approach.

4.3 Interpretations of the "public body" based on the Comprehensive and Progressive Agreement for Trans-Pacific Partnership

The CPTPP, as a recent free trade agreement, is closely linked to the WTO system, especially from the dispute settlement dimension under the ADA and the ASCM. Its regulations are of referential value in evaluating compliance with the WTO law at the international level. Article 17.3 of the CPTPP stipulates a new term, "delegated authority", which is not mentioned in the GATT 1994 and the ASCM but relates to the "public body". The analysis proposes that the criterion of "delegated authority" as stipulated in Article 17.3 serves the same purpose as explanations by WTO tribunals in terms of the "public body", thus, providing references for the interpretation of "public body".

4.3.1 Introduction of the CPTPP

³²⁰ See *ibid.*

³²¹ See *ibid.*, at para. 5.96.

The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) aiming to be a free trade agreement, now involves 11 countries in the Asia-Pacific region, including New Zealand, Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, Peru, Singapore, and Vietnam. Its predecessor is the Trans-Pacific Partnership Agreement (TPP), a free trade agreement to liberalize trade and investment between 12 Pacific-rim countries. The CPTPP includes many of the elements that were negotiated as part of the TPP, but with some significant differences. The economies included in the CPTPP account for 13.3 per cent of the world's GDP-worth a total of US\$ 10.6 trillion, which would have significant influence in the Pacific region.³²²

The CPTPP is linked with WTO rules. Article 6.8 of the agreement stipulates that trade disputes between parties in the CPTPP are under the guidance of WTO rules, such as the ADA (Anti-dumping Agreement) and the ASCM (Agreement on Subsidy and Countervailing Measure). Furthermore, Chapter 17 of the CPTPP provides regulations specifically on entities link with state, such as the SOE. In this regard, it provides references consider factors of the “public body” and attribution of the SOEs.

Specifically, two assessments will be explored through provisions in the CPTPP. First, it can assess the SOE provisions in the CPTPP supported by the “public body” criteria in WTO cases. According to WTO tribunals, identifying a “public body” shall focus on ‘whether the entity itself possesses the core characteristics and functions’ that constitute a “public body”. Accordingly, if the SOE defined in the CPTPP corresponds to the criteria for the “public bodies” by definition, then all SOEs are potentially “public body”, and there may no need to further investigate the entity’s specific conduct in subsidy investigation. However, it could also be contrary to the WTO tribunals’ viewpoint that a “case-by-case” approach to investigation is recommended, based on the view that the situation of Members varies, thus there may not be a unified legal

³²² According to New Zealand Ministry of Foreign Affairs and Trade, <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/cptpp/cptpp-overview/> accessed on 7, January 2020.

standard to evaluate the nature of a behaviour as public body.³²³ It may also cause a situation that each behaviour of SOE is potentially countervailable, thus increasing the volume of subsidy-related disputes. Second, potential factors of “public body” might be discovered to improve “governmental authority” approach. Chapter 17 of the CPTPP provides several terminologies that is differentiated with SOE but linked with state. These terminologies such as “designated monopoly” and “delegated authority” could provide references for interpretation of “public body”.

4.3.2 The definition of “State-owned Enterprises” not directly classified as “public bodies”

Article 17.1 of the CPTPP stipulates definitions of terminology as applied in Chapter 17. Accordingly, an SOE under the CPTPP refers to:

[A]n enterprise that is principally engaged in commercial activities in which a Party:

- (a) Directly owns more than 50 percent of the share capital;
- (b) Controls, through ownership interests, the exercise of more than 50 percent of the voting rights; or
- (c) Holds the power to appoint a majority of members of the board of directors or any other equivalent management body.

The definition first addresses an SOE being an enterprise engaged in commercial activities that a Party is involved in. It then explains whether an enterprise can be identified as an SOE based on the extent that a Party is involved. Subparagraph (a) stipulates an SOE is an enterprise where a Party owns more than 50 per cent of the share capital. And subparagraph (b) stipulates that an SOE is an enterprise where a Party controls more than 50 per cent of the voting rights. Thus, both (a) and (b) address the fact that in an SOE, a Party participates in the business of an entity through majority share capital or voting rights.

³²³ See Appellate Body Report, *United States - Countervailing Duty Measures on Certain Products from China*, WT/DS437/AB/RW, adopted 16 July 2019.

Ownership is the most direct way to identify an SOE by the CPTPP. This leaves a problem as whether the “ownership” qualifies to demonstrate state control over a SOE. In the *Korea - Measures Affecting Trade in Commercial Vessels* Case, the primary evidence to demonstrate the control of government is state ownership.³²⁴ For example, KEIM, a SOCB of Korea, is 100 per cent owned by the GOK or other bodies in Korea, which is considered under the control of the GOK. One presumption about the purpose of state ownership is to obtain the management or control of the entity on behalf of the state. However, the SOEs, where the state has major ownership, can still reflect features of a private firm through “private control”, for example, by employing market-oriented managers to operate business in a private way.³²⁵ Therefore, the SOEs are not necessarily “state-owned and state-controlled”, but could also be “state-owned and private-controlled”. In this regard, a SOE is following market forces and state is one shareholder of it. As analysed by the Appellate Body, in the *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* Case, ‘mere fact that a government is the majority shareholder of an entity does not demonstrate that the government exercise meaningful control over the conduct of that entity’.³²⁶ Therefore, ownership standards as listed in subparagraphs (a) and (b) may not result in an attribution between the SOEs and the “public bodies”.

Subparagraph (c) stipulates an SOE is an enterprise where a Party holds the power to appoint a management body. Appointment of a management body is one evidence of state control in the *Korea - Measures Affecting Trade in Commercial Vessels* Case.³²⁷ In

³²⁴ See Panel Report, *Korea - Measures Affecting Trade in Commercial Vessels*, WT/DS273/R, adopted 7 March 2005.

³²⁵ The blurry boundaries, especially in the case of ownership boundaries, between private firm and SOE has been compared and analyzed by Mike W Peng and others. One of their views is that the ownership boundaries are not fixed, for example, “SOEs can be privatized and private firms can be nationalized to become SOEs”. For SOEs where state has major ownership can still reflect private firm characteristic through “private control”, such as employing market-oriented managers to operate business in a private way. Therefore, SOEs are not necessarily “state-owned and state-controlled”, but could also be “state-owned and private-controlled”. See Mike W Peng and others, ‘Theories of the (State-Owned) Firm’ (2016) 33 *Asia Pacific Journal of Management* 293.

³²⁶ See Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011, at para 541.

³²⁷ See Panel Report, *Korea - Measures Affecting Trade in Commercial Vessels*, WT/DS273/R, adopted 7 March 2005.

this Case, the government of Korea had the right to appoint the president of KEIM, which was regarded as evidence that KEIM is under state control and thus a “public body”.³²⁸ However, in the *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* Case, the Appellate Body highlighted ‘the control of an entity by a government, in itself, is not sufficient to establish that an entity is a public body’.³²⁹ The WTO tribunal further complemented that state having “meaningful” control with evidential elements might demonstrate a “public body”, it provides that:

[E]vidence that a government exercises meaningful control over an entity and its conduct may serve, in certain circumstances, as evidence that the relevant entity possesses governmental authority and exercises such authority in the performance of governmental functions.³³⁰

The tribunal, in the *United States - Countervailing Duty Measures on Certain Products from China* Case, added that the investigation of “meaningful control” of specific conduct is unnecessary compared with investigation of the entity itself.³³¹

Notably, the WTO tribunal did not explain how to demonstrate state control to be “meaningful”. Thus, it is not clear whether appointing “a majority of members of the board of directors” is equivalent to state “meaningful” control. In other words, although the appointment of directors provides the government with the power to control the entity, it still does not qualify as solid evidence of governmental authority. It therefore cannot confirm that the definition of SOE, especially subparagraph (c), will lead to an SOE directly belonging to a “public body”.

4.3.3 The “Designated Monopoly” does not qualify as a factor of “public body”

³²⁸ See *ibid.*

³²⁹ See Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011.

³³⁰ See *ibid.*

³³¹ See Appellate Body Report, *United States - Countervailing Duty Measures on Certain Products from China*, WT/DS437/AB/RW, adopted 16 July 2019.

According to Article 17.1 of the CPTPP, designated monopoly refers to ‘a privately-owned monopoly that is designated after the date of entry into force of this Agreement and any government monopoly³³² that a Party designates or has designated’. Theoretically, it can be further divided into three types based on the definitions of “designate” and “monopoly”³³³: privately-owned monopoly, state-owned monopoly, and government/government agency monopoly.

Privately-owned monopoly refers to a privately-owned entity that is designated or authorized as the sole provider or purchaser of a good or service to expand the scope of that good or service to cover additional ones. Compared with the scenarios of “governmental authority” approach, this monopoly may not correspond to the second one. The second scenario explains the exercising of governmental authority as exercising governmental functions and such behaviour points to a sustained and systematic practice.³³⁴ However, designation as the sole provider or purchaser of a good or service does not necessarily imply that entity is exercising governmental functions. Although such a link may be proven, further evidence pointing to “sustained and systematic” practice is still necessary. The monopoly also does not accord with the third scenario. According to the third scenario, “governmental authority” can be embodied through government’s meaningful control over an entity.³³⁵ However, it is unclear whether the designation by government belongs to meaningful control. Pursuant to the CPTPP, “designate” means ‘to establish, designate or authorize a monopoly, or to expand the scope of monopoly to cover an additional good or service’.³³⁶ Such an expression seems to correspond to a subsidy behaviour in Article 1.1(a)(1)(iv) of the

³³² According to Article 17.1, government monopoly means a monopoly that is owned, or controlled through ownership interests, by a Party or by another government monopoly.

³³³ According to Article 17.1, designate means “to establish, designate or authorize a monopoly, or to expand the scope of monopoly to cover an additional good or service.” Monopoly means “an entity including a consortium or government agency that in any relevant market of a Party is designated as the sole provider or purchaser of a good or service”.

³³⁴ See Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011.

³³⁵ See *ibid.*

³³⁶ See Chapter 17 of CPTPP, footnote 312.

ASCM. According to Article 1.1(a)(1)(iv), a subsidy behaviour may exist when ‘a government... entrusts or directs a private body to provide goods or services ...’.³³⁷

Therefore, such a monopoly is more likely to describe a subsidization behaviour as stipulated in Article 1.1 of the ASCM rather than the factor of a “public body”.

It is debatable whether a privately-owned monopoly corresponds to the first scenario of the “governmental authority” approach. The first standard explains the evidence for governmental authority thus: ‘a state or other legal instrument expressly vests authority in the entity concerned’. It includes two parts, one is the entity is vested in the authority, the other is that authorization is stipulated by legal instrument. The CPTPP has legal validity among its signatories. However, it is debatable whether the designation of sole provider or purchaser of a good or service legally belongs to a governmental authorization. As analysed before, such an expression is more like a description of subsidy conduct. It may show that the entity has a link with the government. However, the WTO tribunal addressed this point in its report, stating ‘the existence of mere formal links between an entity and government in the narrow sense is unlikely to suffice to establish the necessary possession of governmental authority’.³³⁸ Thus, the link between a privately-owned entity and the government may not be sufficient to establish the necessary threshold of governmental authority. Therefore, it cannot confirm that a privately-owned monopoly is a factor of “public body”.

State-owned monopoly refers to an entity that is owned or controlled by the government through ownership interests and designated or authorized as the sole provider or purchaser of a good or service or can expand the scope of that good or service to cover additional ones. Similar to a privately-owned monopoly, this designation behaviour does not qualify as an indication of the exercise of governmental function or authorization in the governmental authority. Yet it may be confused with the third

³³⁷ See Article 1.1(a)(1)(iii) of ASCM.

³³⁸ See Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011, at para 318.

standard that ‘a government exercises meaningful control over an entity in certain circumstances’, because the entity is “controlled” by the government through ownership interest. However, control through an “ownership interest” is not a decisive element as a type of meaningful control. According to the WTO tribunal, ‘control of an entity by a government, in itself, is not sufficient to establish that an entity is a public body’.³³⁹ Besides, government ownership is ‘not evidence of meaningful control of an entity by government and cannot, without more, serve as a basis for establishing that the entity is vested with the authority to perform a governmental function’.³⁴⁰ Rather, control through ownership is one feature of an SOE as defined in Article 17.1 of the CPTPP, in this case, the state-owned monopoly is functionally equivalent to an SOE and may be one type of SOE based on its definition, which is also one reason why this monopoly cannot be regarded as a reference to “public body”.

Government agency monopoly refers to a government agency that is designated or authorized as the sole provider or purchaser of a good or service, or can expand the scope of that good or service to cover additional ones. Since the subject of this monopoly is government agency, it shall perform a governmental function and possess governmental authority. Though there is no definition for government agency under this term, as an extension of government, a government agency monopoly is to a large extent naturally a “public body”.

4.3.4 The “Delegated Authority” as a reference to interpret the “public body”

Apart from designated monopoly, another concept recorded in Article 17.3 of the CPTPP is “delegated authority”, which cannot be found in the GATT 1994 and the ASCM but relates to “public body”. Pursuant to Article 17.3:

Each Party shall ensure that when its state-owned enterprises, state enterprises and

³³⁹ See *ibid.* at para. 320.

³⁴⁰ See *ibid.* at para. 346.

designated monopolies exercise any regulatory, administrative or other governmental authority that the Party has directed or delegated to such entities to carry out, those entities act in a manner that is not inconsistent with that Party's obligations under this Agreement.

Although Article 17.3 does not state the definition of delegated authority directly, it is possible to analyse that one interpretation of delegated authority is 'SOE, state enterprises or designated monopolies that exercise any regulatory, administrative or other governmental authority'. The term "delegated authority" is then potentially a factor of a "public body" or the authority that a "public body" has.

The description of delegated authority corresponds to the basic rule interpreted by the Appellate Body that the "public body" must be an entity that 'possesses, exercises or is vested with governmental authority'.³⁴¹ In detail, it corresponds to standards in the "governmental authority" approach. First, the delegated authority has regulatory, administrative, or governmental authority, which is a legal announcement of the right of authority. In addition, the delegated authority explains what could be examples of regulatory, administrative or other governmental authority, for example, the 'power to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees or other charges'.³⁴² And those are clear governmental functions, normally with a specific system and period to operate.³⁴³ It may not satisfy the third standard directly, because meaningful control is a blurry concept, thus it is difficult to embody either by ownership interest or the behaviour itself. However, as delegated authority reflects the first two standards, it is solid enough to prove such a definition belongs to at least one form of "public body".

Moreover, the concept of the delegated authority can further distinguish the term SOE from the "public body", which avoids the risk that every SOE is potentially a "public

³⁴¹ See *ibid.* at para. 317.

³⁴² See footnote 12 of Article 17.4 at CPTPP

³⁴³ For example, according to China's departmental regulation Measures for Transfer of Rights and Interests of Toll Roads, the maximum period of payment should not surpass 30 years. See the Chinese government website http://www.gov.cn/gzdt/2008-09/02/content_1085631.htm accessed 26 April 2020.

body” by a general definition. Pursuant to Article 17.3, when an SOE exercises regulatory or other governmental authority directed by the government, such SOE can be recognized as a delegated authority. Hence, neither government ownership nor governmental function is the central criterion of judgement as regards delegated authority. An entity where a state is the majority shareholder of that enterprise or holds the power to appoint a management body can be identified as an SOE, but not a delegated authority if the entity does not exercise governmental authority. As an SOE is one subject of delegated authority, it may be identified as a “public body” under authorization in one case, but not without governmental authority in another. This reflects WTO tribunals’ analysis that the standard to determine the delegation of governmental authority is not specific and does not depend on one decisive element, the “public body” identification may vary from case to case, ‘the same entity may possess certain features suggesting it is a public body, and other that suggest that it is a private body’.³⁴⁴ Accordingly, the regulations of delegated authority as stipulated in Article 17.3 serves the same purposes as the explanation of WTO tribunals, thus, the provisions of delegated authority can be interpreted to improve the concept of “public body”.

4.4 Factors for “public body” identification

Based on the analysis of “public body” by WTO cases and provisions of the CPTPP, a “public body” can refer to the following:

An entity that exercises any regulatory, administrative, or other governmental authority that the Party has directed or delegated to such entity.

Footnote 1: Examples of ‘exercising any regulatory, administrative or other governmental authority’ include: the power to expropriate, grant licenses, approve

³⁴⁴ See Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011, at para 318.

commercial transactions, or impose quotas, fees, or other charges.

Footnote 2: The determination of a “public body” shall focus on ‘whether the entity itself possesses the core characteristics and functions’ that constitutes a “public body”, and follow the principle to ‘avoid focusing exclusively or unduly on any single characteristic without affording due consideration to others that may be relevant’. In this regard, state intervention, as well as the scope and content of government policies relating to the sector in which the investigated entity operates can serve as evidence of “public body” determination.

Footnote 3: Approaches to demonstrate “public body” may include, but not be exhausted by:

- (a) A state or other legal instrument expressly vests authority in the entity concerned;
- (b) An entity exercising governmental functions may serve as evidence, particularly where such evidence points to a sustained and systematic practice;
- (c) A government exercises meaningful control over an entity in certain circumstances; (Formal indicia of government control are manifold, and there is evidence that such control has been exercised in a meaningful way.)

4.5 The “public body” issue in the case of China

Although there is an intention to reduce the state intervention and promote the SOEs as independent market players reflected by national law and reform of SOEs, the SOEs in China are not clearly distinguished from the “public bodies”. The separation of state intervention stipulated in SOAE law is an appropriate starting point for state and SOE to pursue. However, despite the Guiding Opinions have specific regulations reducing the state intervention and pursuing for independent market players, it still needs feedback in practice and evidence in the future.

The findings also highlighted that SOEs in China, especially Chinese central SOEs (Yang Qi), are potentially “public bodies” when serving specific responsibility, for example, stabilizing supply and ensuring security of relevant industries through strictly following national macro-control measures. However, it may be impossible to identify the Yang Qi as a whole “public body” due to its diversified functions and responsibilities, further feedback and more evidence through questionnaires could help to refine the evaluation during the “public body” investigation.

4.5.1 The Common features of the SOEs from different sources

In order to analyse the special case of the SOEs in China, it is useful to have a general understanding on the common features of the SOEs. Although the concept of the SOE is absent in the WTO agreements, the definition of the SOEs has been reflected in different jurisdictions and context, such as the free trade agreements and working reports. The analysis of those sources provides a preliminary evaluation of the SOEs in the context of the “public body” issue.

As will be discussed in the following sections, there are two common features of the SOE definition: the state control through the ownership and appointment of a management body. Two points in this situation are worth of notice. Although, according to the WTO tribunal, ‘the control of an entity by a government, in itself, is not sufficient to establish that an entity is a public body’,³⁴⁵ it does not indicate such control cannot be evidence with further elements. The tribunal further mentioned that ‘a government exercises meaningful control’ might be an embodiment of governmental authority, especially when ‘formal indicia of government control are manifold, and there is evidence that such control has been exercised in a meaningful way’.³⁴⁶ Therefore, state

³⁴⁵ See Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011, at para. 318.

³⁴⁶ See *ibid.*

control is still potentially a standard for a “public body”, albeit the WTO tribunal did not explain how to demonstrate the state control to be “meaningful”.

Second, compared with the blurry expression of the state control, the objective of the SOE may help to identify a “public body”. For example, the third objective of the SOEs recorded in the EU working paper indicates the purpose of the SOE is to conduct a governmental function as a long-term practice, which corresponds to the second scenario of the “governmental authority approach” that ‘entity is exercising governmental functions may serve as evidence, particularly where such evidence points to a sustained and systematic practice’.³⁴⁷ In this sense, the objective of the SOE can clarify the link between the government and entity, which provides references when identifying a “public body”.

4.5.1.1 The SOEs and selected free-trade agreements (FTAs)

The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) has a separate chapter defining and regulating SOEs. Pursuant to Article 17.1 of the agreement, SOE refers to an enterprise that is principally engaged in commercial activities in which a Party:

- (a) directly owns more than 50 per cent of the share capital;
- (b) controls, through ownership interests, the exercise of more than 50 per cent of the voting rights; or
- (c) holds the power to appoint a majority of members of the board of directors or any other equivalent management body.

Under the CPTPP, the SOEs can be defined either by ownership or influence on appointment of management body. As analysed in Section 4.3.2, ownership is the most direct way to identify an SOE by the CPTPP. This leaves a problem as whether

³⁴⁷ European Commission and Directorate-General for Economic and Financial Affairs, ‘State-Owned Enterprises in the EU: Lessons Learnt and Ways Forward in a Post-Crisis Context.’ <<http://bookshop.europa.eu/uri?target=EUB:NOTICE:KCBC16031:EN:HTML>> accessed 10 July 2020.

“ownership” qualifies to demonstrate state control over an SOE. In the *Korea - Measures Affecting Trade in Commercial Vessels* Case, the primary evidence to demonstrate the control of government is state ownership.³⁴⁸ For example, KEIM, a SOCB of Korea, is 100 per cent owned by GOK or other bodies in Korea, which is considered under the control of GOK. One presumption about the purpose of state ownership is to obtain the management or control of the entity on behalf of the state. However, SOEs, where the state has major ownership, can still reflect features of a private firm through “private control”, for example, by employing market-oriented managers to operate the business in a private way.³⁴⁹ Therefore, the SOEs are not necessarily “state-owned and state-controlled”, they can also be “state-owned and private-controlled”. In this regard, an SOE is following market forces and state is one shareholder of it. As analysed by the Appellate Body, in the *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* Case, ‘mere fact that a government is the majority shareholder of an entity does not demonstrate that the government exercise meaningful control over the conduct of that entity’.³⁵⁰

The appointment of a management body is one evidence of state control in the *Korea - Measures Affecting Trade in Commercial Vessels* Case.³⁵¹ In this Case, government of Korea has the right to appoint the president of KEIM, which is regarded as an evidence that KEIM is under state control and thus a “public body”.³⁵² This conclusion is rebutted by the Appellate Body, in the *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* Case, that ‘the control of an

³⁴⁸ See Panel Report, *Korea - Measures Affecting Trade in Commercial Vessels*, WT/DS273/R, adopted 7 March 2005.

³⁴⁹ The blurry boundaries, especially in the case of ownership boundaries, between private firm and SOE has been compared and analyzed by Mike W Peng and others. One of their views is that the ownership boundaries are not fixed, for example, “SOEs can be privatized and private firms can be nationalized to become SOEs”. For SOEs where state has major ownership can still reflect private firm characteristic through “private control”, such as employing market-oriented managers to operate business in a private way. Therefore, SOEs are not necessarily “state-owned and state-controlled”, but could also be “state-owned and private-controlled”. See Mike W Peng and others, ‘Theories of the (State-Owned) Firm’ (2016) 33 Asia Pacific Journal of Management 293.

³⁵⁰ See Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011, at para 541.

³⁵¹ See Panel Report, *Korea - Measures Affecting Trade in Commercial Vessels*, WT/DS273/R, adopted 7 March 2005.

³⁵² See *ibid.*

entity by a government, in itself, is not sufficient to establish that an entity is a public body'.³⁵³ The WTO tribunal further complemented that state “meaningful” control with evidential elements might demonstrate a “public body”.

However, the WTO tribunal did not explain how to demonstrate state control to be “meaningful”. Thus, it is not clear whether appointing ‘a majority of members of the board of directors’ equates with state “meaningful” control. In other words, although the appointment of directors provides the government with the power to control the entity, it is still not qualified as solid evidence of governmental authority. It thus could not confirm that definition of a SOE, especially subparagraph (c), will lead a SOE directly belong to a “public body”.

The US-Australia FTA and NAFTA (North American Free Trade Agreement) share similar definitions of an SOE, they briefly define “state enterprise” as “an enterprise owned, or controlled through ownership interests, by any level of government of a Party”.³⁵⁴ The USA-Singapore FTA provides a more detailed definition based on Singapore’s situation. It generally defines an SOE as a “government enterprise” where ‘an enterprise owned, or controlled through ownership interests, by that Party’.³⁵⁵ However, the judgement of enterprises owned by Singapore relies on “effective influence”. The agreement explains “effective influence” as the state “owns more than 50 per cent of the voting rights of entity” or exercises substantial influence over the board of directors or managing body of an entity.³⁵⁶

The US-Australia FTA, NAFTA and USA-Singapore FTA expressly indicated state control through ownership when defining a SOE, which is distinguished with that in CPTPP. Nonetheless, such definition is differentiated with “public body” relying on

³⁵³ See Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011.

³⁵⁴ See Free Trade Agreement Australia 2005 (USA-Australia FTA), Art. 14.12(9). NAFTA, Art. 1505.

³⁵⁵ See Free Trade Agreement Singapore 2004 (USA- Singapore FTA), Art. 12.8 (6).

³⁵⁶ See *ibid.* Art. 12.8 (5).

WTO tribunal's analysis that 'the control of an entity by a government, in itself, is not sufficient to establish that an entity is a public body'.³⁵⁷ However, it still should be noticed that state "meaningful" control with evidential elements might demonstrate a "public body", albeit the WTO tribunal did not explain how to demonstrate state control to be "meaningful".

4.5.1.2 The SOEs and the EU

The European Commission to the Council of the European Union and the European Parliament published a report in 2016, aiming to analyse recent development of SOEs in the EU and identify best practices with reform efforts.³⁵⁸ Comparing with definitions in FTAs, this EC report conducts a discussion on role and objective as well as a classification of SOEs.

Based on the fact that there is no common definition of an SOE, the report refers to a definition of "public non-financial corporations" in ESA 2010 (European System of Accounts)³⁵⁹ as 'non-financial corporations, quasi-corporations and non-profit institutions, recognized as independent legal entities, that are market producers and are subject to control by government units'.³⁶⁰ According to the above expression, an SOE is defined as a corporation where the state exercises control, 'regardless of the size of ownership'.³⁶¹ The report then classifies SOE into four categories: 'companies fully owned by public authorities'; 'companies where public authorities have a majority share'; 'companies where public authorities retain a minority share but have special statutory powers'; 'companies where public authorities have a minority share and no special powers, these are generally not considered as SOEs however they may be of

³⁵⁷ See Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011.

³⁵⁸ European Commission and Directorate-General for Economic and Financial Affairs (n 341).

³⁵⁹ Statistical Office of the European Communities and European Commission (eds), *European System of Accounts: ESA 2010* (Publications Office of the European Union 2013).

³⁶⁰ European Commission and Directorate-General for Economic and Financial Affairs (n 341).

³⁶¹ See *ibid.*

relevance in order to obtain a fuller picture of governments' stake in the economy'.³⁶²

One point reflected in this report is that "ownership" may not be a requisite element to define SOEs, but rather "control by government units". Noticeably, reinforcing the influence of control may blur the boundary between SOE and "public body". Since meaningful control by government is one of the clear standards that determine whether an entity belongs to "public body", solely relying on state control to define SOE may conflate definitions of SOE and "public body".

In addition, the report also addresses the role and objectives of SOEs in socio-economic, political, and historical perspectives. The report provides three objectives of SOEs, first, SOEs tackle the dilemma where there is only one supplier (natural monopoly) or competition is imperfect. Second, SOEs carry out 'nationally strategic but risky or long-term investments where private sector investors were not available'. The third situation calls for SOEs to benefit other industries or pursue social objectives. The third objective, according to the report, can be explained as government - operated SOEs exploiting the externalities of SOEs to conduct a governmental function. For example, providing subsidized or non-profit services to particularly vulnerable consumers or remote areas as a minimum level of access to services which are considered as essential and basic goods; saving private companies from bankruptcy or taking advantage of the flexibility offered by company law through forming companies via administrative units of the state.

As the Appellate Body defined "public body" as an entity that 'possesses, exercises or is vested with governmental authority',³⁶³ thus an SOE with both commercial and non-commercial objectives could potentially be identified as a "public body". The first and second objectives of SOEs embody the salient feature of conducting business which

³⁶² See *ibid.*

³⁶³ See Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011.

does not originally satisfy “public body” conditions. However, the third objective indicates that the purpose of SOE is to conduct a governmental function. And as an objective, it is not difficult to understand that such a programme refers to a long-term practice. As analysed by the Appellate Body, an entity exercising governmental functions may be considered a “public body”, especially when such practice is sustainable and systematic.³⁶⁴ Accordingly, an SOE serving the third objective is tend to be a “public body”.

Notably, compared with the blurry expression of state control, the regulation of objectives may be a more efficient way to identify the features of an SOE. It clarifies the link between government and the entity, which provides references when identifying “public body”.

4.5.1.3 The SOEs and the OECD

The OECD published guidelines on the corporate governance of state-owned enterprises in 2015 (the Guidelines), they are recommendations for governments to ensure SOEs operate efficiently, transparently and in an accountable manner.³⁶⁵

The Guidelines’ purposes are to ensure that SOEs share the same aims of private enterprise, despite the government being the owner. Specifically, they guarantee that SOEs operate as good practice private enterprises, and ensure they can compete on a level playing field.³⁶⁶ In this sense, there is no difference between an SOE and a private entity, and government plays a role as an owner that is pursuing maximum economic benefit.

³⁶⁴ See *ibid.*

³⁶⁵ OECD, ‘OECD Guidelines on Corporate Governance of State-Owned Enterprises, 2015 Edition’ 11 <https://www.oecd-ilibrary.org/governance/oecd-guidelines-on-corporate-governance-of-state-owned-enterprises-2015_9789264244160-en> accessed 10 July 2020.

³⁶⁶ See *ibid.*

The Guidelines define an SOE as ‘any corporate entity recognized by national law as an enterprise, and in which the state exercises ownership’.³⁶⁷ It further addresses that the definition applies to enterprises under the control of the state and explains “control” as the state being the ‘ultimate beneficiary owner of the majority of voting shares’ or otherwise exercising an “equivalent degree of control”.³⁶⁸ The first explanation of “control” describes the state as a shareholder of an SOE exercising shareholder rights, which recognizes an SOE as a general enterprise without governmental interference. Noticeably, the Guidelines then provide an example of “equivalent degree of control”, whereby ‘legal stipulations or corporate articles of association ensure continued state control over an enterprise or its board of directors in which it holds a minority stake’.³⁶⁹ As a ‘legal instrument expressly vests authority in the entity’ is interpreted as a condition to be a public body,³⁷⁰ above description is to large extent corresponds to “public body”.

4.5.1.4 The SOEs and the World Bank Group

On 20 December 2018, the World Bank Group (WBG) published an Approach Paper supporting the reform of state-owned enterprises. Regarding the definition of SOE, the paper used two types of SOEs: either the ‘government has significant control through full, majority, or substantial minority ownership’,³⁷¹ or the three criteria offered by Raballand et al. As analysed by Raballand et al., an SOE is characterized by: ‘(1) control by the state; (2) legal and financial autonomy from the state (characterized by a legal personality, specific rules of operation defined under a legal regime, and budget autonomy); and (3) participation in the productive sector’.³⁷²

³⁶⁷ See *ibid* at page 14.

³⁶⁸ See *ibid*.

³⁶⁹ See *ibid*.

³⁷⁰ See Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011.

³⁷¹ World Bank Group, ‘Approach Paper World Bank Group Support for the Reform of State-Owned Enterprises, 2007-2018: An IEG Evaluation’ 3 <http://ieg.worldbank.org/sites/default/files/Data/reports/ap_soereform.pdf> accessed 10 July 2020.

³⁷² See *ibid*.

As a common feature of SOEs, state control is no doubt indicated in WBG's report as a core criterion to identify an SOE, either by its own identification or through Raballand et al.'s analysis. Besides, the second characteristic emphasizes that an SOE has 'legal and financial autonomy from the state'. However, the second characteristic also adds that there are 'specific rules of operation defined under a legal regime', which may leave space for state intervention. And this may, to some extent, correspond to the Appellate Body's interpretation that a 'legal instrument expressly vests authority in the entity'.³⁷³

4.5.1.5 Conclusion

State control through ownership and appointment of a management body are common features of SOE's definition. Although, according to the WTO tribunal, 'the control of an entity by a government, in itself, is not sufficient to establish that an entity is a public body',³⁷⁴ it does not indicate such control cannot be an evidence with further elements. The tribunal further mentioned that 'government exercises meaningful control' might be an embodiment of governmental authority, especially when 'formal indicia of government control are manifold, and there is evidence that such control has been exercised in a meaningful way'.³⁷⁵ Therefore, state control is still potentially a standard for a "public body", albeit the WTO tribunal did not explain how to demonstrate state control to be "meaningful".

Second, compared with the blurry expression of state control, the objectives of an SOE may of help to identify a "public body". For example, the third objective of an SOE recorded in the EU working paper indicates that the purpose of an SOE is to conduct a governmental function in long-term practice, which corresponds to the second scenario

³⁷³ See Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011, at paras 310 and 321.

³⁷⁴ See *ibid.*, at para 318.

³⁷⁵ See *ibid.*

of “governmental authority approach” that ‘entity is exercising governmental functions may serve as evidence, particularly where such evidence points to a sustained and systematic practice’.³⁷⁶ It clarifies the link between government and entity, which provides references when identifying “public body”.

4.5.2 The SOEs in China as reflected in regulations and reform

State intervention or state control over SOEs in China is more consolidated compared with common features of SOEs. However, China’s ultimate control over SOEs is not simply emblematic of meaningful control or “governmental authority”. Although the SOEs are controlled by the state or state agency, such as SASAC (State-owned Assets Supervision and Administration Commission of the State Council), market forces still prevail among the SOEs. In other words, the state intervention and the entity’s behaviour under market forces coexist in an SOE, which lead to controversy in subsidy determination. The analysis based on the national law and reform of SOEs reflected state’s attitude to reduce the state intervention and promote the SOEs as independent market players.

4.5.2.1 The “public body” criteria relate to China: the state intervention and market forces

As Jesse Kreier comments on the China’s anti-dumping investigations on US n-propanal exporters and its non-market conditions existing in the US energy and petrochemical sector in July 2020:

[T]he 145 alleged subsidies include many of the same programs investigated in the n-propanal AD case and alleged in the parallel AD investigation. Thus, the issue whether government interventions are properly addressed by AD, CVD or both, once again presents itself.³⁷⁷

³⁷⁶ European Commission and Directorate-General for Economic and Financial Affairs (n 341).

³⁷⁷ See Zhiguo Yu and Jesse Kreier, ‘China and Distortions - Bis’ (*International Economic Law and Policy Blog*) <<https://ielp.worldtradelaw.net/2020/08/china-and-distortions-bis.html>> accessed 20 August 2020.

The state intervention is an important factor in trade remedy investigations. It is also appeared in Section 4.4 of this research as a factor for the “public body” identification and addressed by the WTO tribunal. In the *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China Case*³⁷⁸ and *United States - Countervailing Duty Measures on Certain Products from China Case*³⁷⁹, the Appellate Body suggested to analyse determination of “public body” by a “case-by-case approach” in the countervailing investigation, nonetheless it also pointed out that the state intervention as well as ‘the scope and content of government policies relating to the sector in which the investigated entity operates’, can also be regarded as evidence of “public body” determination.³⁸⁰

The state intervention is also a significant concern for China’s exporters in trade remedy investigations. As highlighted by Mark Wu, China’s economic structure is featured by a mixture of state intervention and market forces, it is state-dominated with market forces working domestically where ‘private enterprises drive much of China’s dynamic growth’, which brings challenges to the subsidy determination.³⁸¹ As analysed by Wu, China’s “uniqueness” is reflected in six aspects. First, SASAC, as a government agency, has centralised control over SOEs (state-owned enterprises), which is differentiated with government control fragmented among various ministries or agencies. Second, Central Huijin, another government agency, is the largest shareholder of the biggest four commercial banks of China, which demonstrates the state’s influence over financial institutions. Third, the NDRC, as an economic coordination agency, has a broader range of powers to implement economic development plans. Fourth, the

³⁷⁸ See Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011.

³⁷⁹ See Appellate Body Report, *United States - Countervailing Duty Measures on Certain Products from China*, WT/DS437/AB/RW, adopted 16 July 2019.

³⁸⁰ See *ibid.*

³⁸¹ See Mark Wu, ‘The “China, Inc.” Challenge to Global Trade Governance’ (2016) 57 *Harvard International Law Journal* 261, 264. Jorge Miranda, ‘How China Did not Transform into a Market Economy’ in James J Nedumpara and Weihuan Zhou (eds), *Non-Market Economies in the Global Trading System: The Special Case of China* (Springer Singapore 2018) <<https://www.springer.com/gp/book/9789811313301>> accessed 9 July 2020. Jochem De Kok, ‘The Future of EU Trade Defence Investigations against Imports from China’ (2016) 19 *Journal of International Economic Law* 515.

‘Chinese economy [comprises] nested corporate group structures’ within which ‘control mechanisms [are] put in place by the state to temper its undesired effects’. Fifth, the CPC is actively involved running Chinese economy, but its role is distinguished from the state. Sixth, although the Party-state may possess centralised mechanisms of formal control, it allows firms in most sectors to be subject to market forces, which plays a key role in driving growth.

Indicated by above “uniqueness”, state intervention or state control over SOEs in China is consolidated compared with common features of SOEs. However, China’s ultimate control over SOE is not simply emblematic of meaningful control or “governmental authority” as described in Section 4.4 of this research or by the Appellate Body in the *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* Case. If simply relying on China’s control over an SOE can determine a “public body”, then there won’t be controversy on the subsidy determination in the *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* Case.³⁸² What makes the issue complicated is the state ‘allows market forces to play out in huge swaths of the economy’.³⁸³ Although SOEs are controlled by state or state agency, such as SASAC (State-owned Assets Supervision and Administration Commission of the State Council), market forces still prevail among the SOEs. For example, SASAC controls more than half of Chinese companies on the Fortune Global 500 list of the world’s largest corporations, it still ensures its SOEs ‘fight with each other for market share’ and ‘subject to market forces and stay competitive’.³⁸⁴

Relying on market forces’ advantage in resource allocation, China has achieved rapid economic growth since 1978.³⁸⁵ The state’s willingness to apply market forces and the

³⁸² See Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011.

³⁸³ See *ibid.*

³⁸⁴ See Wu (n 374) 271.

³⁸⁵ See *ibid.*

achievement of economic growth has attracted many Chinese entrepreneurs seeking to forge links with the state. And this, in return, improved the state control over the entity. For example, ‘when Alibaba bought back shares from foreign investors, it then sold the shares to the China Development Bank’s private investment arm and two investment funds run by princelings, and as a payback, Alibaba could embark on a new business in the financial sector’.³⁸⁶

Therefore, the analysis of following sections focuses on Chinese regulations and documentary guidelines pertinent to the state intervention. It assesses the relationship between the state and the SOEs with reference to the factors for “public body” identification concluded in Section 4.4 and the WTO case law.

4.5.2.2 Investor role and less state intervention in national law

One national law that reflects the relationship between the state and the SOEs is the Law of the People’s Republic of China on the State-Owned Assets of Enterprises (hereafter SOAE law).³⁸⁷ Article 2 of the SOAE law defines the features and role of the state in an SOE, accordingly, ‘the term “state-owned assets of enterprises” (henceforth “state-owned assets”) as mentioned in this Law refers to the rights and interests formed by the various forms of investment of the state in enterprises’. In such an SOE, the government plays a role as an investor, it has rights and interests based on its investment in the enterprise. Such an expression is distinguished with definitions that the state is exercising control by ownership or appointment of the board of directors.

Article 6 of the SOAE law points out three principles concerning state interference in an enterprise’s autonomy. The first principle is the ‘separation of government bodies

³⁸⁶ See *ibid.*

³⁸⁷ The law is published by the Ministry of Justice of the People’s Republic of China, http://www.moj.gov.cn/Department/content/2009-01/20/592_201254.html accessed 26 March 2020. See English version translated by lawinfochina.com, <http://en.pkulaw.cn/display.aspx?id=7195&lib=law> accessed 26 March 2020.

and enterprises’. The principle literally rejects the view that an SOE is a branch of government. The second principle is ‘separation of the administrative functions of public affairs and the functions of the state-owned assets contributor’. This principle further “isolates” behaviours with governmental features, such as ‘administrative functions of public affairs’, from normal business activity. The third principle is ‘non-intervention in the legitimate and independent business operations of enterprises’. This principle ensures the entity has autonomy and is independently governing itself regarding business operations. The principles not only define the autonomy of an SOE, but also allow the enterprise subject to market forces without state intervention.

Besides, Article 6, on the other hand, defines behaviours with governmental characteristics, which helps to interpret a “public body”. According to the first principle, a governmental entity is potentially an enterprise combined with a governmental body. Based on the second principle, such an entity may possess administrative functions of public affairs. Relying on the third principle, in a governmental entity, the government may have influence on the legitimate and independent business operations of the enterprise. Conclusively, these three features are potential manifestations of governmental interference, which may serve as references for “public body” identification.

Moreover, Article 7 reflects the government’s responsibility relating to the SOEs.

Pursuant to Article 7, the state shall:

...take measures to promote the centralization of state-owned capital to important industries and key fields that have a bearing on the national economic lifeline and state security, optimize the layout and structure of the state-owned economy, promote the reform and development of state-owned enterprises, improve the overall quality of the state-owned economy, and strengthen the control force and influence of the state-owned economy.³⁸⁸

³⁸⁸ See Article 7 of SOAE law

Article 7 clearly highlights the government's responsibility in protecting the national economic lifeline and state security through scientifically allocating state resources as well as improving the overall quality of state-owned assets. Notably, the article points out the methods that fulfil the government's responsibility, 'allocating state resources as well as improving the overall quality of state-owned assets'. The expression of these methods, such as "allocating state resources", again emphasizes the state's role in SOEs as an investor. In other words, the state is obliged to protect the national economic lifeline and state security through scientific investment.

However, it is notable that the second half of Article 7 mentions 'strengthen the control force and influence of the state-owned economy', which may correspond to 'meaningful control of government over an SOE' as a common feature of "public body". Though there is no legal explanation of this expression, "control" in Article 7 may have different meanings under the context of SOAE law. As stipulated in Article 2, the government/ state is an investor in SOEs, so 'strengthen the control force' can be interpreted as a method to maximize the benefit to the investor. For example, with the same amount of investment, the SOE makes more profit through reform and development, which makes the government's investment appreciate. And as a result, the government is, in fact, in "control" of more capital compared with its original investment.³⁸⁹

Conclusively, interpreting the role of state as an investor with less state intervention may eliminate the dilemma that both the SOE and "public body" share similar features of state control. It distinguishes the government's legal rights as an investor from governmental interference, thus preventing an SOE's behaviour from being regarded as governmental behaviour. It suggests that an SOE under the SOAE law is not originally a "public body". However, shareholder right itself may also only prove the state has right based on its investment, assessment on implementation of the right may rely on

³⁸⁹ This is one interpretation of "control", and more economic analysis might be possible here. However, this is not the purpose of this research.

further practice.

4.5.2.3 Attempts to have independent market players in the reform of SOEs

The reform of SOEs reflects an attempt to promote SOEs as independent market players through less state intervention. The Guiding Opinions of the CPC Central Committee and the State Council on Deepening the Reform of State-owned Enterprises (henceforth Guiding Opinions) stipulated requirement that relate to the current round of reform of SOEs.³⁹⁰

One element of the current reform is corporate governance, the regulation of corporate governance reform set key goals for legal person management and corporate modernisation of SOEs.³⁹¹ And one major concern of corporate governance is the involvement of state intervention in business decision making.³⁹² Two regulations highlight the Party's leadership over SOEs. Paragraph 4 of Section 2 in Article 1 of the Guiding Opinions has the title 'the Party's leadership over SOEs shall be upheld'. Section 5 in Article 2 of the corporate governance regulations also stipulates maintenance of the Party's leadership. In practice, as Lin observed: 'in 53 central enterprises, the occupants of top positions, including the board chairman, CEOs, and party secretaries, are appointed and evaluated by the Central Organization Department of the Chinese Communist Party'.³⁹³ Therefore, under the current reform, commentators worries about the role of the Party are exacerbated, and the commercial

³⁹⁰ The Guidelines are published on the official website of the State Council of the People's Republic of China, http://www.gov.cn/zhengce/2015-09/13/content_2930440.htm accessed 26 March 2020. See English version translated by lawinfochina.com, <http://en.pkulaw.cn/display.aspx?cgid=26c39a43ea095fcebdfb&lib=law#> accessed 26 March 2020. The reform of SOEs has several rounds which can be classified by different periods. For more on previous reform see Weihuan Zhou, Henry Gao and Xue Bai, 'Building a Market Economy Through Wto-Inspired Reform of State-Owned Enterprises in China' (2019) 68 International & Comparative Law Quarterly 977.

³⁹¹ Guiding Opinions on Further Improving the Corporate Governance Structure of State-owned Enterprises (promulgated by Gen. Off. of the St. Council (Guo Ban Fa [2017] No. 36), 24 April 2017, effective 24 April 2017) are regulations that promotes the reform of corporate governance reform and under the spirit of Guiding Opinions of the CPC Central Committee and the State Council on Deepening the Reform of State-owned Enterprises. http://www.gov.cn/zhengce/content/2017-05/03/content_5190599.htm accessed 1 April 2020.

³⁹² Weihuan Zhou, Henry Gao and Xue Bai, 'Building a Market Economy Through Wto-Inspired Reform of State-Owned Enterprises in China' (2019) 68 International & Comparative Law Quarterly 977, 984.

³⁹³ Lin (n 60) 584.

decisions of SOEs will be affected by the Party.³⁹⁴

Guiding Opinions, on other hand, highlight that SOEs as independent market players through less state intervention. The expression “independent market player” appears in the second principle of Guiding Opinions, where the ‘the direction of socialist market economic reform shall be adhered to’. The following paragraph explains “the direction of socialist market” as:

... follow the rules and laws of a market economy and enterprise development, make unwavering efforts to separate government from business, government from capital, and ownership from the right to business operations, uphold the unity of rights, obligations and responsibilities, and always combine incentive mechanisms and restraint mechanisms so as to promote SOEs to become independent market players in the true sense where they engage in autonomous operations, make profits and assume losses independently, bear risks on their own, practice self-discipline and pursue self-development pursuant to the law. SOEs under the socialist market economy shall be role models for conscientiously performing social responsibilities.³⁹⁵

Accordingly, an SOE is encouraged to be an independent market player by separation between government and the entity. ‘Separate government from business’ and even further separation of ‘ownership from the right to business operations’ indicate the state does not aim to take over the business management of the SOE. It rather takes advantage of the enterprise’s flexibility to market, and eliminates the risk of potential countervailing measures as a result of administrative control.³⁹⁶ Under such regulation, if properly practised, SOEs in China are assured of an independent legal personality whereby they ‘engage in autonomous operations, make profits and assume losses independently, bear risks on their own, practice self-discipline and pursue self-development pursuant to the law’.

³⁹⁴ Zhou, Gao and Bai (n 388) 985.

³⁹⁵ See Part (2) Basic principles of Guiding Opinions of the CPC Central Committee and the State Council on Deepening the Reform of State-owned Enterprises.

³⁹⁶ Che Luyao, ‘Legal Implications of the Deepened Reform of Chinese State-Owned Enterprises: What Can Be Expected from Recent Reforms?’ (2016) 8 *Tsinghua China Law Review* 171, 175.

An SOE's role as an independent market player is also stipulated in the objectives listed in Guiding Opinions. It addresses that, by 2020, the reform shall form a 'state-owned asset management system, a modern enterprise system and a market-oriented business operation mechanism that are more in line with China's basic economic system and the requirements for the development of the socialist market economy'.³⁹⁷ In particular, the 'market-oriented business operation mechanism' indicates that the operation of an SOE shall be based more on market principles, rather than administrative command by the state. Moreover, the objectives clearly describe the reform as a "corporate-style reform of SOEs" whereby SOEs can engage in "autonomous and flexible business operations" without administrative concern. This, again, emphasizes enterprises' right to handle their own affairs.

4.5.3 SOEs in China under the assessment of "public body" criteria

The regulation and reform of SOE in China are not guaranteed those entities are clearly distinguished from the "public bodies". The separation of state intervention stipulated in the SOAE law is an appropriate starting point for state and SOEs to pursue. However, despite Guiding Opinions have specific regulations reducing state intervention and pursuing for independent market players, it still needs feedback in practice and evidence in the future.

Recalling the criteria for "public body" identification in Section 4.4, "public body" refers to an entity that exercises any regulatory, administrative, or other governmental authority that the Party/State has directed or delegated to such entity.

Footnote 1: Examples of 'exercising any regulatory, administrative or other governmental authority' include: the power to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees, or other charges.

³⁹⁷ See Part (3) Main objectives of Guiding Opinions of the CPC Central Committee and the State Council on Deepening the Reform of State-owned Enterprises.

Footnote 2: The determination of a “public body” shall focus on ‘whether the entity itself possesses the core characteristics and functions’ that constitutes a “public body”, and follow the principle to ‘avoid focusing exclusively or unduly on any single characteristic without affording due consideration to others that may be relevant’. In this regard, state intervention, as well as the scope and content of government policies relating to the sector in which the investigated entity operates can serve as evidence of “public body” determination.

Footnote 3: Approaches to demonstrate “public body” may include, but not be exhausted by:

- (d) A state or other legal instrument expressly vests authority in the entity concerned;
- (e) An entity exercising governmental functions may serve as evidence, particularly where such evidence points to a sustained and systematic practice;
- (f) A government exercises meaningful control over an entity in certain circumstances; (Formal indicia of government control are manifold, and there is evidence that such control has been exercised in a meaningful way.)

The criteria contain one description with three explanatory references. The description defines a “public body” and highlights it is exercising governmental authority that is vested by the government. Footnote 1 provides specific examples to identify a behaviour with “governmental authority”. Footnote 2 suggested principles when identifying a “public body”. And footnote 3 complements general approaches to determine a “public body”.

As analysed in Section 4.5.1, state control and state ownership are common features of SOEs definition in various reports and regulations. Although WTO tribunals hold that ‘the control of an entity by a government, in itself, is not sufficient to establish that an

entity is a public body’,³⁹⁸ it does not indicate such control cannot be evidence of governmental authority along with further reasons. Rather, ‘government exercises meaningful control’ might be an embodiment of governmental authority, especially when ‘formal indicia of government control are manifold, and there is evidence that such control has been exercised in a meaningful way’.³⁹⁹ State ownership has the same issue as state control. Despite not being a decisive criterion for “public body” identification, it may serve such a purpose in conjunction with other elements.⁴⁰⁰

State intervention or state control over SOEs in China is more consolidated compared with common features of SOEs. One example is that SASAC, as a government agency, has a centralised control among SOEs (state-owned enterprises), which is differentiated with government control fragmented among various ministries or agencies. Another controversial example is the Party’s leadership role in corporate governance as stipulated in the SOAE law. Although the dominate political party is synonymous with the state in many state capitalist, as analysed by Wu, Party in China functions independent from the state.⁴⁰¹ Therefore, the Party’s position is ambiguous when identifying a “public body”, albeit, in practice, the Party may have a large influence on the occupants of top positions, including the board chairman.⁴⁰²

What is more, the government’s responsibility relating to the SOEs, as stipulated in Article 7 of the SOAE law, emphasizes that the state shall ‘strengthen the control force and influence of the state-owned economy’. Despite, there are no specific provisions explaining the method to strengthen such control, state control or intervention over the

³⁹⁸ See Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011, at para. 318.

³⁹⁹ See *ibid.*

⁴⁰⁰ According to the Appellate Body, “state ownership, while not being a decisive criterion, may serve as evidence indicating, in conjunction with other elements, the delegation of governmental authority”. And the “governmental authority” is the core element to decide whether an entity belongs to public body. See Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011, at para. 310.

⁴⁰¹ Wu (n 374) 280.

⁴⁰² See Li-Wen Lin, ‘A Network Anatomy of Chinese State-Owned Enterprises’ (2017) 16 *World Trade Review* 583. See also Weihuan Zhou, Henry Gao and Xue Bai, ‘Building a Market Economy Through Wto-Inspired Reform of State-Owned Enterprises in China’ (2019) 68 *International & Comparative Law Quarterly* 977.

SOE is enlarged compared with common features of SOE. As recorded in Footnote 2, such state intervention may contribute to the determination of a “public body”.

One important role of the state, as stipulated in Article 2 of the SOAE law is that an investor in an SOE has rights and interests based on its investment in the enterprise. This indicates the government has the right to participate in the enterprise’s decision making conferred by its investment. And one issue here is whether the state’s shareholder right can justify the state’s behaviour as a normal activity rather than “governmental authority”. Che contends that exercising shareholder rights is distinguished by the implementation of administrative measures, as Guiding Opinions ensure the state’s status as a “contributor of shares of SOEs”.⁴⁰³ However, shareholder right itself may only prove the state has right based on its investment, assessment on implementation of the right may rely on further practice. It could not originally be concluded as a ‘shift in the paradigm of the state-to-market relationship’.⁴⁰⁴ As analysed by Lin, the state actively exercise its rights in ‘executive appointment and evaluation rights’, and ‘has been reluctant in exercising its financial rights’, so ‘the ways the state-owner exercise its shareholder rights suggest that the goal of the state-owner is to balance the interests of multiple groups and organs (and their ruling elite) embedded in the network, instead of maximization of shareholder wealth at individual firms’.⁴⁰⁵ Therefore, it is not the shareholder right itself, but the behaviour of how state conduct its shareholder role that relates to the determination of a “public body”. In this regard, the shareholder role could not distinguish the state behaviour with “governmental authority”.

Nonetheless, the SOAE law and Guiding Opinions reflect the state’s attitude on state intervention over the SOEs. The SOAE law clearly points out three principles regulating government intervention outside the enterprise’s autonomy. Based on the

⁴⁰³ Luyao (n 392) 179.

⁴⁰⁴ See *ibid.*

⁴⁰⁵ See in (n 398) 589.

principles of “separation of government bodies and enterprises”, “separation of the administrative functions of public affairs and the functions of the state-owned assets contributor”, and “non-intervention in the legitimate and independent business operations of enterprises”, the SOAE law distinguishes government interference from an investor in business operations.⁴⁰⁶ Besides, the expression “strengthen the control force” in Article 7 could have an alternative interpretation, i.e. maximizing the benefit to the investor. For example, with the same amount of investment, the SOE makes more profit through reform and development, which makes the government’s investment appreciate. And as a result, the government does, in fact, “control” more capital compared with its original investment. And such “control” is differentiated from the “control” of exercising “governmental authority”.

Pursuant to the Guiding Opinions, an independent market player is addressed and distinguished from government intervention. The Guiding Opinions clearly ‘separate government from business’ and further separate ‘ownership from the right to business operations’, which ensured SOEs in China have an independent legal personality whereby they ‘engage in autonomous operations, make profits and assume losses independently, bear risks on their own, practice self-discipline and pursue self-development pursuant to the law’. A similar stipulation also corresponds to the objectives listed by Guiding Opinions, where there is ‘market-oriented business operation mechanism that are more in line with China's basic economic system’.⁴⁰⁷ In particular, the “market-oriented business operation mechanism” indicates that the operation of an SOE shall be based on market principles rather than the administrative command of the state.⁴⁰⁸

Moreover, the Guiding Opinions divide SOEs into two categories, the commercial SOEs and SOEs in public welfare nature, which have both governmental and private

⁴⁰⁶ See Article 6 of SOAE law.

⁴⁰⁷ See Part (3) Main objectives of Guiding Opinions of the CPC Central Committee and the State Council on Deepening the Reform of State-owned Enterprises.

⁴⁰⁸ See *ibid.*

features. According to Guiding Opinions, commercial SOEs shall engage in ‘commercial operations in accordance with market requirements, and independently carry out production and business activities pursuant to the law primarily for the purposes of enhancing the vitality of the state-owned economic sector, amplifying the functions of state-owned capital, and preserving and increasing the value of state-owned assets, so as to achieve the survival of the fittest and orderly market entry and exit’.⁴⁰⁹ Though commercial SOEs are defined as conducting independent production and business activities, they may potentially interweave with state behaviour. The Guiding Opinions further classify commercial SOEs as those ‘whose business belongs to industries and fields of sufficient competition’ and ‘whose core business belongs to major industries and key fields concerning national security or the national economic lifeline, or that are mainly responsible for major special project tasks’.⁴¹⁰ For the first kind, the assessment of SOEs is based on business performance indicators or market competitiveness.⁴¹¹ However, for the second kind, the evaluation shall not only consider their business performance, but also aspects such as their ‘efforts to serve national strategies, safeguard national security and the operation of the national economy, develop cutting-edge strategic industries and complete special tasks’.⁴¹² The evaluation standards indicate that the second kind of commercial SOE may serve national strategies by playing a role as government organ, and such behaviour may corresponds to features of “public body” in exercising a governmental function.

The SOEs in public welfare nature are considered to have authority designated by the Guiding Opinions to protect people’s livelihood, serve the society at large and provide public goods and services.⁴¹³ Nonetheless, ‘cost control, product and service quality, operating efficiency and support capabilities’ are emphasised for evaluating their performance, while ‘their business performance indicators and the preservation and

⁴⁰⁹ See Part (4) of Guiding Opinions of the CPC Central Committee and the State Council on Deepening the Reform of State-owned Enterprises.

⁴¹⁰ See *ibid.*

⁴¹¹ See *ibid.*

⁴¹² See *ibid.*

⁴¹³ See Zhou, Gao and Bai (n 388) 1019; Luyao (n 392) 184.

appreciation of the value of their State-owned assets shall be assessed in a differentiated manner according to the different characteristics of such enterprises'. These evaluating factors are private and commercial features, and there is a pursue for a market-oriented transform. Therefore, it is arguable, in some senses, whether the classification of SOEs and the guidance of a market-oriented assessment system as stipulated belong to a designation of governmental authority, thus corresponding to a "public body".

Conclusively, the regulation and reform of SOEs in China are not guaranteed those entities are clearly distinguished from the "public bodies". The separation of state intervention stipulated in SOAE law is an appropriate starting point for state and SOEs to pursue. However, despite the Guiding Opinions have specific regulations reducing state intervention and pursuing for independent market players, it still needs feedback in practice and evidence in the future.

4.5.4 A case study of the Chinese central SOEs (Yang Qi)

Yang Qi is potentially a "public body" when serving specific responsibility, for example, stabilizing supply and ensuring security of relevant industries through strictly following national macro-control measures. Accordingly, it may be impossible to identify the Yang Qi as a unified "public body" due to its diversified functions and responsibilities.

4.5.4.1 The special relationship between the government and Yang Qi is reflected in three aspects

Chinese central SOE, also called Yang Qi, represents a group of SOEs that have special relationship with the government of China. Although Yang Qi is not literally regulated in law, its special relationship with the government is reflected in three aspects.

First, every Yang Qi is recorded in a "directory" being published by the State – owned Assets Supervision and Administration Commission of the State Council (SASAC).

The SASAC is an institution directly under the management of the State Council of China.⁴¹⁴ According to the Notice on the Institutional Establishment of the State Council (hereafter “the Notice”), SASAC is “an ad-hoc ministerial-level organization directly subordinated to the State Council”.⁴¹⁵ On the official website of the SASAC, there is a column called “Directory” showing 96 Yang Qis that the SASAC has supervised. The feature of this structure is similar to a list of departments of the government, or divisions that performs particular function. Yang Qi in the “directory”, to some extent, may distinguish with SOEs that out of the range due to its special relationship with the SASAC.

Second, the control of the SASAC over Yang Qi is embodied by the tasks or functions of the SASAC that stipulated in the Notice. The Notice contains six tasks regarding the SASAC which may affect the evaluation of the SOEs as follows:

(a) Authorized by the State Council, in accordance with the Company Law of the People’s Republic of China and other administrative regulations, SASAC performs the investor’s responsibilities, supervises and manages the state-owned assets of enterprises under the supervision of the Central Government (excluding financial enterprises), and enhances the management of state-owned assets.

(b) SASAC shoulders the responsibility of supervising the preservation and increment of the value of the state-owned assets of the supervised enterprises: establishes and improves the index system of the preservation and increment of the value of the state-owned assets, and works out the assessment criteria; supervises and administers the preservation and increment of the value of the state-owned assets of the supervised enterprises through statistics and auditing; and is responsible for the management work of wages and remuneration of the supervised enterprises and formulates policies regulating the income distribution of the top executives of the supervised enterprises and organizes implementation of the policies.

(c) SASAC guides and pushes forward the reform and restructuring of state-owned enterprises, advances the establishment of modern enterprise system in SOEs, improves corporate governance, and propels strategic adjustment of the layout and structure of the state economy.

⁴¹⁴ See the official website of SASAC at <http://en.sasac.gov.cn/aboutus.html>.

⁴¹⁵ See the Notice on the Institutional Establishment of the State Council (No.11 [2008] of the State Council) on the official website of SASAC at http://en.sasac.gov.cn/2018/07/17/c_7.htm.

(d) SASAC appoints and removes the top executives of the supervised enterprises, and evaluates their performances through legal procedures and either grants rewards or inflicts punishments based on their performances; establishes a corporate executives selection system in accordance with the requirements of the socialist market economy system and modern enterprise system, and improves incentives and restraints systems for corporate management.

(e) SASAC is responsible for organizing the supervised enterprises to turn the state-owned capital gains over to the state, participates in formulating management system and methods of the state-owned capital operational budget, and is responsible for working out the state-owned capital operational budget and final account and their implementation in accordance with related regulations.

(f) SASAC is responsible for urging the supervised enterprises to carry out the guiding principles, policies, related laws and regulations and standards for safety production and inspects the results in accordance with the responsibilities as investor.

(g) SASAC is responsible for the fundamental management of the state-owned assets of enterprises, works out draft laws and regulations on the management of the state-owned assets, establishes related rules and regulations and directs and supervises the management work of local state-owned assets according to law.

(h) SASAC undertakes other tasks assigned by the State Council.⁴¹⁶

Paragraph (a), (c), (e) and (g) focus on identifying the nature of SASAC as an investor of SOEs under the supervision of the Central Government. SASAC is obliged to supervise the preservation and increment of the value of the state-owned assets of the supervised enterprises, which reflects the investor's responsibility. These paragraphs indicate the impact of SASAC on Yang Qi at a macro-level through i.e., establishing related rules and regulations.

Comparatively, paragraph (b), (d) and (f) provide specific rules for SASAC to fulfil its supervisory responsibility in practise. Paragraph (b) enables SASAC to “formulate the income distribution of the top executives” of the SOEs. And according to paragraph (d), the SASAC can appoint and remove the top executives of the SOEs. It is also

⁴¹⁶ See *ibid.*

responsible for SASAC to urge “the supervised enterprises to carry out the guiding principles, policies, related laws and regulations and standards for safety production”, albeit the purpose of safety production is blurry.

Paragraph (h) is an ambiguous article, it leaves space for the Central Government to assign tasks to the SASAC to perform the investors’ responsibilities, which potentially including urging the SOEs to carry out governmental authority.

Therefore, although the Notice mainly talks about the tasks of the SASAC, it also illustrates how does the SASAC influence the supervised enterprises from a macro-level to specific power (such as the appointment of top executives).

Another indicator of SASAC’s control over Yang Qi is manifested by Yang Qi’s own description. For example, according to the description of China National Pharmaceutical Group Co., Ltd. (Sinopharm), it is “a large healthcare group directly under the SASAC”.⁴¹⁷ Sinochem Group, who’s predecessor as China National Chemicals Import and Export Corporation, announced that it is under the supervision of SASAC in its 2015 Annual Report.⁴¹⁸ Such supervisory relationship is also appeared in China Resources (Holdings) Co., Ltd. (“CR” or “China Resources Group”) where it announced, “in 2003, under the direct supervision of SASAC”, and became “one of the key state-owned enterprises”. Recalling the Notice has regulated the SASAC’s tasks especially aiming at “the supervised enterprises”, those Yang Qi are more intended to connected with the government.

4.5.4.2 The relationship between SASAC and Yang Qi belongs to evidentiary elements to determine a “public body” but not definition of it

As addressed by the Appellate Body in the *United States - Countervailing Duty*

⁴¹⁷ See the official website of the Sinopharm at <http://www.sinopharm.com/en/1398.html>.

⁴¹⁸ See the official website of the Sinochem at <http://english.sinochem.com/1528.html>.

Measures on Certain Products from China Case, it is crucial to distinguish the evidentiary elements for the “public body” determination and the definition of a “public body”.⁴¹⁹ Recalling the criteria for “public body” identification in Section 4.4, a “public body” is by definition an entity that exercises any regulatory, administrative or other governmental authority that the Party/State has directed or delegated to such entity. This definition is the core and the ultimate standard and decisive criterion to determine a “public body”.

All three footnotes that described in Section 4.4 belong to elementary elements that contributes to the identification of a “public body”. That is to say, each element itself does not equal to the definition or the decisive factor to determine a “public body”. As the Appellate Body reiterated that, an investigating authority must ‘avoid focusing exclusively or unduly on any single characteristic without affording due consideration to others that may be relevant’⁴²⁰. For example, in the *United States - Countervailing Duty Measures on Certain Products from China* Case, “state ownership”, “use the entities resources as its own”, “nature of an entity’s conduct or practise” may serve, in conjunction with other elements, as evidence.⁴²¹ Otherwise, those factors are unnecessary if they cannot answer the “central question of whether the entity itself possesses the core characteristics and functions that would qualify it as a public body’.⁴²²

This principle is crucial when conducting a “public body” investigation in the context of Yang Qi. First, Section 4.5.3 has provided an analysis of the state intervention in government policies and regulations relating to SOEs in China through evaluating the SOAE law and Guiding Opinions. Unless the law expressly vests authority in the entity that corresponds to the definition of “public body”, it serves as one elementary element for the “public body” determination. The conclusion of Section 4.5.3 also demonstrates

⁴¹⁹ See Appellate Body Report, *United States - Countervailing Duty Measures on Certain Products from China*, WT/DS437/AB/RW, adopted 16 July 2019, at para. 5.97.

⁴²⁰ See *ibid.*

⁴²¹ See *ibid.*, at paras. 5.97 and 5.101.

⁴²² See *ibid.*

that SOEs in China cannot be directly classified as “public bodies”.

Second, the relationship between SASAC and Yang Qi also serve as the evidentiary elements for the “public body” determination. To begin with, the “directory” listing 96 Yang Qi published by SASAC neither indicate Yang Qi is expressly granted with authority by a state, nor being a governmental subsidiary. This may only lead to a presumption that Yang Qi is, to some extent, distinguished with SOEs that out of the range.

In addition, although paragraph (b), (d) and (f) of the Notice stipulate specific functions of SASAC, none of them correspond literally and directly to the definition of a “public body”. As stated by paragraph (b) and (d), appointing the top executives or formulating the income of the top executives do not necessarily define what a “public body” is. It rather belongs to an evidence of the state intervention as well as the state ownership, it is one expression that the state is conducting its shareholder role.

Paragraph (f) may potentially correspond to the definition of a “public body” due to specific conditions. According to paragraph (f), SASAC is obliged to urge ‘the supervised enterprises to carry out the guiding principles, policies, related laws and regulations and standards for safety production’. As addressed by the Appellate Body in the *United States - Countervailing Duty Measures on Certain Products from China* Case, ‘depending on the specific circumstances of each case, relevant evidence may include: ... evidence regarding “the scope and content of government policies relating to the sector in which the investigated entity operates”’.⁴²³ Paragraph (f) only serve as evidentiary element when ‘the guiding principles, policies, related laws and regulations and standards’ belong to general and ambiguous government policies. However, the nature of the supervised Yang Qi when carrying out the related tasks or policies is the main question, because it may relate to the definition of a “public body”. For example,

⁴²³ See *ibid*, at para. 5.96.

if Yang Qi exercised any one of the activities as concluded in Footnote 1 of criteria for “public body” identification in Section 4.4, i.e., grant licenses, then that Yang Qi is more intended to be a “public body” when granting licenses. In that sense, SASAC has directed or delegated the governmental authority to the Yang Qi when fulfilling its responsibility as stipulated in paragraph (f).

Therefore, it is crucial to identify what tasks are assigned by the SASAC or the State Council based on paragraph (f) and (h), and determine whether does it belong to a delegation of governmental authority. And if not, whether there have solid evidentiary elements to determine that Yang Qi belongs to a “public body”. In this sense, the analysis of specific Yang Qi is requisite and will be discussed in the following Section.

4.5.4.3 Yang Qi is potentially a “public body” when serving specific responsibility

The analysis of the specific Yang Qi can be performed from two aspects due to the fact that their core business span over multiple areas and serve different responsibilities. From one aspect, Yang Qi have business and services that aims to increase the revenue and efficiency. Form another aspect, they also, to some extent, shoulder the political responsibilities safeguarding the national security. This can be illustrated by an example of the Sinochem Group as following.

The Sinochem Group, who’s predecessor as China National Chemicals Import and Export Corporation, is one Yang Qi under the supervision of SASA. The 2015 Annual Report of the Sinochem (the latest version that can be accessed) embodies two responsibilities serving different purpose at a macro-level. One responsibility, as stated by the chapter of Management Report in the annal report, is embodied by missions such as becoming ‘a role model with “advanced technologies, energy conservation, environmental friendliness”’.⁴²⁴ And Accordingly, as addressed by the report, it

⁴²⁴ See the official website of the Sinopharm at <http://english.sinochem.com/1528.html> .

focuses on ‘utmost devotion to increasing revenue and efficiency’, ‘deepening strategic transformation’ and ‘constantly solidifying management foundation’. This responsibility indicates one nature of stabilizing growth as a modern enterprise.

Another responsibility is reflected by one mission that is to be ‘a staunch force in ensuring energy security, agriculture security, and progress of the chemical industry’,⁴²⁵ which is more connected with the government. As explained by the subtitle ‘steadily improve social influence’, the Sinochem Group also ‘perform political, economic and social responsibilities as prescribed by the Central Government, giving full play to our national team role in energy and agriculture sectors’. The “political responsibility” is generally understood to participate in activities as part of development strategy of the state, which is more likely to conduct governmental functions. For example, in order to ‘steadily improve social influence’ the Sinochem Group:

‘strictly follow national macro-control measures, namely fertilizer procurement and storage during the low seasons, strategic crude oil and refined oil reserve building, Sino-foreign Potash Fertilizer Negotiations on a united front, which greatly contributes to stabilizing supply and ensuring security of relevant industries’.⁴²⁶

Accordingly, the purpose of activities, such as “fertilizer procurement and storage during the low seasons”, is to strictly follow national macro-control measures stabilizing supply and ensuring security of relevant industries. This is more of a governmental function rather than an enterprise’s social responsibility.⁴²⁷ ‘‘

The chapter of Business Overviews in the annual report has further explained the Sinochem Group’s responsibilities. The table below illustrates types of major business

⁴²⁵ See *ibid.*

⁴²⁶ See *ibid.*

⁴²⁷ According to the European Commission, enterprise’s social responsibility, also called corporate social responsibility (CSR), is ‘a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis’. See European Commission, ‘Promoting a European framework’, COM (2001) 366 final. See also Doreen McBarnet, Aurora Voiculescu and Tom Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (1st edition, Cambridge University Press 2009) 114.

of the Sinochem Group and their branches.

Types of major business	Energy Business	Agriculture Business	Chemical Business	Real Estate Business	Financial Business
The branch of major business	Exploration and production	Fertilizer business	Fluorine chemical	City operation	Trust business
The branch of major business	Oil refinery	Seed business	Natural rubber and rubber chemical	Real estate development	Financial leasing
The branch of major business	Oil trade	Agrochemical business	Pharmaceutical business	Hotel operation	Securities investment fund
The branch of major business	Warehousing and logistics	Agriculture service	Chemical logistics	Commercial leasing	Finance company
The branch of major business	Distribution and retailing		Petrochemical feedstock distribution	Retail business	Life insurance

Notably, the Sinochem Group may play different roles and serve diverse purposes and goals when engaging in multiple businesses and their branches. For example, the energy business contains five branches: exploration and production, oil refinery, oil trade warehousing and logistics and distribution and retailing. The goal of the “oil trade” branch is establishing ‘a stable and extensive sales network’ through ‘long-term cooperation relationship with major oil companies and related financial institutions in oil trading and risk management, and provide quality crude oil and professional services for domestic and foreign clients’.⁴²⁸ This branch literally does not show any factors of evidentiary elements for the “public body” determination.

⁴²⁸ See the official website of the Sinopharm at <http://english.sinochem.com/1528.html>.

Comparatively, the “warehousing and logistics” branch is more connected with the government, especially corresponding to ‘strictly follow national macro-control measures stabilizing supply and ensuring security of relevant industries’ as mentioned in the Management Report.⁴²⁹ As explained by the chapter of Business Overviews, the Sinochem Group is ‘entrusted by the state to build the national strategic crude oil reserve base and refined oil reserve base, contributing our part to China’s energy security’. In this sense, the Sinochem Group is responsible, to some extent, to perform a governmental function contributing to China’s energy security. And this can be regarded as one evidentiary element for the “public body” determination.

Accordingly, the evaluation of the Sinochem Group is preferably based on branch-level of its major business. Taking the “warehousing and logistics” branch as example, the following analysis illuminates the evaluation of the Sinochem Group in a “public body” investigation.

To begin with, the Sinochem Group cannot be literally and directly identified by the definition of the “public body” recalling the criteria for “public body” identification in Section 4.4. Therefore, the evaluation should consider multiple evidentiary elements to ‘avoid focusing on exclusively or unduly on any single characteristic without affording due consideration to others that may be relevant’.⁴³⁰

First, Article 7 of the SOAE law embodies an intention of state intervention through government policies. As analysed in the Section 4.5.3, Article 7 of the SOAE law stipulates that the state shall ‘strengthen the control force and influence of the state-owned economy’.⁴³¹ Although there are no specific provisions explaining the detailed method to strength such control force, it reflects the intention of state intervention through government policy at macro-level. This corresponds to Footnote 2 of the criteria for “public body” identification that ‘state intervention as well as the scope and

⁴²⁹ See *ibid.*

⁴³⁰ See the criteria for “public body” identification in Section 4.4.

⁴³¹ See Section 5.5.3 of Chapter 4 of this research.

content of government policies relating to the sector in which the investigated entity operates, could also be regarded as evidence to determine “public body”.

Second, the Guiding Opinion potentially indicate Yang Qi serving special business may corresponds to features of “public body” in exercising a governmental function. As analysed in the Section 4.5.3, the Guiding Opinions divide SOEs into two categories, the commercial SOEs and SOEs in public welfare nature, which have both governmental and private features. Though commercial SOEs are defined as conducting independent production and business activities, they may potentially interweave with state behaviour. The Guiding Opinions further classify commercial SOEs as those ‘whose business belongs to industries and fields of sufficient competition’ and ‘whose core business belongs to major industries and key fields concerning national security or the national economic lifeline, or that are mainly responsible for major special project tasks’.⁴³² For the second kind of SOEs, their evaluation shall not only consider business performance, but also aspects such as their ‘efforts to serve national strategies, safeguard national security and the operation of the national economy, develop cutting-edge strategic industries and complete special tasks’.⁴³³ The “warehousing and logistics” business of the Sinochem Group is more likely belong to the second kind. And the evaluation standards indicate that this kind of SOEs may serve national strategies by playing same role as subsidiary of government, and such behaviour may correspond to features of “public body” in exercising a governmental function. This may correspond to second paragraph of Footnote 3 of the criteria for “public body” identification that ‘an entity exercising governmental functions may serve as evidence’.

Third, the relationship between SASAC and Yang Qi also belongs to one evidentiary element. As discussed in Section 4.5.4.2, the Sinochem Group is a Yang Qi listed in the “directory” of SASAC, it is also under the supervision of SASAC as announced in its

⁴³² See Part (4) of Guiding Opinions of the CPC Central Committee and the State Council on Deepening the Reform of State-owned Enterprises.

⁴³³ See *ibid.*

2015 Annual Report, which indicates the Sinochem Group has been supervised or controlled more directly under SASAC compared with general SOEs.

This view of point is further supported by the Notice stipulating the tasks and functions of SASAC. According to the Notice, the supervisory relationship between SASAC and the Sinochem Group is embodied by three paragraphs. Paragraph (b) and (d) enables the SASAC to appoint the top executives and paragraph (f) require SASAC to urge ‘the supervised enterprises to carry out the guiding principles, policies, related laws and regulations and standards for safety production’. Paragraph (f) leaves a space that potentially correspond to the definition of a “public body” due to specific conditions. For example, if Yang Qi exercised any one of the activities as concluded in Footnote 1 of criteria for “public body” identification in Section 4.4, i.e., grant licenses, then that Yang Qi is more intended to be a “public body” when granting licenses. However, this should be evaluated by further investigation.

Forth, the responsibility of the Sinochem Group as stated in its Annual report is another evidentiary element. One responsibility of the Sinochem Group, as stated by the chapter of Management Report in the annal report, is embodied by a mission that is to be ‘a staunch force in ensuring energy security, agriculture security, and progress of the chemical industry’. ⁴³⁴ As explained by the subtitle ‘steadily improve social influence’, the Sinochem Group ‘perform political, economic and social responsibilities as prescribed by the Central Government, giving full play to our national team role in energy and agriculture sectors’. The “political responsibility” is generally understood to participate in activities as part of development strategy of the state, which is more likely to conduct governmental functions. For example, in order to ‘steadily improve social influence’ the Sinochem Group:

‘strictly follow national macro-control measures, namely fertilizer procurement and storage during the low seasons, strategic crude oil and refined oil reserve

⁴³⁴ See *ibid.*

building, Sino-foreign Potash Fertilizer Negotiations on a united front, which greatly contributes to stabilizing supply and ensuring security of relevant industries'.⁴³⁵

Accordingly, the purpose of activities, such as “fertilizer procurement and storage during the low seasons”, is to strictly follow national macro-control measures stabilizing supply and ensuring security of relevant industries. This is more of a governmental function rather than an enterprise’s social responsibility.

This governmental factor is more specific in the “warehousing and logistics” business of the Sinochem Group. As explained by the chapter of Business Overviews in the annual report, the Sinochem Group is ‘entrusted by the state to build the national strategic crude oil reserve base and refined oil reserve base, contributing our part to China’s energy security’. In this sense, the Sinochem Group is responsible, to some extent, to perform a governmental function contributing to China’s energy security. Recalling paragraph (b) of Footnote 3 of the criteria for “public body” identification in Section 4.4 and as addressed by the Appellate Body in the *United States - Countervailing Duty Measures on Certain Products from China* Case, ‘an entity exercising governmental functions may serve as evidence, particularly where such evidence points to a sustained and systematic practise’.⁴³⁶ Accordingly, the task to ‘build the national strategic crude oil reserve base and refined oil reserve base’ entrusted by the state is more likely a long-term strategy aiming at state’s energy security, which can be regarded as an evidentiary element.

In conclusion, the Sinochem Group is more likely a “public body” when shouldering the responsibility of stabilizing supply and ensuring security of relevant industries through strictly following national macro-control measures such as conducting the “warehousing and logistics” business. Besides, the evaluation of the Sinochem Group

⁴³⁵ See the official website of the Sinopharm at <http://english.sinochem.com/1528.html>.

⁴³⁶ See Appellate Body Report, *United States - Countervailing Duty Measures on Certain Products from China*, WT/DS437/AB/RW, adopted 16 July 2019, at para. 5.96.

is focusing on extraordinarily specific case. The “warehousing and logistics” business is only one branch of the Sinichem Group’s energy business. And there are four branches within the energy business and four businesses have same level with the energy business. Therefore, it may be impossible to identify the Yang Qi as a unified “public body” due to its diversified functions and responsibilities.

Notably, due to the limitation of accessible information, more evidence through questionnaires could help to refine the evaluation in the “public body” investigation. For example, if the Sinochem Group exercised any one of the activities as concluded in Footnote 1 of criteria for “public body” identification in Section 4.4, i.e., grant licenses, then it is by definition a “public body” when granting licenses. In that sense, SASAC may has delegated the governmental authority to the Sinochem Group when fulfilling its responsibility as stipulated in paragraph (f) of the Notice.

4.6 Conclusion

The determination of subsidy is concretized by the “public body” issue. which call for an interpretation of “public body” under Article 1.1 of ASCM. There are three main cases that discuss “public bodies” within the WTO dispute settlement system. First is the *Korea - Vessels* Case where “control of government” is recognised as one crucial factor of a “public body”.⁴³⁷ In addition, commercial principle and public policy objective may not qualify as factors to determine a “public body”. Then, in the *US - AD and CVD* Case, a “public body” is defined as an entity that possesses, exercises or is vested with governmental authority.⁴³⁸ “Control of government” as proposed in the *Korea -Vessels* Case may be of relevance but relies on certain circumstances. Despite “governmental authority” provides a clue for identifying a “public body”, the Appellate Body did not clarify what is necessary to demonstrate such authority, thus more criteria

⁴³⁷ See Panel Report, *Korea - Measures Affecting Trade in Commercial Vessels*, WT/DS273/R, adopted 7 March 2005.

⁴³⁸ See Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011.

shall be provided to prevent excessive discretion through the appropriate interpretations. The determination of “public body” is further improved in the *US - CVD* Case, where it focuses on ‘whether the entity itself possesses the core characteristics and functions’ that constitute a “public body”, and follows a principle to ‘avoid focusing exclusively or unduly on any single characteristic without affording due consideration to others that may be relevant’.⁴³⁹ In this regard, state intervention, as well as ‘the scope and content of government policies relating to the sector in which the investigated entity operates’, could also be regarded as evidence for determine a “public body”.

The CPTPP, as a recent free trade agreement closely links with the WTO system, especially in the dispute settlement dimension under the ADA and the ASCM. Its regulations are of referential value in evaluating the compliance of WTO law at international level. Article 17.3 of the CPTPP stipulates a new term “delegated authority”, which is not recorded in the GATT 1994 and the ASCM but relates to the “public body”. The analysis proposed that the criterion of “delegated authority” as stipulated in Article 17.3 serves same purposes with explanation by WTO tribunals in the term “public body”, thus, providing references to the interpretation of a “public body”.

Based on the analysis of “public body” by WTO cases and provisions of the CPTPP, the “public body” can refer to the following:

An entity that exercises any regulatory, administrative, or other governmental authority that the Party has directed or delegated to such entity.

Footnote 1: Examples of ‘exercising any regulatory, administrative or other governmental authority’ include: the power to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees, or other charges.

⁴³⁹ See Appellate Body Report, *United States - Countervailing Duty Measures on Certain Products from China*, WT/DS437/AB/RW, adopted 16 July 2019.

Footnote 2: The determination of a “public body” shall focus on ‘whether the entity itself possesses the core characteristics and functions’ that constitutes a “public body”, and follow the principle to ‘avoid focusing exclusively or unduly on any single characteristic without affording due consideration to others that may be relevant’. In this regard, state intervention, as well as the scope and content of government policies relating to the sector in which the investigated entity operates.

Footnote 3: Approaches to demonstrate “public body” may include, but not exhausted:

- (a) A state or other legal instrument expressly vests authority in the entity concerned;
- (b) An entity is exercising governmental functions may serve as evidence, particularly where such evidence points to a sustained and systematic practice;
- (c) A government exercises meaningful control over an entity in certain circumstances; (Formal indicia of government control are manifold, and there is evidence that such control has been exercised in a meaningful way.)

The findings also highlighted that SOEs in China, especially Chinese central SOEs (Yang Qi), are potentially “public bodies” when serving specific responsibility, for example, stabilizing supply and ensuring security of relevant industries through strictly following national macro-control measures. However, it may be impossible to identify the Yang Qi as a unified “public body” due to its diversified functions and responsibilities, further feedback and more evidence through questionnaires could help to refine the evaluation during the “public body” investigation.

Chapter 5: The “non-market economy treatment” in the China’s Accession Protocol

This chapter and the following Chapter 6 have explored the solution of the “double remedy” issue based on analysing the topic of “non-market economy treatment” in anti-dumping investigations. They aim to prevent the abuse of trade remedies by seeking appropriate interpretations of the WTO anti-dumping agreements regulating the “non-market economy treatment”. In specific, Article 15 of the China’s Accession Protocol to the WTO (CAP) is the direct legal basis of the “non-market economy treatment” targeting China within its validity under the WTO system. It allowed WTO Members to sidestep some controversies related to China’s economic structure, especially when calculating the dumping margin in the anti-dumping investigations.⁴⁴⁰ The interpretation of Article 15 is also one of the major issues in the *EU – Price Comparison Methodologies Case*.⁴⁴¹ This chapter showed that WTO Members cannot resort to the CAP when applying a discriminatory treatment or surrogate method to calculate the dumping margins for China’s products in the wake of the expiry of the provisions of Article 15. And especially, such discriminatory treatment for China cannot be based on its special market status. To reach this conclusion, the chapter has conducted a doctrinal analysis on the text of the CAP as well as its preparatory work (*travaux préparatoires*) and the WTO case law.

However, as discussed by several commentators, ‘this does not mean that the EU or other markets will have no defence against genuine Chinese dumping practices’.⁴⁴²

⁴⁴⁰ See James J Nedumpara and Weihuan Zhou, *Introduction: Non-market Economies in the Global Trading System—The Special Case of China* in James J Nedumpara and Weihuan Zhou (eds), *Non-Market Economies in the Global Trading System: The Special Case of China* (Springer Singapore 2018) <<https://www.springer.com/gp/book/9789811313301>> accessed 9 July 2020. Stéphanie Noël and Weihuan Zhou, ‘EU’s New Anti-Dumping Methodology and The End of The Non-Market Economy Dispute?’ (2019) 14 *Global Trade and Customs Journal* <<https://papers.ssrn.com/abstract=3424435>> accessed 9 July 2020.

⁴⁴¹ See *European Union — Measures Related to Price Comparison Methodologies* (DS516) www.wto.org/english/tratop_e/dispu_e/cases_e/ds516_e.htm. See also Weihuan Zhou and Delei Peng, ‘EU - Price Comparison Methodologies (DS516): Challenging the Non-Market Economy Methodology in Light of the Negotiating History of Article 15 of China’s WTO Accession Protocol’ (2018) 52 *Journal of World Trade* 505.

⁴⁴² See Edwin Vermulst, Juhi Dion Sud and Simon J Evenett, ‘Normal Value in Anti-Dumping Proceedings against China Post-2016: Are Some Animals Less Equal than Others’ (2016) 11 *Global Trade and Customs Journal* 212, 224; Weihuan Zhou and Delei Peng, ‘EU - Price Comparison Methodologies (DS516): Challenging the Non-Market

Article 2 of the ADA and Article VI of the GATT 1994 have stipulated the determination of dumping margins in special situations. And interpretations of the CAP do not preclude WTO Members applying the general rules set out in Article 2 of the ADA and Article VI of the GATT 1994.⁴⁴³ As a very creative practitioner in this regard, the EU has made revisions to its anti-dumping regulations by replacing the non-market economy provisions with a country-neutral methodology dealing with market distortions caused by the state intervention.⁴⁴⁴ Therefore, another two major concerns in the *EU – Price Comparison Methodologies* Case regarding the EU anti-dumping regulations and WTO law has been evaluated in the following chapter.⁴⁴⁵

5.1 The legal basis of the “non-market economy treatment”

The “non-market economy treatment” in the anti-dumping investigation, , also called the non-market economy methodology, relates to the discriminatory determination of dumping margins albeit the term “non-market economy” is nowhere defined in any GATT or WTO agreements.⁴⁴⁶ In general, the determination of dumping margins is based on a comparison between export price and normal value (normally domestic price in investigated country). The discriminatory use of surrogate method in anti-dumping investigation based on the market economy conditions ‘could be a violation of the non-discrimination obligation’ and is a “derogation from the WTO obligations’.⁴⁴⁷ However, discriminatory treatment is allowed but may not for a sustained position due to the specific circumstances of the investigated country, which generally targets on non-

Economy Methodology in Light of the Negotiating History of Article 15 of China’s WTO Accession Protocol’ (2018) 52 Journal of World Trade 505.

⁴⁴³ See Weihuan Zhou, ‘China’s Litigation on Non-Market Economy Treatment at the WTO: A Preliminary Assessment’ (2017) 5 Chinese Journal of Comparative Law 345.

⁴⁴⁴ Vermulst, Sud and Evenett (n 416) 224; Noël and Zhou (n 413).

⁴⁴⁵ See *European Union — Measures Related to Price Comparison Methodologies* (DS516) www.wto.org/english/tratop_e/dispu_e/cases_e/ds516_e.htm.

⁴⁴⁶ See James J. Nedumpara and Archana Subramanian, ‘China’s Long March to Market Economy Status: An Analysis of China’s WTO Protocol of Accession and Member Practices’ in James J. Nedumpara and Weihuan Zhou (eds), *Non-Market Economies in the Global Trading System: The Special Case of China* (Springer Singapore 2018) <<https://www.springer.com/gp/book/9789811313301>> accessed 9 July 2020.

⁴⁴⁷ See *ibid*.

market economies.⁴⁴⁸

Three sources, to different extents, permit WTO Members to apply special treatment when calculating the dumping margin and imposing anti-dumping duty. The Accessional Protocol to the WTO, especially for China (the CAP), directly and expressly stipulated such discriminatory treatment in Article 15:

(a) In determining price comparability under Article VI of 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:

...

(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.

Under the Protocol, WTO Members may calculate dumping margin through a method not based on China's domestic price. Subparagraph (d) of Article 15 stipulates a deadline for this treatment, it states that 'in any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession'.⁴⁴⁹ Then, what should be the appropriate interpretation of the expiry of Article 15: (a)(ii) becomes a key issue for special treatment discussed by experts,⁴⁵⁰ which will be analysed in the following

⁴⁴⁸ See *ibid.*

⁴⁴⁹ According to Article 15: (d):

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

⁴⁵⁰ See for example, Jorge Miranda, 'More on Why Granting China Market Economy Status after December 2016 Is Contingent upon Whether China Has in Fact Transitioned into a Market Economy' (2016) 11 *Global Trade and Customs Journal* 244; Bernard O'Connor, 'Much Ado about Nothing: 2016, China and Market Economy Status' (2015) 10 *Global Trade and Customs Journal* 176; Jochem De Kok, 'The Future of EU Trade Defence Investigations against Imports from China' (2016) 19 *Journal of International Economic Law* 515; Yenkong Ngangjoh-Hodu and Tianzhu Han, 'China's Market Economy Dilemma and Its Interplay with EU Anti-Dumping Law' (2019) 27 *Asia Pacific Law Review* 102; Roberto Soprano, 'The Principle of Effectiveness in the Interpretation of the Protocol of Accession of China to the World Trade Organization: Market Economy Considerations in Anti-Dumping Investigations' (2019) 46 *Legal Issues of Economic Integration* 29.

sections. Notably, such a legal basis is not applicable to other countries, because they are commitments to specific countries when accessing the WTO, such as China and Vietnam.⁴⁵¹

Another legal basis with a rigorous threshold is the second *Ad Note* to Article VI: 1 of the GATT 1994, it provides that:

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

The second *Ad Note* to Article VI: 1 “euphemistically” allows Members to calculate dumping margins not based on a strict comparison with domestic prices. However, the requirements to apply this provision are far stricter than those of other legal bases. Under the second *Ad Note*, the exporting country must have ‘a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the state’. The provision describes a type of “Soviet Union” model where the central government makes an economic plan and controls the operation of the domestic market. The Appellate Body, in the *European Communities - Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China Case*, pointed out that the second *Ad Note* stipulates a strict rule when identifying the exporting country in its context. Specifically, the non-market economy methodology is applicable to a country when it reflects a ‘complete or substantially complete monopoly of trade’ and the ‘fixing of all prices by the State’, and it is not ‘applicable to lesser forms of NMEs that do not fulfil both conditions’.⁴⁵² Accordingly, the investigating authority has to explicitly prove that the

⁴⁵¹ See Case T-512/09 *Rusal Armenal ZAO v Council of the European Union* [2013] ECLI:EU: T: 2013:571.

⁴⁵² See Appellate Body Report, *European Communities - Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, 15 July 2011, at para. 290.

The Report interprets the rules when applying the Second *Ad Note* to Article VI: 1 as follows:

We observe that the second *Ad Note* to Article VI:1 refers to a "country which has a complete or substantially complete monopoly of its trade" and "where all domestic prices are fixed by the State". This appears to describe a certain type of NME, where the State monopolizes trade and sets all domestic prices. The second *Ad Note* to

Chinese economy meets these two criteria.⁴⁵³ And it does not fit China's situation as a transitional economy described in Paragraph 150 of the Working Party Reports.⁴⁵⁴ As concluded by one commentator, 'no country today would fall within this narrowly defined category'.⁴⁵⁵ Therefore, the application of this legal basis is very limited.

Comparatively, Article VI: (b) of the GATT1994 and Article 2.2 of the ADA provide a general legal basis for alternative treatments among WTO Members. Based on Article VI of the GATT 1994:

[A] product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another:

(a) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or,

(b) in the absence of such domestic price, is less than either

(i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or

(ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.

Article VI:1 would thus not on its face be applicable to lesser forms of NMEs that do not fulfil both conditions, that is, the complete or substantially complete monopoly of trade and the fixing of all prices by the State.

⁴⁵³ See Vermulst, Sud and Evenett (n 20) 219.

⁴⁵⁴ See Doha WTO Ministerial Conference Fourth Session, 'Report of the Working Party on the Accession of China' <<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/Min01/3.pdf&Open=True>> accessed 10 July 2020. It records that:

[S]everal members of the Working Party noted that China was continuing the process of transition towards a full market economy. Those members noted that under those circumstances, in the case of imports of Chinese origin into a WTO Member, special difficulties could exist in determining cost and price comparability in the context of anti-dumping investigations and countervailing duty investigations. In fact, way back in 1998, i.e. prior to China's accession to the WTO, the EU had recognized that China is an economy in transition when it introduced the MET criteria in the basic AD Regulation.

⁴⁵⁵ See Sherzod Shadikhodjaev, 'Non-Market Economies, Significant Market Distortions, and the 2017 EU Anti-Dumping Amendment' (2018) 21 *Journal of International Economic Law* 885, 889. See also Weihuan Zhou, Henry Gao and Xue Bai, 'Building a Market Economy Through Wto-Inspired Reform of State-Owned Enterprises in China' (2019) 68 *International & Comparative Law Quarterly* 977, 1008; Weihuan Zhou, 'China's Litigation on Non-Market Economy Treatment at the WTO: A Preliminary Assessment' (2017) 5 *Chinese Journal of Comparative Law* 345.

Article VI: 1(b) of the GATT 1994 stipulates two alternatives for dumping margin calculation “in the absence of domestic price”. One is to take the highest comparable price to any third country, and the other is to construct a normal value via cost of production and reasonable additions. However, it does not further explain how to define the situation of “absence”. Possible scenarios could be that the ‘domestic price is not reliable in a special market’⁴⁵⁶ or a situation that cannot fulfil the conditions listed in subparagraph (a).

Article 2.2 of the ADA provides a similar method:

When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.

Compared with Article VI: (b) of the GATT 1994, the ADA provides an explanation of the situation “absence of such domestic price”. Pursuant to Article 2.2, “absence of such domestic price” refers to when there are no sales of the like product “in the ordinary course of trade”, there is a “particular market situation” or a “low volume of sales”. Thus, a discriminatory method is allowed based on any one of three situations. Nonetheless, Article 2.2 does not provide necessary instructions to demonstrate these thresholds, thus interpretations of these thresholds are explored in Chapter 6.

5.2 Introduction of Article 15 of the CAP

⁴⁵⁶ See Panel Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/R, adopted 22 October 2010.

Article 15 of the CAP regulates price compatibility in determining subsidies and dumping affairs under Article VI of the GATT 1994, the ADA and the ASCM. The most distinct feature of Article 15 of the CAP, especially in its subparagraph (a)(ii), provides WTO members with the possibility to derogate from domestic prices of China when determining normal value for dumping margin calculation. Accordingly, if Chinese manufactures were unable to show that the market economy conditions exist, the “non-market economy treatment” will be applied. Compared with strict rules of Article 2.2 of the ADA and Article VI of the GATT 1994, CAP is undoubtedly a preferential source for WTO members to apply the alternative treatment in trade remedy field.⁴⁵⁷

However, the discriminatory treatment in Article 15: (a)(ii) of the CAP officially expired on 12 December 2016,⁴⁵⁸ promoting debates on the legal effect of this expiry. Specifically, WTO members have different opinions on this issue, for example, Australia had already recognized China as a market economy in 2005, while the US opposes China’s demand that it be treated one. Moreover, experts hold different attitudes on this issue, some observers consider that the expiry of subparagraph (a)(ii) of Article 15 means that the remaining provisions of Article 15 still allow WTO Members to apply a surrogate method when calculating dumping margins for China’s products.⁴⁵⁹ And some commentators insist that WTO Members can no longer resort to a surrogate country method or similar methodology targeting China but must use Chinese domestic prices or costs to calculate dumping margins.⁴⁶⁰

⁴⁵⁷ For examples of disputes relating to the interpretation of CAP, see Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011.

⁴⁵⁸ According to Article 15: (d) of CAP: “in any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession”.

⁴⁵⁹ See Jorge Miranda, ‘More on Why Granting China Market Economy Status after December 2016 Is Contingent upon Whether China Has in Fact Transitioned into a Market Economy’ (2016) 11 *Global Trade and Customs Journal* 244; Bernard O’Connor, ‘Much Ado about Nothing: 2016, China and Market Economy Status’ (2015) 10 *Global Trade and Customs Journal* 176; Terence P Stewart and others, ‘The Special Case of China: Why the Use of a Special Methodology Remains Applicable to China after 2016’ (2014) 9 *Global Trade and Customs Journal* 272; Laurent Ruessmann and Jochen Beck, ‘2016 and the Application of an NME Methodology to Chinese Producers in Anti-Dumping Investigations’ (2014) 9 *Global Trade and Customs Journal* 457.

⁴⁶⁰ Jochem De Kok analysed China’s Accession Protocol to the WTO and concluded WTO Members may ‘no longer have resources to an NME methodology’ based on the Protocol. See Jochem De Kok, ‘The Future of EU Trade

The interpretation of Article 15 is one of the major issues in the *EU – Price Comparison Methodologies* Case, where the EU contended that the expiry of Article 15(a)(ii) still allowed the “non-market economy treatment” of China and merely shifted the burden of proof from Chinese producers to the investigating authorities.⁴⁶¹ The EU based its arguments on interpreting the remaining paragraphs of Article 15 of the CAP, as well as the Report of the Working Party on China’s accession to the WTO.⁴⁶²

The analysis of this issue below lends support to the view that WTO Members can no longer resort to a surrogate country method or similar methodology targeting China by the CAP, arguments by the EU will be analysed through interpretations of Article 15 of the CAP regarding its textual and contextual structure, preparatory work of the protocol based on VCLT (Vienna Convention on the Law of Treaties), along with interpretations by the WTO panel and appellate body.⁴⁶³

5.3 Textual and contextual analysis of Article 15 of CAP

Based on the textual and contextual analysis of Article 15 of the CAP, WTO Members may not resort to remaining provisions of Article 15 (a) to apply the “non-market economy treatment” for China in anti-dumping investigation. Besides, the first and

Defence Investigations against Imports from China’ (2016) 19 *Journal of International Economic Law* 515; Yenkong Ngangjoh-Hodu and Tianzhu Han, ‘China’s Market Economy Dilemma and Its Interplay with EU Anti-Dumping Law’ (2019) 27 *Asia Pacific Law Review* 102; Roberto Soprano, ‘The Principle of Effectiveness in the Interpretation of the Protocol of Accession of China to the World Trade Organization: Market Economy Considerations in Anti-Dumping Investigations’ (2019) 46 *Legal Issues of Economic Integration* 29. Weihuan Zhou and Delei Peng, ‘EU - Price Comparison Methodologies (DS516): Challenging the Non-Market Economy Methodology in Light of the Negotiating History of Article 15 of China’s WTO Accession Protocol’ (2018) 52 *Journal of World Trade* 505.

Some researchers, such as Weihuan Zhou, insist WTO members may continue to label China as an NME but whatever this label may entail, it no longer justifies the application of the NME methodology. See Weihuan Zhou, ‘China’s Litigation on Non-Market Economy Treatment at the WTO: A Preliminary Assessment’ (2017) 5 *Chinese Journal of Comparative Law* 345. Minyou Yu and Jian Guan, ‘The Non-Market Economy Methodology Shall Be Terminated After 2016’ (2017) 12 *Global Trade and Customs Journal* 16.

⁴⁶¹ See *European Union — Measures Related to Price Comparison Methodologies* (DS516) www.wto.org/english/tratop_e/dispu_e/cases_e/ds516_e.htm. See also Weihuan Zhou and Delei Peng, ‘EU - Price Comparison Methodologies (DS516): Challenging the Non-Market Economy Methodology in Light of the Negotiating History of Article 15 of China’s WTO Accession Protocol’ (2018) 52 *Journal of World Trade* 505.

⁴⁶² See *ibid*.

⁴⁶³ See Weihuan Zhou, ‘China’s Litigation on Non-Market Economy Treatment at the WTO: A Preliminary Assessment’ (2017) 5 *Chinese Journal of Comparative Law* 345.

third sentences of Article 15 (d) may not justify a surrogate method on China's product. At least, China is not obliged to prove market economy conditions, to justify a "market economy treatment", to WTO Members whose national law do not 'contains market economy criteria as of the date of (China's) accession'.

According to its title, the purpose of Article 15 is to serve price comparability in determining subsidies and dumping.⁴⁶⁴ Its subparagraph (a) regulates the distinguished determination of normal value for China as follows:

- (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.

Its subparagraph (d) provides a sunset clause for subparagraph (a)(ii) as follows:

- (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

⁴⁶⁴ According to CAP, title of Article 15 is "Price Comparability in Determining Subsidies and Dumping".

non-market economy provisions of subparagraph (a) shall no longer apply to that industry or sector.

Before interpreting related provisions, recalling the *United States - Standards for Reformulated and Conventional Gasoline Case*,⁴⁶⁵ the Appellate Body admitted that WTO law could be interpreted by VCLT and recalled Article 31 of VCLT that: ‘A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’.⁴⁶⁶ Accordingly, interpretation of the treaty shall focus on several standards which include, but not exclusively, ordinary meaning, context, object and purpose.

5.3.1 The first and third sentences of Article 15 (d) may not justify the “non-market economy treatment” on China’s products

Some exports consider that Article 15 (a)(i) and the first and third sentences of Article 15 (d) are still justify non-market economy methodology when Article 15 (a)(ii) expires, and China has to meet market economy requirements to avoid special treatment.⁴⁶⁷

Before discussing the connections between the sentences of Article 15 (d), the condition that ‘China has to meet market economy requirements’ has a threshold that is stipulated at the end of Article 15 (d). The proviso here is that the importing WTO Member’s national law ‘contains market economy criteria as of the date of (China’s) accession’.⁴⁶⁸

⁴⁶⁵ See Appellate Body Report, *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996.

⁴⁶⁶ See *ibid*, at para 17.

⁴⁶⁷ See Jorge Miranda, ‘More on Why Granting China Market Economy Status after December 2016 Is Contingent upon Whether China Has in Fact Transitioned into a Market Economy’ (2016) 11 *Global Trade and Customs Journal* 244; Bernard O’Connor, ‘Much Ado about Nothing: 2016, China and Market Economy Status’ (2015) 10 *Global Trade and Customs Journal* 176; Terence P Stewart and others, ‘The Special Case of China: Why the Use of a Special Methodology Remains Applicable to China after 2016’ (2014) 9 *Global Trade and Customs Journal* 272; Laurent Ruessmann and Jochen Beck, ‘2016 and the Application of an NME Methodology to Chinese Producers in Anti-Dumping Investigations’ (2014) 9 *Global Trade and Customs Journal* 457; James J. Nedumpara and Archana Subramanian, ‘China’s Long March to Market Economy Status: An Analysis of China’s WTO Protocol of Accession and Member Practices’ in James J Nedumpara and Weihuan Zhou (eds), *Non-Market Economies in the Global Trading System: The Special Case of China* (Springer Singapore 2018) <<https://www.springer.com/gp/book/9789811313301>> accessed 9 July 2020.

⁴⁶⁸ See Edwin Vermulst, Juhi Dion Sud and Simon J Evenett, ‘Normal Value in Anti-Dumping Proceedings against China Post-2016: Are Some Animals Less Equal than Others’ (2016) 11 *Global Trade and Customs Journal* 212, 215. Xuewei Feng, ‘The Termination of the Grandfather Clause in China’s Accession Protocol and the Normal Value

In other words, only when relevant WTO Members have national law stipulating market economy criteria, and especially no later than the time of China's accession to the WTO, then the first sentence of Article 15 (d) can be applied. National laws that do not fulfil this threshold thus cannot justify a surrogate method being applied to China's products in anti-dumping investigation. And China is not obliged to prove market economy conditions based on afore-mentioned national laws.

Noticeably, the above-mentioned threshold may not easy to satisfy, albeit Members like the EU that has a long history regulating dumping affairs with "state-controlled economy".⁴⁶⁹ As mentioned by Noël, Stéphanie and Zhou, Weihuan, the revision of EU AD regulation in 1998 created a list of non-market economy countries, including China; however, the EU Commission published a working document including five "country-wide" criteria to evaluate the granting of market economy status in 2008, which after "the time of China's accession to the WTO" (11 December 2011).⁴⁷⁰ Therefore, in this regard, the qualification of the EU is disputable.

The afore-mentioned conclusion can also be supported in the aspect of the scope of China's commitments in the CAP. According to the Ministry Commerce of China in 2016, only 17 out of 162 WTO Members have national legislation referring to market economy status.⁴⁷¹ If China has to fulfil the requirements of WTO Members who do not have clear market economy standards regardless of time, it might allow at least 145 Members with discretion in enacting market economy standards that China is obliged

Construction After Fifteen Years of Accession' in James J Nedumpara and Weihuan Zhou (eds), *Non-Market Economies in the Global Trading System: The Special Case of China* (Springer Singapore 2018) <<https://www.springer.com/gp/book/9789811313301>> accessed 9 July 2020.

⁴⁶⁹ The EU's first AD legislation was adopted in 1968 and contained a provision for state-controlled economies. See Stéphanie Noël and Weihuan Zhou, 'EU's New Anti-Dumping Methodology and The End of The Non-Market Economy Dispute?' (2019) 14 Global Trade and Customs Journal <<https://papers.ssrn.com/abstract=3424435>> accessed 9 July 2020.

⁴⁷⁰ See Commission of the European Communities, 'Commission Staff Document on Progress by the People's Republic of China towards Graduation to Market Economy Status in Trade Defence Investigations SEC (2008) 2503 Final' <http://trade.ec.europa.eu/doclib/docs/2009/june/tradoc_143599.pdf> accessed 10 July 2020. See also Stéphanie Noël and Weihuan Zhou, 'EU's New Anti-Dumping Methodology and The End of The Non-Market Economy Dispute?' (2019) 14 Global Trade and Customs Journal <<https://papers.ssrn.com/abstract=3424435>> accessed 9 July 2020.

⁴⁷¹ Regular Press Conference of the Ministry of Commerce on March 2, 2016, <http://english.mofcom.gov.cn/article/newsrelease/press/201603/20160301272238.shtml>.

to follow. And without a clear stipulation of NME within the WTO legal system, the legality of and disputes related to these national laws are difficult for the WTO DSB to regulate. More importantly, such a scenario is not regulated and reflected within the CAP, thus it may ultimately increase China's obligation and illegally expand China's commitments in the CAP. Therefore, the surrogate method based on the CAP can only be justified for WTO Members whose national law stipulates market economy criteria, and especially, no later than the time of China's accession to the WTO.

Regarding the connections between the sentences of Article 15 (d), several commentators assert that the first and third sentences logically correspond to subparagraph (a), while the second sentence refers to subparagraph (a)(ii), thus 'if it is only subparagraph (a)(ii) that provides Members with the ability to use a special methodology, there would be no reason for the first and third sentences to refer to subparagraph (a) instead of (a)(ii)'.⁴⁷²

In response to this reading, first, subparagraph (a) or, more precisely, the chapeau of subparagraph (a) itself cannot provide a legal basis for the non-market economy methodology because the operation of the subparagraph (a) 'is subject to the rules contemplated in the sub-paragraphs' (discussed in detail in next Section).⁴⁷³

Subparagraph (a) itself does not provide a legal basis for options but only states such options are available. In this regard, it is meaningless to highlight the distinctions between the sentences of Article 15 (d) by the chapeau of subparagraph (a) and subparagraph (a)(ii), because it is subparagraph (a)(i) and subparagraph (a)(ii) that constitute the legal basis for a 'methodology that is not based on a strict comparison with domestic prices or costs in China'.

⁴⁷² See Terence P Stewart and others, 'The Special Case of China: Why the Use of a Special Methodology Remains Applicable to China after 2016' (2014) 9 *Global Trade and Customs Journal* 272; Jorge Miranda, 'More on Why Granting China Market Economy Status after December 2016 Is Contingent upon Whether China Has in Fact Transitioned into a Market Economy' (2016) 11 *Global Trade and Customs Journal* 244.

⁴⁷³ See Weihuan Zhou, 'China's Litigation on Non-Market Economy Treatment at the WTO: A Preliminary Assessment' (2017) 5 *Chinese Journal of Comparative Law* 345.

Besides, what the first and the third sentences can justify is an early termination of the non-market economy methodology before 2016 by satisfying the market economy conditions.⁴⁷⁴ This interpretation is highlighted by the Appellate Body, in the *European Communities - Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China* Case, that:

Paragraph 15(d) of China's Accession Protocol establishes that the provisions of paragraph 15(a) expire 15 years after the date of China's accession (that is, 11 December 2016). It also provides that other WTO Members shall grant before that date the early termination of paragraph 15(a) with respect to China's entire economy or specific sectors or industries if China demonstrates under the law of the importing WTO Member 'that it is a market economy' or that 'market economy conditions prevail in a particular industry or sector'.⁴⁷⁵

Accordingly, the two sentences are included ensure the China's producers are not treated discriminatorily when they satisfy market economy conditions. As will be discussed in Section 5.5, subparagraph (d) is functionally established to ensure the "specials rules will expire" either in or before 2016.

Besides, the links between the sentences of Article 15 (d) refer to the termination of a special methodology based on the expression "in any event", as analysed by Edwin Vermulst. A common feature of the sentences in Article 15 (d) is that they relate to the termination of the non-market economy treatment. Both the first and third sentences stipulate termination of the surrogate method if the market economy requirements are satisfied, the only differences between them is the scope of the subject (the first sentence refers to the whole market of China, the third one refers to specific industries or sectors). The second sentence is based on scenarios established by the first and third sentences. Specifically, from the overall structure, it is unnecessary to use 'in any event'

⁴⁷⁴ Weihuan Zhou and Delei Peng, 'EU - Price Comparison Methodologies (DS516): Challenging the Non-Market Economy Methodology in Light of the Negotiating History of Article 15 of China's WTO Accession Protocol' (2018) 52 *Journal of World Trade* 505.

⁴⁷⁵ Appellate Body Report, *European Communities - Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, 15 July 2011.

in the second sentence, if the first and third sentences continue to apply, and the surrogate method is still to be applied. “In any event” is added to ensure that China is not ‘subjected to the special/analogue country methodology which deviates from the normal value calculation in Article 2 of ADA’.⁴⁷⁶ Therefore, the first and third sentences of Article 15 (d) may not justify a discriminatory method for China’s products.

5.3.2 Remaining provisions of Article 15(a) cannot justify the “non-market economy treatment” on China’s products

Several commentators assert that in the wake of the expiry of subparagraph(a)(ii), the remaining provisions of Article 15 (a) still apply, such as the chapeau of subparagraph (a) and subparagraph (a)(i), thus allowing WTO Members to use the non-market economy methodology for China.⁴⁷⁷ One argument being pointed out is that using China’s domestic price for dumping calculation, post-2016, would make subparagraph (a)(i) meaningless.⁴⁷⁸ Because in addressing the rules of treaty interpretation of VCLT, the ‘Appellate Body has recognized that “interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility”’.⁴⁷⁹ And

⁴⁷⁶ See Edwin Vermulst, Juhi Dion Sud and Simon J Evenett, ‘Normal Value in Anti-Dumping Proceedings against China Post-2016: Are Some Animals Less Equal than Others’ (2016) 11 Global Trade and Customs Journal 212, 215. See also Weihuan Zhou, ‘China’s Litigation on Non-Market Economy Treatment at the WTO: A Preliminary Assessment’ (2017) 5 Chinese Journal of Comparative Law 345.

⁴⁷⁷ See Barbara Barone and others, ‘Market Economy Status for China after 2016?’ (European Parliament 2016) <<http://bookshop.europa.eu/uri?target=EUB:NOTICE:QA0216255:EN:HTML>> accessed 10 July 2020. See also Bernard O’Connor, ‘The Myth of China and Market Economy Status in 2016’ (*International Economic Law and Policy Blog*) <<https://worldtradelaw.typepad.com/files/oconnorresponse.pdf>> accessed 10 July 2020; Bernard O’Connor, ‘Market-Economy Status for China Is Not Automatic’ (*VoxEU.org*, 27 November 2011) <<https://voxeu.org/article/china-market-economy>> accessed 13 July 2020. Laurent Ruessmann and Jochen Beck, ‘2016 and the Application of an NME Methodology to Chinese Producers in Anti-Dumping Investigations’ (2014) 9 Global Trade and Customs Journal 457; Theodore R Posner, ‘A Comment on Interpreting Paragraph 15 of China’s Protocol of Accession by Jorge Miranda’ (2014) 9 Global Trade and Customs Journal 146; Terence P Stewart and others, ‘The Special Case of China: Why the Use of a Special Methodology Remains Applicable to China after 2016’ (2014) 9 Global Trade and Customs Journal 272; Jorge Miranda, ‘More on Why Granting China Market Economy Status after December 2016 Is Contingent upon Whether China Has in Fact Transitioned into a Market Economy’ (2016) 11 Global Trade and Customs Journal 244.

⁴⁷⁸ See Terence P Stewart and others, ‘The Special Case of China: Why the Use of a Special Methodology Remains Applicable to China after 2016’ (2014) 9 Global Trade and Customs Journal 272; Jorge Miranda, ‘More on Why Granting China Market Economy Status after December 2016 Is Contingent upon Whether China Has in Fact Transitioned into a Market Economy’ (2016) 11 Global Trade and Customs Journal 244.

⁴⁷⁹ See Terence P Stewart and others, ‘The Special Case of China: Why the Use of a Special Methodology Remains Applicable to China after 2016’ (2014) 9 Global Trade and Customs Journal 272, 276. James J. Nedumpara and Archana Subramanian, ‘China’s Long March to Market Economy Status: An Analysis of China’s WTO Protocol of

in this regard, subparagraph (a)(ii) is ‘nothing but a draftsman’s tautological reinforcement of paragraph (a)(i)’.⁴⁸⁰

In response to this viewpoint, Article 31 of VCLT also highlights that treaties shall be interpreted “in their context”.⁴⁸¹ In this regard, it was first analysed in Section 5.3.1 of this research that a non-market economy methodology is not preferable post-2016 due to the connections between the sentences of Article 15 (d). In particular, “In any event” in the second sentence of Article 15 (d) is added to ensure that China is not ‘subjected to the special/analogous country methodology which deviates from the normal value calculation in Article 2 of ADA’.⁴⁸²

Besides, the chapeau of subparagraph (a) cannot provide a legal basis for the non-market economy methodology because the operation of the chapeau ‘is subject to the rules contemplated in the sub-paragraphs’.⁴⁸³ Article 15(a) stipulates the determination of “price comparability” with two options based on China’s specific situation. The chapeau itself, however, does not provide options but only states such options are available. In other words, it is subparagraphs (a)(i) and (ii) that provide specific methods that it should be “based on”.

Furthermore, subparagraph (a)(i) alone cannot justify a non-market economy methodology for China, because subparagraphs (a)(i) and (ii) should not be interpreted separately.⁴⁸⁴ As analysed by observers, those two subparagraphs are “two sides of one

Accession and Member Practices’ in James J Nedumpara and Weihuan Zhou (eds), *Non-Market Economies in the Global Trading System: The Special Case of China* (Springer Singapore 2018) <<https://www.springer.com/gp/book/9789811313301>> accessed 9 July 2020.

⁴⁸⁰ James J. Nedumpara and Archana Subramanian, ‘China’s Long March to Market Economy Status: An Analysis of China’s WTO Protocol of Accession and Member Practices’ in James J Nedumpara and Weihuan Zhou (eds), *Non-Market Economies in the Global Trading System: The Special Case of China* (Springer Singapore 2018) <<https://www.springer.com/gp/book/9789811313301>> accessed 9 July 2020.

⁴⁸¹ According to Article 31 of VCLT: ‘a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’.

⁴⁸² See Edwin Vermulst, Juhi Dion Sud and Simon J Evenett, ‘Normal Value in Anti-Dumping Proceedings against China Post-2016: Are Some Animals Less Equal than Others’ (2016) 11 Global Trade and Customs Journal 212, 215; Weihuan Zhou, ‘China’s Litigation on Non-Market Economy Treatment at the WTO: A Preliminary Assessment’ (2017) 5 Chinese Journal of Comparative Law 345.

⁴⁸³ See *ibid.*

⁴⁸⁴ See *ibid.*

coin”, which constitutes an integral process or system to determine “price comparability”. The remaining subparagraph (a)(i) itself is not to be read ‘*a contrario*’ or as also conferring the right to employ the NME Methodology’ because it is ‘granted exclusively by subparagraph (a)(ii)’.⁴⁸⁵ Therefore, if subparagraph (a)(i) works as the legal basis of NME methodology, it makes subparagraph (a)(ii) redundant.

Another reason claimed for continuing the non-market economy methodology for China is that Article 9 and Article 15 are twinned, while Article 9 provides that China should let its prices be set by the market, Article 15 regulates what should be done during the transition phase.⁴⁸⁶ Furthermore, if China cannot demonstrate it is a market economy, then WTO Members’ rights remain valid under subparagraphs(a), in particular, subparagraph (a)(i), and subparagraph (d).⁴⁸⁷

One point overlooked by this viewpoint is that Article 9 stipulates a long-term requirement, but Article 15(a)(ii) along with second sentence of Article 15 (d) offer a temporary solution, thus their features do not correspond with each other. Moreover, the implementation of second sentence of Article 15 (d) does not reply to Article 9, thus they are focusing on a different issue, which cannot constitute a legal basis for special treatment for China. Recall Article 9(1) of CAP that states:

China shall, subject to paragraph 2 below, allow prices for traded goods and services in every sector to be determined by market forces, and multi-tier pricing practices for such goods and services shall be eliminated.

Article 9 states that prices for traded goods and services shall be determined by market forces, which is obviously a long-time commitment based on China’s market status when accessing the WTO. At the time of accession to the WTO, China was identified as continuing the process of transition towards a full market economy by some WTO

⁴⁸⁵ See *ibid.*

⁴⁸⁶ See Barbara Barone and others, ‘Market Economy Status for China after 2016?’ (European Parliament 2016) 9 <<http://bookshop.europa.eu/uri?target=EUB:NOTICE:QA0216255:EN:HTML>> accessed 10 July 2020.

⁴⁸⁷ See *ibid.*, at page 10.

Members, thus in a situation of neither a centrally -planned soviet model or a market-controlled model.⁴⁸⁸ As domestic markets differ from country to country, there does not have to be a unified model to measure how long the transition of an economy will take, neither is it possible to calculate. And that is probably the reason why Article 9 does not have an expiry date as in Article 15. Thereby the commitment requires China to take steps and fulfil the requirement of price control gradually.

However, Article 15: (a)(ii) and the second sentence of Article 15: (d) express a temporary nature. It states, in any event, that the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession. “In any event”, here addresses how, despite China still being a so-called “non-market economy” under the national laws of some WTO Members and maintaining a special form of market status for a comparatively long period since its accession to the WTO, Article 15 (a)(ii) shall still be abolished. In other words, under any circumstances (whether or not China has been granted market economy status), subparagraph (a)(ii) shall be terminated, which implies that implementation of the second sentence of Article 15: (d) does not rely on Article 9. In practice, 11 December 2016 has already passed, and Article 15 (a)(ii) has come to an end, but Article 9 may still have effect, which also reveals the differences between Article 15(a)(ii), the second sentence of Article 15 (d) and Article 9. Therefore, a surrogate method for China cannot be justified by the connections between Article 9 and Article 15.

Notably, as mentioned by James J. Nedumpara and Archana Subramanian, the principle of *in dubio mitius* may provide a thought on this issue.⁴⁸⁹ The Latin phrase *in dubio*

⁴⁸⁸ See Doha WTO Ministerial Conference Fourth Session, ‘Report of the Working Party on the Accession of China’ <<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/Min01/3.pdf&Open=True>> accessed 10 July 2020, at para 150.

⁴⁸⁹ James J. Nedumpara and Archana Subramanian, ‘China’s Long March to Market Economy Status: An Analysis of China’s WTO Protocol of Accession and Member Practices’ in James J Nedumpara and Weihuan Zhou (eds), *Non-Market Economies in the Global Trading System: The Special Case of China* (Springer Singapore 2018) <<https://www.springer.com/gp/book/9789811313301>> accessed 9 July 2020.

mitius refer to “more leniently in case of doubt”.⁴⁹⁰ Regarding to international law, the principle holds that ‘where there is doubt about the existence of an obligation under international law, no obligation will be found in order to avoid limiting state sovereignty’.⁴⁹¹ Accordingly, based on afore-mentioned debates of Article 15, its expiry does not suggest to bring obligations to China. For now, the obligations to China is to receive a special methodology in anti-dumping investigation if it cannot show the market economy condition prevail in its industry. Therefore, at least, it is not preferential for Chinese manufacturers continue to demonstrate market economy position and justify a treatment of using their own cost for dumping margin calculation as long as there does not has a result of this issue.

5.4 Preparatory work (*travaux préparatoires*) of Article 15 of CAP

The VCLT addresses the importance of supplementary documents such as preparatory work of the treaty for interpretation of international provisions. The chapeau of Article 32 of the VCLT states:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31 ...

Pursuant to Article 32 of the VCLT, preparatory work on the treaty and the circumstances of its conclusion can be applied to the interpretation of international clauses. The preparatory resources of Article 15 of the CAP, such as the Sino-US bilateral WTO agreement⁴⁹² and the working paper on the accession of China,⁴⁹³ have

⁴⁹⁰ Aaron X Fellmeth and Maurice Horwitz, *Guide to Latin in International Law* (Oxford University Press 2009) <<https://www.oxfordreference.com/view/10.1093/acref/9780195369380.001.0001/acref-9780195369380>> accessed 9 July 2020.

⁴⁹¹ See *ibid.*

⁴⁹² See ‘U.S. - China Bilateral WTO Agreement’ (1999) <<https://clintonwhitehouse4.archives.gov/WH/New/WTO-Conf-1999/factsheets/fs-004.html>> accessed 13 July 2020.

⁴⁹³ See Doha WTO Ministerial Conference Fourth Session, ‘Report of the Working Party on the Accession of China’ <<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/Min01/3.pdf&Open=True>> accessed 10 July 2020. See also Ministry of Foreign Affairs of the People’s Republic of China, ‘Bilateral Agreement on China’s Entry into the WTO Between China and the United States’ <https://www.fmprc.gov.cn/mfa_eng/ziliao_665539/3602_665543/3604_665547/t18051.shtml> accessed 13 July 2020.

indicate that market status of China cannot justify a continuance of the “non-market economy treatment”, and such a treatment is not recommended for modern China and preferable to be terminated in the wake of expiry of Article 15 (a)(ii).

5.4.1 The Sino-US bilateral WTO agreement

The interpretation of the bilateral agreement suggests that the market status of China cannot justify a continuance of the “non-market economy treatment” and such a treatment is preferable to be terminated in the wake of expiry of Article 15 (a)(ii).

A Chinese Government Delegation held a series of talks with different government delegations in order to achieve a general agreement before formally accessing to the WTO. In November 1982, the Chinese Government obtained observer status and sent a delegation to attend the 36th Session of the Contracting Parties of GATT for the first time. On 10 July 1986, Ambassador Qian Jiadong, Permanent Representative of the People's Republic of China to the UN Office at Geneva, formally submitted an application for the resumption of China's membership of GATT as a Contracting Party. China later started bilateral talks with the Contracting Parties of GATT. From 10 and 15 November of 1999, the Chinese Government Delegation and the US Government Delegation held talks on China's accession to the WTO in Beijing. On 15 November, the two sides signed a bilateral agreement on China's entry to the WTO, which formally brought their talks to an end.⁴⁹⁴

The Sino-US bilateral WTO agreement (henceforth the bilateral agreement), as mentioned by the Ministry of Foreign Affairs of the People's Republic of China, not only promotes the all-round development of China-US trade and economic ties, and stabilizes and expands overall China-US relations, but, more importantly, helps to

⁴⁹⁴ See Ministry of Foreign Affairs of the People's Republic of China, 'Bilateral Agreement on China's Entry into the WTO Between China and the United States' <https://www.fmprc.gov.cn/mfa_eng/ziliao_665539/3602_665543/3604_665547/t18051.shtml> accessed 13 July 2020.

accelerate the process of China's entry to the WTO.⁴⁹⁵

The bilateral agreement covers all agricultural products, all industrial goods, and all service areas,⁴⁹⁶ part two of the agreement lists the “resolution of key unsolved issues”, which is relevant to Article 15 of CAP. Specifically, part two provides:

Anti-dumping. The agreement ensures that the United States can continue to apply our current non-market economy methodology in antidumping cases involving imports from China for 15 years. China can, of course, request review under U.S. law of specific sectors or the economy as a whole to determine if it is market oriented and no longer subject to the special methodology ...⁴⁹⁷

Two points are indicated by part two: first, the title of part two, namely, “resolution of key unsolved issues”, reaffirmed the “temporary” nature of the non-market economy methodology, which cannot last long. The “resolution of key unsolved issues” implies that issues relating to normal value construction cannot be properly solved when contracting the agreement, which might foreshadow the later CAP. Despite it is listed as “resolution”, it is not a solution in a real sense, the blurry expression “non-market economy methodology” does not specify what the methodology is and without further instructions. One conjecture or explanation of the ambiguous regulation of such a methodology, under this situation, is that the so called “non-market economy methodology” is a compromise attempt to deal with the dilemma of China's anti-dumping issue, and as an “attempt”, it is not authorized as a formal method in this agreement. Therefore, the method is temporarily effective for a limited period as negotiated in the agreement.

Notably, part two does not bind the exchange of a “non-market economy methodology” to requirement that demonstrating a market economy. At least one

⁴⁹⁵ See *ibid.*

⁴⁹⁶ See ‘U.S. - China Bilateral WTO Agreement’ (1999) <<https://clintonwhitehouse4.archives.gov/WH/New/WTO-Conf-1999/factsheets/fs-004.html>> accessed 13 July 2020.

⁴⁹⁷ See *ibid.*

commentator considers that as the provisions of Article 15 do not state that China will automatically become a market economy, then the special treatment shall remain unchanged.⁴⁹⁸ However, from a literal reading of part two of the bilateral agreement, the “non-market economy methodology” is an independent methodology, and the reason why the US is vested with the authority to apply such a method is because the agreement confers such a right. In other words, the NME treatment is not created to evaluate China’s economic status but to provide a method in anti-dumping investigation. The proof of a market economy status, in the agreement, is to allow earlier termination of this method if China can satisfy the market-oriented standards. Therefore, continuance of the “non-market economy methodology” cannot be justified by China’s economic status based on the bilateral agreement.

Second, when it comes to the 15-year deadline, the “non-market economy methodology” shall be terminated. One could argue that the agreement does not literally mention a “termination” or “expiry” as in Article 15 (d) of the CAP, thus it does not relinquish the application of “non-market economy methodology”. The bilateral agreement provides no direct instruction on this issue. However, relying on context of the agreement, it is unnecessary to negotiate a timescale, if the “non-market economy methodology” is always available. The ambiguous regulation of “non-market economy methodology” in the bilateral agreement provides the US with discretion in anti-dumping investigations neglecting domestic price of China’s products for 15 years. In return, after expiry, termination should also include a methodology that is ambiguously applied in anti-dumping investigations. The time limit can also be reflected by Summary of US – China Bilateral Agreement, it provides that:

Anti-dumping and Subsidies Methodology:

The agreed protocol provisions ensure that American firms and workers will have strong protection against unfair trade practices including dumping and subsidies. The U.S. and China have agreed that we will be able to maintain our current anti-

⁴⁹⁸ See Barbara Barone and others, ‘Market Economy Status for China after 2016?’ (European Parliament 2016) <<http://bookshop.europa.eu/uri?target=EUB:NOTICE:QA0216255:EN:HTML>> accessed 10 July 2020.

dumping methodology (treating China as a non-market economy) in future anti-dumping cases without risk of legal challenge. This provision will remain in force for 15 years after China's accession to the WTO.⁴⁹⁹

The phrase “remain in force” indicate that the validity of special methodology has a deadline and it is not designated as common methodology for trade remedy investigations. When the special methodology is expired, WTO Members shall follow the clear rules in Article VI of the GATT 1994, the ADA and the ASCM as stipulated in the chapeau of Article 15.

Crucially, this is more of referential value when compared with Article 15. As the provisions in Article 15 of the CAP are stipulated in the form of different layers in order to regulate the special situation of China, the expiry of one layer might inevitably trigger confusion in understanding the whole provision. By reference to the bilateral agreement, the expiry of Article 15(a)(ii) is preferably indicates termination of the non-market economy methodology in all its forms.

5.4.2 The report of the working paper on the accession of China

The analysis of reports on the working paper rebuts the view that the market status of China can justify the continuance of the non-market economy methodology.⁵⁰⁰

On March 4, 1987, a working party was established to examine a request from the Government of the People's Republic of China for resumption of its status as a GATT contracting party, and to submit to the General Council of WTO recommendations

⁴⁹⁹ See as cited by See Xuewei Feng, ‘The Termination of the Grandfather Clause in China's Accession Protocol and the Normal Value Construction After Fifteen Years of Accession’ in James J Nedumpara and Weihuan Zhou (eds), *Non-Market Economies in the Global Trading System: The Special Case of China* (Springer Singapore 2018) <<https://www.springer.com/gp/book/9789811313301>> accessed 9 July 2020.

⁵⁰⁰ For example, see Barbara Barone and others, ‘Market Economy Status for China after 2016?’ (European Parliament 2016) <<http://bookshop.europa.eu/uri?target=EUB:NOTICE:QA0216255:EN:HTML>> accessed 10 July 2020; James J. Nedumpara and Archana Subramanian, ‘China's Long March to Market Economy Status: An Analysis of China's WTO Protocol of Accession and Member Practices’ in James J Nedumpara and Weihuan Zhou (eds), *Non-Market Economies in the Global Trading System: The Special Case of China* (Springer Singapore 2018) <<https://www.springer.com/gp/book/9789811313301>> accessed 9 July 2020.

which could include a Draft Protocol on the status of China. On December 7, 1995, the Government of China applied for accession to the Marrakesh Agreement Establishing the World Trade Organization, the existing working party which then transformed into the WTO Accession Working Party. The Report of the working party on the accession of China (henceforth the working paper) was published on 10 November 2001.⁵⁰¹

The working paper covers the evaluation of China's trade regime including economic policies, a framework for making and enforcing policies, policies affecting trade in goods, a trade-related intellectual property regime, policies affecting trade in services and other issues.⁵⁰² Section IV (13) of the working paper records discussions of the trade remedy issue for China's special domestic market and a draft of China's commitments relating to Article 15 of the CAP.

Paragraph 150 of Section IV (13) addresses cost and price comparability concerning China, it provides that:

Several members of the Working Party noted that China was continuing the process of transition towards a full market economy. Those members noted that under those circumstances, in the case of imports of Chinese origin into a WTO Member, special difficulties could exist in determining cost and price comparability in the context of anti-dumping investigations and countervailing duty investigations. Those members stated that in such cases, the importing WTO Member might find it necessary to take into account the possibility that a strict comparison with domestic costs and prices in China might not always be appropriate.

Despite paragraph 150 recording the discussion of China's economic structure,⁵⁰³ the function of this paragraph does more than that; it, rather aims to reach an agreement on a trade remedy treatment for China. The WTO's legal rules grew out of the Uruguay

⁵⁰¹ See Doha WTO Ministerial Conference Fourth Session, 'Report of the Working Party on the Accession of China' <<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/Min01/3.pdf&Open=True>> accessed 10 July 2020.

⁵⁰² See *ibid.*, at pp. i-iv.

⁵⁰³ See Edwin Vermulst, Juhi Dion Sud and Simon J Evenett, 'Normal Value in Anti-Dumping Proceedings against China Post-2016: Are Some Animals Less Equal than Others' (2016) 11 *Global Trade and Customs Journal* 212.

Round negotiations, they aim to ‘facilitate trade among countries with different economic structures rather than force a country to adopt another’s structure’.⁵⁰⁴ The negotiators anticipated that a member’s economy might differ from a market-oriented structure, thus they foresaw four alternative economic structures and crafted WTO rules to regulate them.⁵⁰⁵ As a draft of commitments for accessing the WTO, paragraph 150 is obviously not an obligation for China’s economic structure. In fact, China did not pronounce its economic status when accessing the WTO.⁵⁰⁶ It, rather, attempted to avoid a negative effect on its specific economic structure from a trade remedy treatment, which is supported by the Chinese representative’s statement in paragraph 151 of the working paper, that ‘certain WTO Members ... had treated China as a non-market economy and imposed antidumping duties on Chinese companies without identifying or publishing the criteria used’.⁵⁰⁷ The following subparagraphs of paragraph 151 established cautious regulations when determining price comparability, which clearly indicates the purpose of Article 15 is to tackle the trade remedy issue,⁵⁰⁸ albeit it may not clarify the abolition of the “non-market economy treatment” in the CAP.⁵⁰⁹

Besides, the Working Party, through the literal expression of paragraph 150, clearly expressed their concern over price comparability in trade remedy investigations rather than a demonstration of market status. In other words, the Working Group worried that ‘special difficulties could exist in determining cost and price comparability’ but not ‘China was continuing the process of transition towards a full market economy’. The focus of the Working Party is on the construction of a proper method ensuring cost and

⁵⁰⁴ See Mark Wu, ‘The “China, Inc.” Challenge to Global Trade Governance’ (2016) 57 *Harvard International Law Journal* 261, 287.

⁵⁰⁵ Four alternative economic structures include a command economy structure prevalent in Communist countries, a “transition” economy from a centrally planned economy system to a market-oriented system, corporatism, and an integrated conglomerate-led structure. See *ibid.*

⁵⁰⁶ See Edwin Vermulst, Juhi Dion Sud and Simon J Evenett, ‘Normal Value in Anti-Dumping Proceedings against China Post-2016: Are Some Animals Less Equal than Others’ (2016) 11 *Global Trade and Customs Journal* 212.

⁵⁰⁷ See *ibid.*

⁵⁰⁸ Folkert Graafisma and Elena Kumashova, ‘In Re China’s Protocol of Accession and the Anti-Dumping Agreement: Temporary Derogation or Permanent Modification?’ (2014) 9 *Global Trade and Customs Journal* 154.

⁵⁰⁹ Terence P Stewart and others, ‘The Special Case of China: Why the Use of a Special Methodology Remains Applicable to China after 2016’ (2014) 9 *Global Trade and Customs Journal* 272.

price comparability, despite China's special market situation being the origin of the difficulty. Therefore, the recommendation for a surrogate method in the last sentence of paragraph 150 already contains the consideration that China is not regarded as a market economy by some WTO Members, while confirmed as market economy by others. The title of Article 15 of the CAP, namely, "Price Comparability in Determining Subsidies and Dumping", further reaffirms its focus.

Notably, the second *Ad Note* to Article VI: 1 of GATT 1994 contains similar expressions to paragraph 150 as follows:

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

The second *Ad Note* also allows a surrogate method in anti-dumping investigation, but it specifies the requirements for that method. According to the Appellate Body, the second *Ad Note* stipulated a strict rule when identifying an exporting country in its context.⁵¹⁰ Specifically, a non-market economy methodology is applicable to a country when it reflects a complete or substantially complete monopoly of trade and the fixing of all prices by the State, and it is not 'applicable to lesser forms of NMEs that do not fulfil both conditions'.⁵¹¹ China, when under evaluation by the Working Party, might reflect some features of a country in the second *Ad Note*. However, 'no country today would fall within this narrowly defined category'.⁵¹² In this sense, as the surrogate

⁵¹⁰ See Appellate Body Report, *European Communities - Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, 15 July 2011, at para290.

The Report interprets the rules when applying the Second *Ad Note* to Article VI: 1 as follows:

We observe that the second Ad Note to Article VI:1 refers to a "country which has a complete or substantially complete monopoly of its trade" and "where all domestic prices are fixed by the State". This appears to describe a certain type of NME, where the State monopolizes trade and sets all domestic prices. The second Ad Note to Article VI:1 would thus not on its face be applicable to lesser forms of NMEs that do not fulfil both conditions, that is, the complete or substantially complete monopoly of trade and the fixing of all prices by the State.

⁵¹¹ See *ibid.*

⁵¹² See Sherzod Shadikhodjaev, 'Non-Market Economies, Significant Market Distortions, and the 2017 EU Anti-

method in the second *Ad Note* is not applicable to a country like China, then, the same method as in paragraph 150 may have a similar interpretation, which provides reference for Article 15 of the CAP.⁵¹³

5.5 References of interpretation by the *European Communities - Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China Case*⁵¹⁴ and the *Rusal Armenal ZAO V Council of the European Union Case*⁵¹⁵

The discussion of WTO case law also shed light on the understanding of Article 15 of the CAP. Based on the analysis of the WTO tribunals, the remaining provisions of Article 15 (a) and (d) cannot justify NME treatment for China. And China's market status cannot justify an exception to treat China differently in the anti-dumping investigation.

The Appellate Body, in the *European Communities - Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China Case*, addressed an integral feature of Article 15:

Paragraph 15(d) of China's Accession Protocol establishes that the provisions of paragraph 15(a) expire 15 years after the date of China's accession (that is, 11 December 2016). It also provides that other WTO Members shall grant before that date the early termination of paragraph 15(a) with respect to China's entire economy or specific sectors or industries if China demonstrates under the law of the importing WTO Member 'that it is a market economy' or that 'market economy conditions prevail in a particular industry or sector'. Since paragraph 15(d) provides for rules on the termination of paragraph 15(a), its scope of application cannot be wider than that of paragraph 15(a). Both paragraphs concern exclusively

Dumping Amendment' (2018) 21 *Journal of International Economic Law* 885, 889; Weihuan Zhou, Henry Gao and Xue Bai, 'Building a Market Economy Through Wto-Inspired Reform of State-Owned Enterprises in China' (2019) 68 *International & Comparative Law Quarterly* 977, 1008; Weihuan Zhou, 'China's Litigation on Non-Market Economy Treatment at the WTO: A Preliminary Assessment' (2017) 5 *Chinese Journal of Comparative Law* 345.

⁵¹³ See Edwin Vermulst, Juhi Dion Sud and Simon J Evenett, 'Normal Value in Anti-Dumping Proceedings against China Post-2016: Are Some Animals Less Equal than Others' (2016) 11 *Global Trade and Customs Journal* 212.

⁵¹⁴ See Appellate Body Report, *European Communities - Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, 15 July 2011.

⁵¹⁵ See Case T-512/09 *Rusal Armenal ZAO v Council of the European Union* [2013] ECLI:EU:T:2013:571.

the determination of normal value. In other words, paragraph 15(a) contains special rules for the determination of normal value in antidumping investigations involving China. Paragraph 15(d) in turn establishes that these special rules will expire in 2016 and sets out certain conditions that may lead to the early termination of these special rules before 2016.⁵¹⁶

The analysis of the Appellate Body clearly rebuts the viewpoint that in the wake of the expiry of subparagraph(a)(ii), the remaining provisions of Article 15 (a) and (d) still allow WTO Members to use the non-market economy methodology for China.⁵¹⁷

According to the Appellate Body, subparagraphs (a) and (d) constitute an integral provision regulating special rules for the termination of normal value, where subparagraph (a) provides a description of the special rules and subparagraph (d) provides a termination clause.⁵¹⁸ In other words, their functions are mutually complementary, thus they cannot be interpreted separately. The Appellate Body is very prudent to pick the words, it applied “paragraph 15(a)” rather than “paragraph 15(a)(ii)” or “chapeau of paragraph 15(a)” to describe “special rules for the determination of normal value”, which highlights the “non-market economy treatment” in paragraph 15(a) should be understood as an integral part. It then confirmed that paragraph 15 (d) establishes expiry of “these special rules”, which emphasises paragraph 15 (d) affecting on the “non-market economy treatment” under whole part of paragraph 15(a). in this regard, subparagraph (b) is functionally established to ensure that the “special rules will expire” either in or before 2016.⁵¹⁹

⁵¹⁶ See Appellate Body Report, *European Communities - Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, 15 July 2011.

⁵¹⁷ For example, several experts contend that the NME methodology is still available after 11 December 2016, because Article 15(d) refers to the expiry of Article 15 (a)(ii) only, not the whole of Article 15 (a). See Jorge Miranda, ‘More on Why Granting China Market Economy Status after December 2016 Is Contingent upon Whether China Has in Fact Transitioned into a Market Economy’ (2016) 11 *Global Trade and Customs Journal* 244; Bernard O’Connor, ‘Much Ado about Nothing: 2016, China and Market Economy Status’ (2015) 10 *Global Trade and Customs Journal* 176; Terence P Stewart and others, ‘The Special Case of China: Why the Use of a Special Methodology Remains Applicable to China after 2016’ (2014) 9 *Global Trade and Customs Journal* 272; Laurent Ruessmann and Jochen Beck, ‘2016 and the Application of an NME Methodology to Chinese Producers in Anti-Dumping Investigations’ (2014) 9 *Global Trade and Customs Journal* 457.

⁵¹⁸ See Weihuan Zhou, ‘China’s Litigation on Non-Market Economy Treatment at the WTO: A Preliminary Assessment’ (2017) 5 *Chinese Journal of Comparative Law* 345.

⁵¹⁹ See Appellate Body Report, *European Communities - Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, 15 July 2011, at para. 289.

Moreover, the integral features of Article 15 may also be reflected in the scope of Article 15 (d) as delineated by the Appellate Body.⁵²⁰ Regarding Article 15 (d), the Appellate Body literally expressed that ‘its scope of application cannot be wider than that of paragraph 15(a)’. In other words, the tribunals worried that the interpretation of such a provision might exceed the scope of subparagraph 15 (a), i.e. be applied to subsidy related affairs. Conversely, the interpretation of Article 15 (d) shall at least including Article 15 (a), because it would be unnecessary to use “wider” if subparagraph (d) only imply expiry of one part of paragraph (a).

Besides, the tribunal’s analysis also challenges the viewpoint that the “non-market economy treatment” is still available due to China’s special market status.⁵²¹ The Appellate Body stated:

In our view, therefore, Section 15 of China's Accession Protocol does not authorize WTO Members to treat China differently from other Members except for the determination of price comparability in respect of domestic prices and costs in China, which relates to the determination of normal value. We consider that, while Section 15 of China's Accession Protocol establishes special rules regarding the domestic price aspect of price comparability, it does not contain an open-ended exception that allows WTO Members to treat China differently for other purposes under the Anti-Dumping Agreement and the GATT 1994, such as the determination of export prices or individual versus country-wide margins and duties.⁵²²

According to the Appellate Body, Article 15 only allows WTO Members to apply a discriminatory treatment to China for price comparability in relation to the determination of normal value. An obligation to prove a market economy condition is certainly not included and, in the tribunal’s words, this may create a new exception and enlarge China’s commitments to the CAP. Therefore, when the provisions of Article 15

⁵²⁰ See Edwin Vermulst, Juhi Dion Sud and Simon J Evenett, ‘Normal Value in Anti-Dumping Proceedings against China Post-2016: Are Some Animals Less Equal than Others’ (2016) 11 Global Trade and Customs Journal 212, 217.

⁵²¹ See Barbara Barone and others, ‘Market Economy Status for China after 2016?’ (European Parliament 2016) <<http://bookshop.europa.eu/uri?target=EUB:NOTICE:QA0216255:EN:HTML>> accessed 10 July 2020.

⁵²² See Appellate Body Report, *European Communities - Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, 15 July 2011, at para. 290.

expired, there was no reason for a surrogate method to be available based on the claim that China is not a market economy country.

The EU's General Court made similar statements in the *Rusal Armenal ZAO V Council of the European Union Case*:

... [T]he Council states that there are also other members of the WTO which do not treat Armenia as a market economy and that, unlike in the cases of the People's Republic of China and the Socialist Republic of Vietnam, the Republic of Armenia did not negotiate a deadline beyond which the other WTO members were required to treat it as a market economy.⁵²³

Accordingly, the Court directly believed there were negotiated deadlines for China and Vietnam relating to the "non-market economy treatment" as a commitment to them.⁵²⁴

The Court also, at paragraph 47, emphasized such cut-off date for the expiry of China's commitments for price comparability. The Court stated:

In that regard, the Court notes that point 15 of Part I of the Protocol on the accession to the WTO of the People's Republic of China expressly provides for the possibility that other WTO members may not apply Article 2 of the Anti-Dumping Agreement where the producer(s) concerned fail to show that they operate under market economy conditions as regards the manufacture, production and sale of the like product. The same is true of point 3 of Part I of the Protocol on the Accession to the WTO of the Socialist Republic of Vietnam, which, by reference to paragraphs 527 and 255 of the Working Party Report on the Accession of that country to the WTO, lays down an identical exception. It must be emphasised that, contrary to the Council's and the Commission's contentions, the exceptions in question were not requested by those two candidate countries for accession in exchange for setting a cut-off date after which they would be repealed. As is apparent from paragraph 150 of the Report of the Working Party on the Accession to the WTO of the People's Republic of China and from paragraph 254 of the Report of the Working Party on the Accession of the Socialist Republic of Vietnam, it was the WTO members which raised the issue of price comparability in the candidate countries and obtained the abovementioned commitments from them together with a cut-off date

⁵²³ See Case T-512/09 *Rusal Armenal ZAO v Council of the European Union* [2013] ECLI:EU: T: 2013:571.

⁵²⁴ See *ibid* at para 30. See also Edwin Vermulst, Juhi Dion Sud and Simon J Evenett, 'Normal Value in Anti-Dumping Proceedings against China Post-2016: Are Some Animals Less Equal than Others' (2016) 11 *Global Trade and Customs Journal* 212, 217.

after which the commitments would expire.

The Court confirmed the viewpoint that China's commitment in the Article relates to the price comparability issue, but it is not an obligation to prove its market status. In addition, a cut-off date is set to guarantee the expiry of such a commitment. NME treatment, thus, cannot be justified by the Protocol based on the cut-off date.

5.6 Conclusion

Three sources, to different extent, permit WTO Members to apply special treatment calculating the dumping margin and impose anti-dumping duty. The CAP directly and expressly stipulated such discriminatory treatment to China in its Article 15. The analysis has attempted to show that WTO Members cannot resort to the CAP when applying a surrogate method to calculate dumping margins for China's products in the wake of the expiry of the provisions of Article 15. And especially, such discriminatory treatment for China cannot be based on its special market status.

The findings are based on the interpretations of Article 15 of the CAP regarding its textual and contextual structure, preparatory work of the protocol along with the WTO case law. In detail, based on textual and contextual analysis of Article 15 of the CAP, WTO Members may not resort to remaining provisions of Article 15 (a) to apply "the non-market economy treatment" for China's exporters in the anti-dumping investigation. Besides, the first and third sentences of Article 15 (d) may not justify a surrogate method for China's product. At least, China is not obliged to prove a market economy condition to justify market economy treatment, to WTO Members whose national law do not 'contains market economy criteria as of the date of (China's) accession'. The preparatory resources of Article 15 of CAP, such as the Sino-US bilateral WTO agreement⁵²⁵ and working paper on the accession of China⁵²⁶, indicate

⁵²⁵ See 'U.S. - China Bilateral WTO Agreement' (1999) <<https://clintonwhitehouse4.archives.gov/WH/New/WTO-Conf-1999/factsheets/fs-004.html>> accessed 13 July 2020.

⁵²⁶ See Doha WTO Ministerial Conference Fourth Session, 'Report of the Working Party on the Accession of China'

that the market status of China cannot justify a continuance of the “non-market economy treatment”, and such treatment is not recommended for modern China and preferable to be terminated in the wake of the expiry of Article 15 (a)(ii). Based on the analysis of international cases, the *European Communities - Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China Case*⁵²⁷ and the *Rusal Armenal ZAO V Council of the European Union Case*,⁵²⁸ the remaining provisions of Article 15 (a) and (d) cannot justify the “non-market economy treatment” for China. And China’s market status cannot support an exception to treat China differently in anti-dumping investigation.

However, as discussed by several commentators, ‘this does not mean that the EU or other markets will have no defence against genuine Chinese dumping practices’.⁵²⁹ Article 2 of the ADA and Article VI of the GATT 1994 stipulated the determination of dumping margins in special situations. And the interpretations of the CAP do not preclude WTO Members from applying general rules as set out in Article 2 of the ADA and Article VI of the GATT 1994.⁵³⁰ As a very creative practitioner in this regard, the EU has made revisions to its anti-dumping regulations by replacing the non-market economy provisions with a country-neutral methodology dealing with market distortions caused by the state intervention, which will be evaluated in the following chapter.⁵³¹

<<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/Min01/3.pdf&Open=True>> accessed 10 July 2020.

⁵²⁷ See Appellate Body Report, *European Communities - Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, 15 July 2011.

⁵²⁸ See Case T-512/09 *Rusal Armenal ZAO v Council of the European Union* [2013] ECLI:EU:T:2013:571.

⁵²⁹ See Edwin Vermulst, Juhi Dion Sud and Simon J Evenett, ‘Normal Value in Anti-Dumping Proceedings against China Post-2016: Are Some Animals Less Equal than Others’ (2016) 11 *Global Trade and Customs Journal* 212, 224; Stéphanie Noël and Weihuan Zhou, ‘EU’s New Anti-Dumping Methodology and The End of The Non-Market Economy Dispute?’ (2019) 14 *Global Trade and Customs Journal* <<https://papers.ssrn.com/abstract=3424435>> accessed 9 July 2020.

⁵³⁰ See Weihuan Zhou, ‘China’s Litigation on Non-Market Economy Treatment at the WTO: A Preliminary Assessment’ (2017) 5 *Chinese Journal of Comparative Law* 345.

⁵³¹ See Edwin Vermulst, Juhi Dion Sud and Simon J Evenett, ‘Normal Value in Anti-Dumping Proceedings against China Post-2016: Are Some Animals Less Equal than Others’ (2016) 11 *Global Trade and Customs Journal* 212, 224; Stéphanie Noël and Weihuan Zhou, ‘EU’s New Anti-Dumping Methodology and The End of The Non-Market Economy Dispute?’ (2019) 14 *Global Trade and Customs Journal* <<https://papers.ssrn.com/abstract=3424435>> accessed 9 July 2020.

Chapter 6: The special treatment in the EU anti-dumping regulations

This chapter has explored the appropriate interpretation of another legal basis to the “non-market economy treatment” – Article 2 of the ADA and Article VI of the GATT 1994 – under the WTO law. In specific, it examined the revisions of the “non-market economy treatment” provisions in the EU anti-dumping regulations and their conformity with the WTO law. It concluded that, when conducting the anti-dumping investigations of either market or non-market economies under the WTO legal system, the primary choice in determining a normal value shall be based on the actual cost of production “in the country of origin”, even though such cost is considered to be “distorted”. When the construction of a normal value is necessary, all factors related to the costs in that country, including “price distortions” should be considered ‘as long as they reflect the prevailing conditions in the market of exportation’.

6.1 The EU anti-dumping regulations: a response to the “non-market economy treatment”

Revisions to the anti-dumping regulations were made by the European Parliament and the Council in 2016 and 2017, respectively; these reflect that the EU intended to take steps regulating special treatment at the national level due to a number of external factors.⁵³² On June 8, 2016, the European Parliament and the Council published Regulation 2016/1036⁵³³ (henceforth 2016 Regulation) serving as a revision of the 2009 Regulation⁵³⁴ and regulating NME related affairs. Soon after, on 12 December 2017, a

⁵³² Factors include “huge overcapacities overseas fuelled by massive subsidies and price-distorting policies”, especially, in the steel industry, see Sherzod Shadikhodjaev, ‘Non-Market Economies, Significant Market Distortions, and the 2017 EU Anti-Dumping Amendment’ (2018) 21 *Journal of International Economic Law* 885, 886. See also Christian Tietje and Vinzenz Sacher, ‘The New Anti-Dumping Methodology of the European Union – A Breach of WTO-Law?’ in Marc Bungenberg and others (eds), *The Future of Trade Defence Instruments: Global Policy Trends and Legal Challenges* (Springer International Publishing 2018) <<https://www.springer.com/gp/book/9783319953052>> accessed 14 July 2020.

⁵³³ Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union [2016] L176/21.

⁵³⁴ Council Regulation (EC) 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community [2009] OJ L343/51.

new regulation was released, the new 2017 Regulation⁵³⁵ revised the articles of the 2016 Regulation with respect to determinations of normal value in the case of imports from countries with “significant market distortions”. The new regulation also abolished the notion of “non-market-economy” countries and provisions pertaining to their treatment.

The 2017 Regulation seems to be an attempt that eliminates the boundary between market economy and non-market economy countries, thus treating all WTO Members equally. It is supposed that China and other so called “non-market economies” can be treated equally as market economies, meanwhile, normal value construction and the third country or analogue country methodology will not be applied to products produced in and exported from those countries. Undoubtedly, if the regulation serves that purpose, the EU’s move will play a representative role in reducing trade disputes raised by special treatment of non-market economies. Opponents of this view commented that the new methodology ‘is designed to maintain the effects of the NME Methodology by ensuring the same level of AD duties as the EU had been able to impose through the NME Methodology’.⁵³⁶

More importantly, the revisions of EU anti-dumping regulations reflect the EU’s attitude to the interpretation of China’s Accession Protocol to the WTO.⁵³⁷ After 2016, Article 15(a)(ii) of the China’s Accession Protocol to the WTO officially expired; then, the treatment of China’s products in anti-dumping investigations was urged to be put on the table. Obviously, China expects the EU to follow standard comparisons for dumping margins under Article 2 of the ADA. However, the “non-market economy

⁵³⁵ Regulation (EU) 2017/2321 of the European Parliament and of the Council of 12 December 2017 on amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union [2017] L338/1.

⁵³⁶ See Stéphanie Noël and Weihuan Zhou, ‘EU’s New Anti-Dumping Methodology and The End of The Non-Market Economy Dispute?’ (2019) 14 Global Trade and Customs Journal <<https://papers.ssrn.com/abstract=3424435>> accessed 9 July 2020.

⁵³⁷ See Sherzod Shadikhodjaev, ‘Non-Market Economies, Significant Market Distortions, and the 2017 EU Anti-Dumping Amendment’ (2018) 21 Journal of International Economic Law 885, 886. See also Edwin Vermulst and Juhi Sud, ‘Treatment of China in EU Anti-dumping Investigations Post-December 2017: Plus ça change, plus c’est la même chose’ in James J Nedumpara and Weihuan Zhou (eds), *Non-Market Economies in the Global Trading System: The Special Case of China* (Springer Singapore 2018) <<https://www.springer.com/gp/book/9789811313301>> accessed 9 July 2020.

treatment” could enable the EU to protect its domestic industry through implementation of anti-dumping measures while sidestep controversy by China’s unique economic structure. In this regard, new anti-dumping regulation is enacted as a response.

6.2 The “non-market economy treatment” in the EU 2016 anti-dumping regulation

Under the WTO framework, there is no specific definition of a market economy and a non-market economy.⁵³⁸ Although the second *Ad Note* to Article VI:1 of GATT 1994 defines a special situation/status of an economy that ‘has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State’, it intended to describe a special situation to evaluate dumping margins. And even though they may be regarded as a standard for non-market economy, it is too strict and accordingly ‘not a single WTO Members would qualify as a non-market economy anymore’.⁵³⁹

Comparatively, the EU provides systematic standards around the topic of market status for trade remedy. First, the European Commission has a set of standards to determine economic status.⁵⁴⁰ Accordingly, non-market economies can be granted market

⁵³⁸ See Edwin Vermulst, Juhi Dion Sud and Simon J Evenett, ‘Normal Value in Anti-Dumping Proceedings against China Post-2016: Are Some Animals Less Equal than Others’ (2016) 11 *Global Trade and Customs Journal* 212, 228.

⁵³⁹ See Christian Tietje and Vinzenz Sacher, ‘The New Anti-Dumping Methodology of the European Union – A Breach of WTO-Law?’ in Marc Bungenberg and others (eds), *The Future of Trade Defence Instruments: Global Policy Trends and Legal Challenges* (Springer International Publishing 2018) <<https://www.springer.com/gp/book/9783319953052>> accessed 14 July 2020.

⁵⁴⁰ Commission of the European Communities, ‘Commission Staff Document on Progress by the People’s Republic of China towards Graduation to Market Economy Status in Trade Defence Investigations SEC (2008) 2503 Final’ <http://trade.ec.europa.eu/doclib/docs/2009/june/tradoc_143599.pdf> accessed 10 July 2020. In China’s case, the five criteria are as follows:

- 1 a low degree of government influence over the allocation of resources and decisions of enterprises, whether directly or indirectly (e.g. public bodies), for example through the use of state-fixed prices, or discrimination in the tax, trade or currency regimes.
- 2 an absence of state-induced distortions in the operation of enterprises linked to privatisation and the use of nonmarket trade or compensation system.
- 3 the existence and implementation of a transparent and nondiscriminatory company law which ensures adequate corporate governance (application of international accounting standards, protection of shareholders, public availability of accurate company information).
- 4 the existence and implementation of a coherent, effective, and transparent set of laws which ensure

economy status, if it fulfilled criteria enacted by European Commission. Besides, countries that cannot get market economy status may be able to acquire the same “treatment” as a market economy if they comply with Article 2.7 (c) of the EU 2016 Regulation.⁵⁴¹

Otherwise, Article 2.7 allows discriminatory treatment in dumping margin calculation for non-market economies, it provides that:

In the case of imports from non-market-economy countries, the normal value shall be determined on the basis of the price or constructed value in a market economy third country, or the price from such a third country to other countries...

The stipulation has similar expressions to Article 2.2 of the ADA and Article VI: (b) of the GATT 1994 on building normal value, but they differ in the details. Article 2.7 clearly points out that the construction of normal value applies to non-market economies, while the WTO rules do not address the nature of targeted countries. According to Article 2.2 of the ADA and Article VI: (b) of the GATT 1994, alternative treatments in the anti-dumping investigation might be applied when “a proper comparison” is not available. And this is further explained by three situations: no sales

the respect of property rights and the operation of a functioning bankruptcy regime.

- 5 the existence of a genuine financial sector which operates independently from the state and which in law and practice is subject to sufficient guarantee provisions and adequate supervision.”

⁵⁴¹ The standards of Article 2.7 (c) include:

- 1) decisions of firms regarding prices, costs and inputs, including for instance raw materials, cost of technology and labour, output, sales and investment, are made in response to market signals reflecting supply and demand, and without significant State interference in that regard, and costs of major inputs substantially reflect market values,
- 2) firms have one clear set of basic accounting records which are independently audited in line with international accounting standards and are applied for all purposes,
- 3) the production costs and financial situation of firms are not subject to significant distortions carried over from the former non-market-economy system, in particular in relation to depreciation of assets, other write-offs, barter trade and payment via compensation of debts,
- 4) the firms concerned are subject to bankruptcy and property laws which guarantee legal certainty and stability for the operation of firms, and
- 5) exchange rate conversions are carried out at the market rate.

of a like product “in the ordinary course of trade”, a “particular market situation” or a “low volume of the sales”. The three situations illustrate three main problems that the authority may confront in anti-dumping investigations. The attitude of WTO rules is thus more problem-based and relates to a specific situation where a proper comparison is not possible. Comparatively, Article 2.7 connects a special economic status directly to discriminatory treatment, which indicates it recognises that a non-market economy may represent all the abnormal circumstances stipulated in the ADA. According to the Court of Justice (EU) in the *Commission v Rusal Armenal* Case, ‘the NME methodology under Article 2.7 of the Basic Regulation represented “an approach specific to the EU legal order” rather than an implementation of particular WTO obligations regarding determination of dumping’.⁵⁴²

Notably, although the EU Commission has standards to determine economic status, it is not stipulated within the 2016 Regulation, but conducted on a case-by-case basis. Despite a market economy treatment being available under Article 2.7(c), producers have a burden of proof and it is not easy to satisfy the thresholds.⁵⁴³ The notion of a “non-market economy”, without a unified definition, may grant the EU excessive autonomy in determining market status, which may lead to disputes in anti-dumping investigations.⁵⁴⁴

Nevertheless, the 2016 Regulation has a well-built system for the identification of market status and the treatment of an “immature” market; even for a transitional market, it provides a “market economy” treatment solution. However, such a system is challenged when targeting on China, especially by the expiry of Article 15: (a)(ii) of

⁵⁴² See Judgment of the Court of 16 July 2015, *Commission v Rusal Armenal*, C-21/14 P, EU:C:2015:494, at paras 53 and 59, as cited by Sherzod Shadikhodjaev, ‘Non-Market Economies, Significant Market Distortions, and the 2017 EU Anti-Dumping Amendment’ (2018) 21 *Journal of International Economic Law* 885, 888.

⁵⁴³ “As market economy treatment was granted in response to only 41 (or 17%) out of 248 requests received between 2006 and 2015”. See Shadikhodjaev, Sherzod. “Non-Market Economies, Significant Market Distortions, and the 2017 EU Anti-Dumping Amendment.” *Journal of International Economic Law*, vol. 21, no. 4, 2018, pp. 888–889.

⁵⁴⁴ For example, in 2016, China requested consultations with the European Union on measures related to price comparison methodologies under EU 2016 anti-dumping regulation. See Communication from the Panel, EUROPEAN UNION — MEASURES RELATED TO PRICE COMPARISON METHODOLOGIES, WT/DS516/9, 3 October 2017.

China's Accession Protocol to the WTO. Some experts consider that from 12 December 2016, WTO members can not resort to the CAP applying the "non-market economy treatment" to China in the anti-dumping investigation, but rather use domestic prices or costs of China's products.⁵⁴⁵ As alternatives, WTO Members may resort to general rules set out in Article 2 of the ADA and Article VI of the GATT 1994. Therefore, as a response to the non-market economy issue by the Accession Protocol, the EU published its 2017 Regulation.⁵⁴⁶

6.3 An evaluation of the special treatment in the EU 2017 anti-dumping regulation and its conformity with WTO law

The analysis showed that the special treatment in the EU's 2017 Regulation may not conform to WTO anti-dumping regulations. It suggested that when conducting anti-dumping investigation on either market or non-market economies, the primary choice for determining the normal value shall be based on the actual cost of production, even though such cost is considered to be "distorted". When the construction of a normal value is necessary, all factors related to the costs in that country, including "price distortions", should be considered 'as long as they reflect the prevailing conditions in the market of exportation'.

In detail, the revisions to the "non-market economy treatment" are reflected in two parts in the 2017 Regulation. First, the Commission is vested with the authority to disregard the domestic prices of producers or exporters when there are "significant distortions"

⁵⁴⁵ See Edwin Vermulst, Juhi Dion Sud and Simon J Evenett, 'Normal Value in Anti-Dumping Proceedings against China Post-2016: Are Some Animals Less Equal than Others' (2016) 11 Global Trade and Customs Journal 212, 228. See also Christian Tietje and Vinzenz Sacher, 'The New Anti-Dumping Methodology of the European Union – A Breach of WTO-Law?' in Marc Bungenberg and others (eds), *The Future of Trade Defence Instruments: Global Policy Trends and Legal Challenges* (Springer International Publishing 2018) <<https://www.springer.com/gp/book/9783319953052>> accessed 14 July 2020.

⁵⁴⁶ See Stéphanie Noël and Weihuan Zhou, 'EU's New Anti-Dumping Methodology and The End of The Non-Market Economy Dispute?' (2019) 14 Global Trade and Customs Journal <<https://papers.ssrn.com/abstract=3424435>> accessed 9 July 2020. Edwin Vermulst and Juhi Sud, 'Treatment of China in EU Anti-dumping Investigations Post-December 2017: Plus ça change, plus c'est la même chose' in James J Nedumpara and Weihuan Zhou (eds), *Non-Market Economies in the Global Trading System: The Special Case of China* (Springer Singapore 2018) <<https://www.springer.com/gp/book/9789811313301>> accessed 9 July 2020.

in the country under anti-dumping investigation. The 2017 Regulation further explains “significant distortion” as ‘distortions which occur when reported prices or costs, including the costs of raw materials and energy, are not the result of free market forces because they are affected by substantial government intervention’ in Article 6a: (b). Moreover, in identifying “significant distortion”, the Commission shall consider six elements,⁵⁴⁷ which are mainly on the same basis as the five criteria evaluating China’s economy status. Unlike the five criteria, not all of these elements need to be satisfied, this might be because the burden of proof is transferred from the producers to the Commission, and as a result, reduces the pressure of the Commission.⁵⁴⁸ Therefore, the Commission still has wide discretion to identify any of the elements.⁵⁴⁹

Second, the surrogate country approach is removed from the discriminatory treatment and ‘normal value shall be constructed exclusively on the basis of costs of production and sale reflecting undistorted prices or benchmarks’ as long as a “significant distortion” is proved. A list of referential sources is provided by the 2017 Regulation for the construction of normal value.⁵⁵⁰

⁵⁴⁷ Potential impact of elements to assess the existence of significant distortions include:

- the market in question being served to a significant extent by enterprises which operate under the ownership, control or policy supervision or guidance of the authorities of the exporting country;
- state presence in firms allowing the state to interfere with respect to prices or costs;
- public policies or measures discriminating in favour of domestic suppliers or otherwise influencing free market forces;
- the lack, discriminatory application or inadequate enforcement of bankruptcy, corporate or property laws;
- wage costs being distorted;
- access to finance granted by institutions which implement public policy objectives or otherwise not acting independently of the state.

⁵⁴⁸ See Stéphanie Noël and Weihuan Zhou, ‘EU’s New Anti-Dumping Methodology and The End of The Non-Market Economy Dispute?’ (2019) 14 Global Trade and Customs Journal <<https://papers.ssrn.com/abstract=3424435>> accessed 9 July 2020.

⁵⁴⁹ See *ibid.*

⁵⁵⁰ The sources the Commission may use include:

- corresponding costs of production and sale in an appropriate representative country with a similar level of economic development as the exporting country, provided the relevant data are readily available; where there is more than one such country, preference shall be given, where appropriate, to countries with an adequate level of social and environmental protection;
- if it considers appropriate, undistorted international prices, costs, or benchmarks; or
- domestic costs, but only to the extent that they are positively established not to be distorted, on the basis of

The amendments are generally critiqued as extreme ambiguity, reintroduction of “non-market economy treatment” and country-wide approach (that ignores the individual exporters).⁵⁵¹ In addition to the critiques, the following sections will analyse the consistency between these amendments and WTO rules in depth.

6.3.1 Thresholds of alternative treatments under WTO rules and the 2017 Regulation

Regarding thresholds for alternative treatment, the 2017 Regulation may not conform to WTO regulations, because the “significant distortion” relying on “substantial government intervention” does not satisfy the interpretations of two standards of WTO rules: “in the ordinary course of trade” and “the particular market situation”.

6.3.1.1 The standard of “no sales in the ordinary course of trade”

As mentioned by the Appellate Body in the *United States - Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan* Case, Article 2.2.1 of the ADA sets forth a method for determining whether the sales between any two parties are “in the ordinary course of trade”, but it does not address the more specific issue of transactions between affiliated parties.⁵⁵² Therefore, the expression “in the ordinary course of trade” shall be analysed and interpreted through international regulations.

Regarding the principles of interpretation, recalling the *United States - Standards for*

accurate and appropriate evidence, including in the framework of the provisions on interested parties in point (c).

⁵⁵¹ See Edwin Vermulst and Juhi Sud, ‘Treatment of China in EU Anti-dumping Investigations Post-December 2017: Plus ça change, plus c’est la même chose’ in James J Nedumpara and Weihuan Zhou (eds), *Non-Market Economies in the Global Trading System: The Special Case of China* (Springer Singapore 2018) <<https://www.springer.com/gp/book/9789811313301>> accessed 9 July 2020.

⁵⁵² See Appellate Body Report, *United States - Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 24 July 2001, at para 147.

*Reformulated and Conventional Gasoline Case*⁵⁵³, the Appellate Body announced that WTO law could be interpreted by the VCLT (Vienna Convention on the Law of Treaties), and recalled Article 31 of the VCLT whereby ‘A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’.⁵⁵⁴ Accordingly, “ordinary meaning”, “context” and “object and purpose” are the references when interpreting the WTO provisions.

Based on the VCLT, the interpretation begins with an analysis of the ordinary meaning of “the ordinary course of trade”. According to the Oxford English Dictionary, “ordinary” refers to “belonging to the regular or usual order or course of things”,⁵⁵⁵ “trade” refers to “commercial activity; the buying and selling of goods and commodities”;⁵⁵⁶ furthermore, commercial refers to “looking toward financial profit”.⁵⁵⁷ Then, the ordinary meaning of “the ordinary course of trade” is pursuing profit by buying and selling goods and commodities.⁵⁵⁸ Thus, one essential standard as implied by Article 2.2.1 is whether the destination of sale is making profits, thereby activities which are not aiming to make profits are beyond this meaning.

Under the 2017 Regulation, the “significant distortion” is stipulated as a domestic market where prices or costs “are not the result of free market forces” because of “substantial government intervention”.⁵⁵⁹

⁵⁵³ See Appellate Body Report, *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996.

⁵⁵⁴ See *ibid* at para 17.

⁵⁵⁵ <http://www.oed.com/view/Entry/132361#>.

⁵⁵⁶ <http://www.oed.com/view/Entry/204274?rskey=2gnit9&result=1&isAdvanced=false#eid>.

⁵⁵⁷ <http://www.oed.com/view/Entry/37081?redirectedFrom=Commercial#eid>.

⁵⁵⁸ The ordinary meaning of “ordinary course of trade” is also addressed by experts, see Christian Tietje and Vinzenz Sacher, ‘The New Anti-Dumping Methodology of the European Union – A Breach of WTO-Law?’ in Marc Bungenberg and others (eds), *The Future of Trade Defence Instruments: Global Policy Trends and Legal Challenges* (Springer International Publishing 2018) <<https://www.springer.com/gp/book/9783319953052>> accessed 14 July 2020.

⁵⁵⁹ Article 6a: (b) of 2017 Regulation provides: ‘significant distortions are those distortions which occur when reported prices or costs, including the costs of raw materials and energy, are not the result of free market forces because they are affected by substantial government intervention’.

The standard of “profit” is not reflected in this provision. Instead, evaluation of “significant distortion” relies on expression of prices or costs. In the *United States - Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan* Case, the Appellate Body expressed that price is merely one of terms and conditions of a transaction, and to evaluate the price in “the ordinary course of trade”, different factors shall be considered, such as the volume of sales transactions and additional liabilities or responsibilities in some transactions.⁵⁶⁰ Accordingly, despite price is of relevance, it is not the decisive factor to demonstrate whether an activity is “in the ordinary course of trade”.

Arguably, “government intervention” may neither contribute to the requirements in Article 2.2.1 of the ADA. For example, a government may organize cooperation and training project among companies. And as a result, although the costs and prices of products decreased, the overall profits increase because of the training of technicians and upgrading of technology, which increase the competitiveness of the products at issue, and such a result embodies the overall goal of the manufacturer intending to make profits. In this sense, “government intervention” could assist manufacturers in making profits in the market and this does not necessarily violate free market forces. In addition, as *Christian Tietje and Vinzenz Sacher* state in their research, a price resulting from circumstances other than free market forces does not mean that the actual transaction no longer follows economic procedures.⁵⁶¹

6.3.1.2 Standard of “particular market situation”

The interpretation of “particular market situation” shall also accord with the VCLT. According to the Oxford English Dictionary, “market” refers to “a place at which trade

⁵⁶⁰ See Appellate Body Report, *United States - Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 24 July 2001, at para 142.

⁵⁶¹ See Christian Tietje and Vinzenz Sacher, ‘The New Anti-Dumping Methodology of the European Union – A Breach of WTO-Law?’ in Marc Bungenberg and others (eds), *The Future of Trade Defence Instruments: Global Policy Trends and Legal Challenges* (Springer International Publishing 2018) <<https://www.springer.com/gp/book/9783319953052>> accessed 14 July 2020.

is conducted”⁵⁶², and “situation” refers to a “place, position ... in relation to its surroundings”;⁵⁶³ further, “particular” refers to “distinct, individual, specific”.⁵⁶⁴ A “market” itself is a neutral word that only indicates a platform offering transactions. And “market situation” can be understood as a market position or a market within its surroundings. Thus, the ordinary meaning of a “particular market situation” is a specific market position or market surrounding, and the reason why such a market position is specific is because the market is affected by external factors.⁵⁶⁵

According to the 2017 Regulation, a significantly distorted market is one which is “affected by substantial government intervention”. However, “intervention” means “interfering in any affair, so as to affect its course or issue”, thus “government intervention” also stands for a neutral position which implies the government may have an effect in the course of trade but it is uncertain that whether it has positive or negative results. Therefore, simply connecting negative circumstances of “significant distortion” with “government intervention” may be improper. The “government intervention” itself does not cause any injury to the domestic industries of importing countries, and positive evidence shall be provided that the relevant price is outside free market forces or the objectives law of economy, if that intervention has any negative effect. As some experts state, the finding of a “particular market situation” cannot be only based on government interference, and such interference must lead to dysfunction in free market forces.⁵⁶⁶

Furthermore, ascribing “significant distortion” to “government intervention” may lead to controversy between the ADA and the ASCM.⁵⁶⁷ Dumping and subsidy are two separate trade problems which are governed by the ADA and the ASCM, respectively.

⁵⁶² <http://www.oed.com/view/Entry/114178?rskey=uXPYTH&result=1&isAdvanced=false#eid>.

⁵⁶³ <http://www.oed.com/view/Entry/180520?redirectedFrom=situation#eid>.

⁵⁶⁴ <http://www.oed.com/view/Entry/138260?rskey=9aHt73&result=1&isAdvanced=false#eid>.

⁵⁶⁵ As analysed by Christian Tietje, “whenever a market situation is particular, pricing is not determined by these market forces but rather influenced by external factors”. See Christian Tietje and Vinzenz Sacher, ‘The New Anti-Dumping Methodology of the European Union – A Breach of WTO-Law?’ in Marc Bungenberg and others (eds), *The Future of Trade Defence Instruments: Global Policy Trends and Legal Challenges* (Springer International Publishing 2018) <<https://www.springer.com/gp/book/9783319953052>> accessed 14 July 2020.

⁵⁶⁶ See *ibid.*

⁵⁶⁷ See *ibid.*

The ADA aims to offset injuries from dumping by private manufacturers, while the ASCM aims to counteract injuries from state subsidies. Therefore, an anti-dumping measure based on a “particular market situation” and state behaviour may conflate purposes of the ADA and the ASCM.

In this regard, it may be improper to limit ‘cases of normal value construction to the situation of substantial government intervention’.⁵⁶⁸ This interpretation may be further supported by the “double remedy” issue as analysed by the Appellate Body in the *United States-Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* Case. According to the Appellate Body, the “double remedy” issue is a combination of anti-dumping and anti-subsidy measures that:

...reflects not only price discrimination by the investigated producer between the domestic and export markets (“dumping”), but also “economic distortions that affect the producer’s costs of production”, including specific subsidies to the investigated producer ... An anti-dumping duty calculated based on an NME methodology may, therefore, “remedy” or “offset” a domestic subsidy, to the extent that such subsidy has contributed to a lowering of the export price.⁵⁶⁹

The Appellate Body established a connection between “economic distortions” and “subsidy” by a state, which is under the governance of countervailing law. The stipulations of the 2017 Regulation, with a similar connection, however, are under the governance of anti-dumping law. In that circumstance, since a government subsidy is one type of “government interference”, then it belongs to the case of “significant distortion” under the govern of 2017 Regulation, while it also belongs to a case of “economic distortion” under the ASCM, so a contradiction occurs between two kinds of law.

Notably, the US Trade Preferences Extension Act of 2015 links “ordinary course of

⁵⁶⁸ See *ibid.*

⁵⁶⁹ See Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011, at para 519.

trade” with “particular market situation”.⁵⁷⁰ The Act adds a situation that outside the “ordinary course of trade” as follows: ‘the administering authority determines that the particular market situation prevents a proper comparison with the export price or constructed export price’.⁵⁷¹ Based on this provision, the USDOC is granted with the authority to apply special methodology in anti-dumping investigation, i.e. disregarding the cost in exporting country, if it believes the ‘particular market situation prevents a proper comparison with the export price or constructed export price’. And this is the case in the administrative review on oil country tubular goods (OCTG) from the Republic of Korea.⁵⁷² In this case, the USDOC made affirmative decision that Korean OCTG market as particular market without defining “particular market situation” or factors that constitute “particular market situation”.⁵⁷³ As commented by James J. Nedumpara and Archana Subramanian, ‘decision of the USDOC leaves the meaning and criteria of the term PMS ambiguous and leaves the door open for similar allegations against China, wherein U.S. producers can claim that state interference creates market distortions which do not allow for proper price comparison’.⁵⁷⁴ Furthermore, the Act also make market economy producers no longer “immune” to a surrogate method that usually targets on non-market economies.⁵⁷⁵ Because a justification of alternative method of constructing normal value is based on a founding of “particular market situation” but not the market economy status. However, disregarding the “actual cost” incurred by the particular producer or exporter for the product when calculating dumping margin in anti-dumping investigation solely relying on “particular market

⁵⁷⁰ Trade Preferences Extension Act of 2015, Pub. L. 114–27, §504, 129 Stat. 362–419 (2015).

⁵⁷¹ See *ibid.*

⁵⁷² See International Trade Administration United States Department of Commerce, ‘Issues and Decision Memorandum for the Final Results of the 2014-2015 Administrative Review of the Antidumping Duty Order on Certain Oil Country Tubular Goods from the Republic of Korea A-580-870’ 40 <<https://enforcement.trade.gov/frn/summary/korea-south/2017-07684-1.pdf>> accessed 10 July 2020. See also, James J. Nedumpara and Archana Subramanian, ‘China’s Long March to Market Economy Status: An Analysis of China’s WTO Protocol of Accession and Member Practices’ in J James J Nedumpara and Weihuan Zhou (eds), *Non-Market Economies in the Global Trading System: The Special Case of China* (Springer Singapore 2018) <<https://www.springer.com/gp/book/9789811313301>> accessed 9 July 2020.

⁵⁷³ See *ibid.*

⁵⁷⁴ See *ibid.*

⁵⁷⁵ See Moushami Joshi, ‘Shifting Sands: The Evolution and Future Course of U.S. Anti-dumping Law and Practice Against China and Vietnam’ in James J Nedumpara and Weihuan Zhou (eds), *Non-Market Economies in the Global Trading System: The Special Case of China* (Springer Singapore 2018) <<https://www.springer.com/gp/book/9789811313301>> accessed 9 July 2020.

situation” is against the decision of the Appellate Body in the *European Union - Anti-Dumping Measures on Biodiesel from Argentina* Case, which will be discussed in the following sections.⁵⁷⁶

6.3.2 The construction of normal value

Regarding the construction of normal value, a constructed normal value without reflecting distortion by the exporting country may be contrary to the Appellate Body’s decision in the *European Union - Anti-Dumping Measures on Biodiesel from Argentina* Case.⁵⁷⁷ And it may further lead to an increase of dumping margin and a “double remedy” issue. The analysis suggested that when conducting anti-dumping investigations on either market or non-market economies, the primary choice in determining a normal value shall be based on the actual costs of production, even if such cost is considered to be “distorted”. When a construction of normal value is necessary, all factors related to the costs in that country, including “price distortions”, should be considered ‘as long as they reflect the prevailing conditions in the market of exportation’.

6.3.2.1 Options to determine the normal value

In the anti-dumping investigation, one salient difference between Article 2.2 of the ADA, Article VI:1(b) of the GATT 1994 and the 2017 Regulation in terms of special treatment is the options provided for the normal value determination. WTO rules allow two methods to determine normal value, one is to ‘take a comparable price of a like product when exported to an appropriate third country’, the other is to construct normal value based on ‘the cost of the product in the country of origin plus a reasonable amount’. Compared with WTO law, the surrogate country method is

⁵⁷⁶ See Appellate Body Report, *European Union - Anti-Dumping Measures on Biodiesel from Argentina*, WT/473/AB/R, adopted 6 October 2016.

⁵⁷⁷ See *ibid*, at para. 7.3.

eliminated by the 2017 Regulation in the context of “significant distortions”, and only one method is left, ‘the normal value shall be constructed exclusively on costs of production and sale reflecting undistorted prices or benchmarks’.

It is difficult to determine whether more options could be more efficient to deal with anti-dumping issues. For a single option, the authority may focus on one method and save time when assessing which option is more scientific and closer to the facts. Comparatively, the construction of normal value itself is a complicated task, thus consuming time, so in this sense, a surrogate country method might be a wise choice if strictly proved. Neither the WTO anti-dumping law nor the tribunals clear discusses the options of normal value determination. So, it is supposed that two methods to determine normal value under Article 2.2 of the ADA, Article VI:1(b) of the GATT 1994 are results of the Uruguay Round Negotiations, where negotiators reached a conclusion that the purpose of WTO anti-dumping agreement can be achieved by two options.

6.3.2.2 The “distorted prices” shall be considered for the normal value construction

Both the WTO law and the EU regulation agree that the construction of the normal value is based on the cost of the product. However, the WTO rules regulate the cost of the product “in the country of origin”, while the EU regulation regulates it by reflecting “undistorted prices”, thus they have differences in the origin of sources. In the *European Union - Anti-Dumping Measures on Biodiesel from Argentina* Case, the EU authorities sought to impose anti-dumping duty on the imports of biodiesel from Argentina. The dumping margin was constructed by cost of production other than Argentine biodiesel producer’s records based on the finding that the prices of soybeans and soybean oil in Argentina were lower than international prices due to the export tax system, which constitutes a particular market situation (PMS). The WTO tribunal addressed the issue that picking of cost of production under anti-dumping investigation, which relates to

the EU's approach in using "undistorted prices".⁵⁷⁸

The Appellate Body first addressed the thresholds of Article 2.2.1.1 of the ADA. Under Article 2.2.1.1, investigating authorities are required to use the records kept by the exporter or producer for the construction of normal value as long as the records comply with "generally accepted accounting principles" (GAAP) and "reasonably reflect the costs associated with the production and sale of the product under consideration" (Reasonably Reflecting Test).⁵⁷⁹ The main argument is whether the second threshold refers to "actual cost" incurred by the specific exporter or producer under investigation.⁵⁸⁰ Argentina is the proponent of "actual cost". And the EU disagree with this view based on two claims. First, the EU claims the term "associated" in the second threshold refers to "in normal circumstances", thus 'the European Union was fully entitled to consider which costs would pertain [or relate] to the production and sale of biodiesel in normal circumstances' instead of insisting on "actual costs".⁵⁸¹

The Appellate Body rejected EU's first claim and aligned with the Panel that 'although Article 2.2.1.1 does not explicitly refer to "actual" costs', the second threshold 'relates to whether the costs set out in a producer's or exporter's records "correspond – within acceptable limits – in an accurate and reliable manner to all the actual costs incurred by the particular producer or exporter for the product under consideration"'.⁵⁸² Accordingly, the comparison, under the second threshold of Article 2.2.1.1, involves either costs 'reported in the producer[s]/exporter's records' or 'the costs actually incurred by that producer'.⁵⁸³ In this regard, concluding by the Appellate Body, the

⁵⁷⁸ See Panel Report, *European Union - Anti-Dumping Measures on Biodiesel from Argentina*, WT/DS473/R, adopted 29 March 2016 (as modified by the Appellate Body Report). Appellate Body Report, *European Union - Anti-Dumping Measures on Biodiesel from Argentina*, WT/473/AB/R, adopted 6 October 2016.

⁵⁷⁹ See Weihuan Zhou, 'Appellate Body Report on EU-Biodiesel: The Future of China's State Capitalism under the WTO Anti-Dumping Agreement' (2018) 17 World Trade Review 609, 617. See also Appellate Body Report, *European Union - Anti-Dumping Measures on Biodiesel from Argentina*, WT/473/AB/R, adopted 6 October 2016.

⁵⁸⁰ See Appellate Body Report, *European Union - Anti-Dumping Measures on Biodiesel from Argentina*, WT/473/AB/R, adopted 6 October 2016, at para 6.28.

⁵⁸¹ See *ibid.*

⁵⁸² See *ibid.*, at para 6.30.

⁵⁸³ See *ibid.*

second threshold of Article 2.2.1.1 concerns the costs incurred by the producer that are “genuinely related” to the production and sale of the product, which refers to the “actual costs” as used by the Panel.⁵⁸⁴ And the interpretation of “in normal circumstances”, i.e. in the absence of the alleged distortion caused by Argentina’s export tax system, would add words to the second threshold ‘at issue that are not present in Article 2.2.1.1, namely, the costs that “*would pertain*” and “*in normal circumstances*”’.⁵⁸⁵

In addition, the Appellate Body also rejected the EU’s submission that because the first threshold of Article 2.2.1.1 prescribes costs that actually incurred, then the second threshold ‘must be interpreted to mean something more than that’.⁵⁸⁶ Conversely, the Appellate Body consider the first threshold of Article 2.2.1.1 concerns the general activity of producer or exporter, thus the second threshold is ‘specific to the costs associated with the production and sale of the product’.⁵⁸⁷ Therefore, GAAP-consistent may nonetheless be found not the reasonably reflect the second threshold.⁵⁸⁸

Another argument relates to the interpretation of “reasonableness” of the second threshold in Article 2.2.1.1. Argued by the EU, the “‘reasonableness’ informs not only the term ‘reflect’, but also the determination of the costs associated with the production and sale of the product under consideration”.⁵⁸⁹ The investigation authority is thus permitted to consider whether the costs in the records are reasonable, and a fact of unreasonableness would allow a replacement of those costs in an appropriate manner.⁵⁹⁰

The Appellate Body, however, rejected the EU’s claim. According to the Appellate Body, there is clearly and simply not an ‘additional or abstract standard of ‘reasonableness’ that governs the meaning of ‘costs’ in the second condition in the first

⁵⁸⁴ See *ibid.*

⁵⁸⁵ See *ibid.*

⁵⁸⁶ See *ibid.*, at para 6.3.1.

⁵⁸⁷ See *ibid.*, at para 6.33.

⁵⁸⁸ See *ibid.*

⁵⁸⁹ See *ibid.*, at para 6.35.

⁵⁹⁰ See *ibid.*

sentence of Article 2.2.1.1’.⁵⁹¹

In this regard, the Appellate Body upheld the Panel’s finding that ‘the EU authorities’ determination that domestic prices of soybeans in Argentina were lower than international prices due to the Argentine export tax system was not, in itself, a sufficient basis under Article 2.2.1.1 for concluding that the producers’ records do not reasonably reflect the costs of soybeans associated with the production and sale of biodiesel, or for disregarding those costs when constructing the normal value of biodiesel’.⁵⁹²

Article 2.2.1.1, as interpreted by the tribunals, emphasizes the use of “actual cost” of production, even though such cost is considered to be “distorted” or “artificially lowered”. Price distortion may not be able to justify the use of surrogate costs for normal value construction as long as they are suitably and sufficiently reflected by records kept by the exporter or producer. At least, “price distortions” from the export tax system in the *European Union - Anti-Dumping Measures on Biodiesel from Argentina* Case clearly neither constitute a PMS nor correspond to a violation of two thresholds in Article 2.2.1.1. As analysed by one commentator, ‘the Appellate Body’s rulings come very close to the proposition that price distortions caused by state intervention, and a finding of PMS on that basis, is irrelevant to the determination of whether surrogate costs should be employed’.⁵⁹³

The findings by the tribunal in the *European Union - Anti-Dumping Measures on Biodiesel from Argentina* Case is supported in the *Ukraine - Anti-Dumping Measures on Ammonium Nitrate* Case, where the Appellate Body recalled that ‘it is the records of the individual exporter or producer under investigation that are subject to the condition to “reasonably reflect” the “costs” associated with the production and sale of the product under consideration’.⁵⁹⁴ The Panel in the recent *European Union – Cost*

⁵⁹¹ See *ibid*, at para 6.37.

⁵⁹² See *ibid*, at para 6.55.

⁵⁹³ See Weihuan Zhou, ‘Appellate Body Report on EU-Biodiesel: The Future of China’s State Capitalism under the WTO Anti-Dumping Agreement’ (2018) 17 *World Trade Review* 609, 618.

⁵⁹⁴ See Appellate Body Report, *Ukraine - Anti-Dumping Measures on Ammonium Nitrate*, WT/493/AB/R, adopted

Adjustment Methodologies and Certain Anti – Dumping Measures on Imports from Russia Case also highlighted findings in aforementioned two cases that the existence of government measures (at least in the two cases) ‘did not constitute a sufficient or adequate basis to conclude, in application of the second condition in Article 2.2.1.1, that the records of the producer or exporter under investigation do not “reasonably reflect the costs associated with the production and sale of the product under consideration”’.⁵⁹⁵

Nevertheless, the Appellate Body, in analysing the “as such” claim, considered two circumstances in footnotes where the construction of normal value might be necessary.⁵⁹⁶ In analysing out-of-country information, the tribunal admitted that ‘sources outside the “country of origin” may need to be analysed’.⁵⁹⁷ However, there is one rule that needs to be followed under the Article 2.2 of the ADA, according to the Appellate Body in *European Union - Anti-Dumping Measures on Biodiesel from Argentina* Case:

In circumstances where the obligation in the first sentence of Article 2.2.1.1 to calculate the costs on the basis of the records kept by the exporter or producer under investigation does not apply, or where relevant information from the exporter or producer under investigation is not available, an investigating authority may have recourse to alternative bases to calculate some or all such costs. Yet, Article 2.2 does not specify precisely to what evidence an authority may resort. This suggests that, in such circumstances, the authority is not prohibited from relying on information other than that contained in the records kept by the exporter or producer, including in-country and out-of-country evidence. This, however, does

12 September 2019, at para 6.88.

⁵⁹⁵ See Pane Report, *European Union – Cost Adjustment Methodologies and Certain Anti – Dumping Measures on Imports from Russia*, WT/494/R, adopted 24 July 2020, at para 7.98.

⁵⁹⁶ One is “where the producer under investigation purchases inputs from outside the country of origin to produce the product under consideration”. Another is “where the producer under investigation refuses access to and does not provide information concerning costs, and the investigating authority relies on ‘best information available’ under Article 6.8 and Annex II to the Anti-Dumping Agreement”. See Appellate Body Report, *European Union - Anti-Dumping Measures on Biodiesel from Argentina*, WT/473/AB/R, adopted 6 October 2016, footnote 228, footnote 230.

⁵⁹⁷ According to the Appellate Body:

We do not see, however, that the first sentence of Article 2.2.1.1 precludes information or evidence from other sources from being used in certain circumstances. Indeed, it is clear to us that, in some circumstances, the information in the records kept by the exporter (...) may need to be analysed (...) including (...) sources outside the “country of origin.”

See Appellate Body Report, *European Union - Anti-Dumping Measures on Biodiesel from Argentina*, WT/473/AB/R, adopted 6 October 2016, at para. 6.71.

not mean that an investigating authority may simply substitute the costs from outside the country of origin for the ‘cost of production in the country of origin’. Indeed, Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 make clear that the determination is of the ‘cost of production ... in the country of origin’. Thus, whatever the information that it uses, an investigating authority has to ensure that such information is used to arrive at the ‘cost of production in the country of origin’. Compliance with this obligation may require the investigating authority to adapt the information that it collects.⁵⁹⁸

Accordingly, out-of-country sources are not simply a substitute for original sources, but work as a reference to ‘arrive at the cost of production in the country of origin’ as stipulated as basic principle in Article 2.2 of the ADA. The investigating authority is obliged to “adapt” collected information including out-of-country information closely to the cost of production “in the country of origin”. As has been readdressed by the Panel in the recent *European Union – Cost Adjustment Methodologies and Certain Anti – Dumping Measures on Imports from Russia* Case and the Appellate Body in the *Ukraine - Anti-Dumping Measures on Ammonium Nitrate* Case, an investigating authority is ‘not allowed to simply substitute the costs from outside the country of origin for the “cost of production in the country of origin”’.⁵⁹⁹

In this regard, there are two trains of thoughts on how to “adapt” the information to “in the country of origin”. One comes from the interpretation of Article 2.2.1.1. As analysed by the tribunal, actual costs kept by the exporter or producer shall reflect the ‘costs associated with the production and sale of the product under consideration’ where “distorted” or “artificially lowered” prices are of concern. Thus, such a “distorted” price shall be considered to reflect “in the country of origin”.

Another one is indicated by the Appellate body’s ruling on the adjustment of constructed normal value by EU authorities. It states:

⁵⁹⁸ See *ibid*, at para. 6.73.

⁵⁹⁹ See Panel Report, *European Union – Cost Adjustment Methodologies and Certain Anti – Dumping Measures on Imports from Russia*, WT/494/R, adopted 24 July 2020, at para 7.122; See Appellate Body Report, *Ukraine - Anti-Dumping Measures on Ammonium Nitrate*, WT/493/AB/R, adopted 12 September 2019, at para 6.73.

Other than pointing to the deduction of fobbing costs, the European Union has not asserted, either before the Panel or before us, that the EU authorities adapted, or even considered adapting, the information used in their calculation in order to ensure that it represented the cost of production in Argentina. On the contrary, the EU authorities specifically selected the surrogate price for soybeans to remove the perceived distortion in the cost of soybeans in Argentina. As the Panel stated, the EU authorities selected and used this particular information precisely because it did not represent the cost of soybeans in Argentina. Thus, we agree with the Panel that the surrogate price for soybeans used by the EU authorities did not represent the cost of soybeans in Argentina for producers or exporters of biodiesel.⁶⁰⁰

Accordingly, the investigating authority is obliged to adapt information representing the cost of production in original country. An adjustment is thus required to represent all factors related to the costs in that country, including the “distorted” situation. Conclusively, “price distortions” should be considered for normal value construction ‘as long as they reflect the prevailing conditions in the market of exportation’.⁶⁰¹ The investigating authority is only allowed to apply external benchmark when: (i) the records do not comply with “generally accepted accounting principles” (GAAP); and (ii) the records do not ‘suitably and sufficiently correspond to or reproduce the costs that have a genuine relationship with the production and sale of the specific product under consideration’.⁶⁰² This also corresponds to the analysis of one commentator that ‘if an authority collects data from external sources (i.e. third countries or international reference prices) these data have to be adapted in a way that they reflect the prevailing distortions in the market at issue’.⁶⁰³

The controversy on whether applying “undistorted price” can also be analysed in the context of “double remedy” issue through a simple calculation of dumping margin and

⁶⁰⁰ See Appellate Body Report, *European Union - Anti-Dumping Measures on Biodiesel from Argentina*, WT/473/AB/R, adopted 6 October 2016, at para. 6.81.

⁶⁰¹ See *ibid.*

⁶⁰² See *ibid.*, at para. 6.22. See also, Mukesh Bhatnagar, Pallavi and Isha Das, ‘External Benchmark Choices in Anti-dumping and Countervailing Duty Proceedings: A Battle of ‘Proxies’?’ in James J Nedumpara and Weihuan Zhou (eds), *Non-Market Economies in the Global Trading System: The Special Case of China* (Springer Singapore 2018) <<https://www.springer.com/gp/book/9789811313301>> accessed 9 July 2020.

⁶⁰³ See Christian Tietje and Vinzenz Sacher, ‘The New Anti-Dumping Methodology of the European Union – A Breach of WTO-Law?’ in Marc Bungenberg and others (eds), *The Future of Trade Defence Instruments: Global Policy Trends and Legal Challenges* (Springer International Publishing 2018) <<https://www.springer.com/gp/book/9783319953052>> accessed 14 July 2020.

duties. Pursuant to Article 2.2 and 2.4 of the ADA,⁶⁰⁴ the dumping margin (henceforth DM) is calculated by a fair comparison between the normal value (henceforth NV) and the export price (henceforth EP; then, the formula is: $DM = NV - EP$. If NV — usually the domestic price of a product in the market of the exporting country — is higher than the EP, then a positive DM indicates a potential dumping behaviour, and anti-dumping measures may be implemented based on a determination of injury by investigation.

In cases of export subsidy, the EP, probably lower than the domestic price due to subsidy, is reflected in the dumping calculation, thus increasing the DM compared to that of an unsubsidized case, which will lead to the application of an anti-dumping measure. If a countervailing duty is applied to the same product due to that export subsidy, then the export subsidy has been compensated for twice through anti-dumping duty and countervailing duty. “Double counting” in this case is officially prohibited by Article VI: 5 of the GATT 1994.⁶⁰⁵

In the case of domestic subsidy, WTO law does not give specific rules, because usually it will not trigger the issue of “double remedy”. In general, domestic subsidization affects the NV (normally the domestic price), the EP and the DM equally, thus leaving the DM unchanged. Hence it might be a simple countervailing issue.

Pursuant to Article 2.6a.(a) of the 2017 Regulation, the NV shall be constructed exclusively based on the cost of production and undistorted sale. As analysed above, distortions are subtracted from the NV, thus it cannot reflect the impact of the subsidy on relevant products. As a result, the subsidy’s impact on the EP remains, but its impact is removed from the NV, which leads to an increase in the dumping margin. As a result, an anti-dumping measure and a countervailing measure might be applied simultaneously based on subsidy and an approach of normal value construction, thus

⁶⁰⁴ Article 2.4 of ADA stipulates that: ‘a fair comparison shall be made between the export price and the normal value’.

⁶⁰⁵ Article VI: 5 of GATT 1994 stipulates that: ‘No product ... shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization’.

leading to the issue of “double remedies”.

Table 1 Calculation of DM under domestic subsidy

	DM China market	NV China market	EP China market	DM under EU regulation	NV under EU regulation	EP under EU regulation
General Situation	£100	£500	£400	£130	£530	£400
Domestic Subsidy £50	£100	£450	£350	£180	£530	£350
	DM India market	NV India market	EP India market			
General Situation	£100	£530	£430			

Table 1 illustrates that the application of “undistorted price” to construct a normal value under the 2017 Regulation could lead to a higher dumping margin. In general, the original DM in China would be £100, when the NV and the EP are £500 and £400, respectively. However, the market in China is considered to be significantly distorted, which is very probable in practice, thus the NV would not be China’s domestic price, but constructed by sources without distortion (for the purpose of comparison, normal value without distortion derives from that of India, with a similar level of economic development as China and whose market is generally not considered to be distorted). Hence, the DM would be increased by 30% to £130, based on a comparison between an increased NV — “undistorted” domestic price in India — and China’s EP.

The result can be further supported by the anti-dumping duties in the *European Union - Anti-Dumping Measures on Biodiesel from Argentina* Case where the margins of Argentina’s product calculated in the EU Provisional Regulation, ‘ranging from 6.8% to 10.6%, with the duties imposed by the EU authorities in the Definitive Regulation, which ranged from 22.0% to 25.7%, i.e. two to three times higher’.⁶⁰⁶

⁶⁰⁶ See Appellate Body Report, *European Union - Anti-Dumping Measures on Biodiesel from Argentina*,

The impact of “undistorted price” in the case of domestic subsidy will be magnified. In general, under a domestic subsidy of £50, the DM will stay unchanged if the normal value construction follows the domestic price in China, because both the domestic price and the EP will be decreased by the impact of the subsidy. In contrast, the constructed NV without distortion may lead to an increase of DM when compared with the China’s EP. Hence, the “undistorted price” may result in an unfair calculation of dumping margin.

Table 2 Calculation of duties under domestic subsidy

	No subsidy	Domestic subsidy £50, normal value by distorted price	Domestic subsidy £50, normal value by undistorted price
Normal value	£500	$£500 - £50 = £450$	$£500 - £0 = £500$
Export price	£400	$£400 - £50 = £350$	$£400 - £50 = £350$
AD	£100	$£450 - £350 = £100$	$£500 - £350 = £150$
CVD	£0	£50	£50

Table 2 illustrates that the application of “undistorted price” to construct normal value under domestic subsidy could lead to a serious issue of “double remedy”. When following China’s domestic price as the NV, both the domestic price and the EP decrease under domestic subsidy, the DM remain at £100 and is well balanced by market forces. And even though there exists a DM of £100 and a £50 subsidy, they are subject to anti-dumping law and countervailing law, respectively, thus leaving no potential mistakes and confusion in calculating anti-dumping duty and countervailing duty.

However, when applying the 2017 Regulation, the domestic price is replaced by an

“undistorted price” that has not been affected by domestic subsidy, thus it would not decrease pro-rata like EP, which leads to an increase in the DM. Conclusively, the anti-dumping duty and the countervailing duty is £200 (£150+£50) under the “undistorted” method, while the fact is that at £150 (£100+£50), by which the £50 domestic subsidy has been compensated for twice.⁶⁰⁷

The Appellate Body, in the *United States - Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan* Case, addressed the issue by referring to “fair comparison” as stipulated in Article 2.1 of the ADA, it stated:

...to ensure that prices are ‘comparable’, the Anti-Dumping Agreement provides a mechanism, in Article 2.4, which allows investigating authorities to take full account of the fact ... [that] In making a ‘fair comparison’, Article 2.4 mandates that due account be taken of ‘differences which affect price comparability’, such as differences in the ‘levels of trade’ at which normal value and export price are calculated.⁶⁰⁸

Therefore, to arrive at a fair comparison, the investigating authority shall “take full account of the facts”, and such facts shall include the decrease in domestic price in a “distorted” market, because the domestic price at issue will affect the calculation of the dumping margin. In addition, due account shall be taken of differences which affect “price comparability”, and “level of trade” shall be considered as well, thus the domestic subsidization involved in trade activities of the exporting country under investigation shall also be considered. Conclusively, any form of trade behaviours which will affect “price comparability” shall be considered by the authorities, and as a significant factor, trade behaviours in a distorted market are also a matter of concern. And undistorted prices as applied by the 2017 Regulation may not conform to WTO

⁶⁰⁷ See similar illustration by Katarzyna Kaszubska, ‘Double Remedy: Beyond the Non-market economy status’ in James J Nedumpara and Weihuan Zhou (eds), *Non-Market Economies in the Global Trading System: The Special Case of China* (Springer Singapore 2018) <<https://www.springer.com/gp/book/9789811313301>> accessed 9 July 2020.

⁶⁰⁸ See Appellate Body Report, *United States - Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 24 July 2001, at para 167.

anti-dumping law as interpreted by the Appellate Body.

6.4 Conclusion

The EU's 2017 Regulation was enacted to regulate dumping issues relating to WTO Members with special domestic markets. It particularly deals with a dilemma that the non-market economy provisions of 2016 Regulation may not be efficient in the wake of Article 15(a)(ii) CAP's expiry in December 2016.⁶⁰⁹

However, the 2017 Regulation may not conform to WTO regulations. Regarding thresholds of alternative treatments, the “significant distortion” relying on “substantial government intervention” does not satisfy the interpretations of two standards of WTO rules: “in the ordinary course of trade” and “particular market situation”. Moreover, for approaches to construct the normal value, a constructed normal value without reflecting distortion of exporting country may be contrary to the Appellate Body's decisions, such as the *European Union - Anti-Dumping Measures on Biodiesel from Argentina* Case and the recent *European Union – Cost Adjustment Methodologies and Certain Anti – Dumping Measures on Imports from Russia* Case.⁶¹⁰ Moreover, it may further lead to an increase of the dumping margin and a “double remedy” issue.

Conclusively, when conducting an anti-dumping investigation of either market or non-market economies, the primary choice in determining the normal value shall be based on the actual cost of production, even though such cost is considered to be “distorted”. When the construction of a normal value is necessary, all factors related to the cost in that country, including “price distortions”, should be considered ‘as long as they reflect the prevailing conditions in the market of exportation’.

⁶⁰⁹ See Christian Tietje and Vinzenz Sacher, ‘The New Anti-Dumping Methodology of the European Union – A Breach of WTO-Law?’ in Marc Bungenberg and others (eds), *The Future of Trade Defence Instruments: Global Policy Trends and Legal Challenges* (Springer International Publishing 2018) <<https://www.springer.com/gp/book/9783319953052>> accessed 14 July 2020.

⁶¹⁰ Appellate Body Report, *European Union - Anti-Dumping Measures on Biodiesel from Argentina*, WT/473/AB/R, adopted 6 October 2016; Pane Report, *European Union – Cost Adjustment Methodologies and Certain Anti – Dumping Measures on Imports from Russia*, WT/494/R, adopted 24 July 2020.

Noticeably, China initiated consultations and later a dispute with the EU after 12 December 2016, arguing that ‘the determination of normal value for “non-market economy” countries in anti-dumping proceedings involving products from China’ contrary to WTO law.⁶¹¹ China claimed that the EU’s determination of normal value appears to be inconsistent with Articles 2.1 and 2.2 of the ADA and Articles I:1 and Article VI:1 of the GATT 1994. However, for unknown reasons, China requested the panel to suspend its proceedings. As a result, the legality of the EU’s method remains unsettled under the WTO anti-dumping agreement.⁶¹² And during this period, “market distortion” criteria ‘essentially serve to continue the distinction between MEs and NMEs in AD actions’.⁶¹³

⁶¹¹ See *European Union – Measures Related to Price Comparison Methodologies* (DS516), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds516_e.htm.

⁶¹² See Stéphanie Noël and Weihuan Zhou, ‘EU’s New Anti-Dumping Methodology and The End of The Non-Market Economy Dispute?’ (2019) 14 *Global Trade and Customs Journal* <<https://papers.ssrn.com/abstract=3424435>> accessed 9 July 2020.

⁶¹³ See *ibid.*

Chapter 7: Conclusion

7.1 The “double remedy” issue is a compound issue that requires appropriate interpretations of WTO provisions

The issue of “double remedies” is the embodiment of the abuse of trade remedies due to the ambiguity of the WTO trade remedies agreements. It refers to the duplication of duties where both the anti-dumping and countervailing measures have contributed to the formation of it. The ambiguous WTO trade remedies agreements require systematic and comprehensive countermeasures to the “double remedy” issue where interpretations of the legal basis of the “non-market economy” treatment and the “public body” identification criteria are major concerns.

It is noteworthy that the interpretation of WTO countervailing rules plays an important role on preventing the abuse of trade remedies in the context of the “double remedy” issue. The non-market economy disputes at the US national court, especially, the *Georgetown* Case and the *GPX* Case, suggests the ambiguity of countervailing law is one origin of the “double remedy” issue. The US cases reflect a dilemma that the anti-dumping statute has been frequently revised to regulate the countervailing issue due to an asymmetric development of the US trade remedy laws when confronting the non-market economy disputes. The subsequent US new legislation regulating the issue of “double remedies” does not serve as an efficient solution, but continue such asymmetric development. In this regard, it is still necessary to explore the appropriate interpretations of countervailing law at the WTO level to deal with the issue of “double remedies”.

Accordingly, regulating the trade remedies in the context of the “double remedy” issue calls for interpretations of the WTO trade remedies agreements from both anti-dumping and countervailing perspectives. Concerning the anti-dumping perspective, it is required to explore the interpretations of three legal bases regarding the non-market

economy methodology in the anti-dumping investigations. First, Article 15 of China's Accession Protocol to the WTO (CAP) is the direct legal basis of the non-market economy methodology targeting China within its validity under WTO system. It allows WTO Members to sidestep some controversies related to China's economic structure, especially when calculating dumping margins in anti-dumping investigation.⁶¹⁴ However, subparagraph (d) of Article 15 stipulates a deadline for this treatment, it states 'in any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession'.⁶¹⁵ Then what should be the appropriate interpretation of the expire of Article 15: (a)(ii) becomes a key issue to special treatment discussed by experts,⁶¹⁶ and it is also one of major issues in the *EU – Price Comparison Methodologies Case*.⁶¹⁷

Second, the second *Ad Note* to Article VI: 1 "euphemistically" allows Members to calculate dumping margins not based on a strict comparison with domestic prices. However, the requirements to apply this provision are far stricter than those of other legal bases. Under the second *Ad Note*, the exporting country must have 'a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by

⁶¹⁴ See James J Nedumpara and Weihuan Zhou, 'Introduction: Non-market Economies in the Global Trading System—The Special Case of China' in James J Nedumpara and Weihuan Zhou (eds), *Non-Market Economies in the Global Trading System: The Special Case of China* (Springer Singapore 2018) <<https://www.springer.com/gp/book/9789811313301>> accessed 9 July 2020. Also see Stéphanie Noël and Weihuan Zhou, 'EU's New Anti-Dumping Methodology and The End of The Non-Market Economy Dispute?' (2019) 14 *Global Trade and Customs Journal* <<https://papers.ssrn.com/abstract=3424435>> accessed 9 July 2020.

⁶¹⁵ According to Article 15: (d):

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

⁶¹⁶ See for example, Jorge Miranda, 'More on Why Granting China Market Economy Status after December 2016 Is Contingent upon Whether China Has in Fact Transitioned into a Market Economy' (2016) 11 *Global Trade and Customs Journal* 244; Bernard O'Connor, 'Much Ado about Nothing: 2016, China and Market Economy Status' (2015) 10 *Global Trade and Customs Journal* 176; Jochem De Kok, 'The Future of EU Trade Defence Investigations against Imports from China' (2016) 19 *Journal of International Economic Law* 515; Yenkong Ngangjoh-Hodu and Tianzhu Han, 'China's Market Economy Dilemma and Its Interplay with EU Anti-Dumping Law' (2019) 27 *Asia Pacific Law Review* 102; Roberto Soprano, 'The Principle of Effectiveness in the Interpretation of the Protocol of Accession of China to the World Trade Organization: Market Economy Considerations in Anti-Dumping Investigations' (2019) 46 *Legal Issues of Economic Integration* 29.

⁶¹⁷ See *European Union — Measures Related to Price Comparison Methodologies* (DS516) www.wto.org/english/tratop_e/dispu_e/cases_e/ds516_e.htm. See also Weihuan Zhou and Delei Peng, 'EU - Price Comparison Methodologies (DS516): Challenging the Non-Market Economy Methodology in Light of the Negotiating History of Article 15 of China's WTO Accession Protocol' (2018) 52 *Journal of World Trade* 505.

the state'. The Appellate Body, in the *European Communities - Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China* Case, pointed out that the second *Ad Note* stipulated a strict rule when identifying the exporting country under its context. Specifically, the non-market economy methodology is applicable to a country when it reflects a 'complete or substantially complete monopoly of trade' and the 'fixing of all prices by the State', and it is not 'applicable to lesser forms of NMEs that do not fulfil both conditions'.⁶¹⁸ Accordingly, the investigating authority has to explicitly prove that the Chinese economy meets the two criteria.⁶¹⁹ And it does not fit China's situation as a transitional economy described in Paragraph 150 of the Working Party Reports.⁶²⁰ As concluded by one commentator, 'no country today would fall within this narrowly defined category'.⁶²¹ Therefore, the application of this legal basis is very limited.

Comparatively, Article VI: (b) of the GATT1994 and Article 2.2 of the ADA provide a general legal basis for alternative treatments among WTO Members as the third legal

⁶¹⁸ See Appellate Body Report, *European Communities - Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, 15 July 2011, at para. 290.

The Report interprets the rules when applying the Second *Ad Note* to Article VI: 1 as follows:

We observe that the second *Ad Note* to Article VI:1 refers to a "country which has a complete or substantially complete monopoly of its trade" and "where all domestic prices are fixed by the State". This appears to describe a certain type of NME, where the State monopolizes trade and sets all domestic prices. The second *Ad Note* to Article VI:1 would thus not on its face be applicable to lesser forms of NMEs that do not fulfil both conditions, that is, the complete or substantially complete monopoly of trade and the fixing of all prices by the State.

⁶¹⁹ See Edwin Vermulst, Juhi Dion Sud and Simon J Evenett, 'Normal Value in Anti-Dumping Proceedings against China Post-2016: Are Some Animals Less Equal than Others' (2016) 11 *Global Trade and Customs Journal* 212, 219.

⁶²⁰ See Doha WTO Ministerial Conference Fourth Session, 'Report of the Working Party on the Accession of China' <<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/Min01/3.pdf&Open=True>> accessed 10 July 2020. It records that:

[S]everal members of the Working Party noted that China was continuing the process of transition towards a full market economy. Those members noted that under those circumstances, in the case of imports of Chinese origin into a WTO Member, special difficulties could exist in determining cost and price comparability in the context of anti-dumping investigations and countervailing duty investigations. In fact, way back in 1998, i.e. prior to China's accession to the WTO, the EU had recognized that China is an economy in transition when it introduced the MET criteria in the basic AD Regulation.

⁶²¹ See Sherzod Shadikhodjaev, 'Non-Market Economies, Significant Market Distortions, and the 2017 EU Anti-Dumping Amendment' (2018) 21 *Journal of International Economic Law* 885, 889; Weihuan Zhou, Henry Gao and Xue Bai, 'Building a Market Economy Through Wto-Inspired Reform of State-Owned Enterprises in China' (2019) 68 *International & Comparative Law Quarterly* 977, 1008; Weihuan Zhou, 'China's Litigation on Non-Market Economy Treatment at the WTO: A Preliminary Assessment' (2017) 5 *Chinese Journal of Comparative Law* 345.

basis. One issue relating to these provisions is the ambiguous thresholds of the treatments including: “in the ordinary course of trade”, a “the particular market situation” or a “low volume of sales”. Article 2.2 does not provide necessary instructions to demonstrate these thresholds, thus interpretations of these thresholds are requisite.

On 12 December 2017, the European Parliament and the Council published an anti-dumping regulation on special treatment, which was a response to the CAP issue. Revisions of the “non-market economy treatment” is reflected in two parts in the 2017 Regulation. First, the Commission is vested with authority to disregard the domestic price of a producer or exporter due to “significant distortions” in that country. The 2017 Regulation further explains “significant distortion” as ‘distortions which occur when reported prices or costs, including the costs of raw materials and energy, are not the result of free market forces because they are affected by substantial government intervention’ in Article 6a: (b). Moreover, in identifying “significant distortion”, the Commission shall consider six elements,⁶²² which are mainly on the same basis as the five criteria evaluating China’s economy status. Unlike the five criteria, not all of these elements need to be satisfied, this might be because the burden of proof is transferred from producers to the Commission, and as a result, reduces the pressure on the Commission.⁶²³ Therefore, the Commission still has wide discretion in identifying any of the elements.⁶²⁴ The second revision of the “non-market economy treatment” is that

⁶²² The potential impact of elements to assess the existence of significant distortions includes:

- the market in question being served to a significant extent by enterprises which operate under the ownership, control or policy supervision or guidance of the authorities of the exporting country;
- state presence in firms allowing the state to interfere with respect to prices or costs;
- public policies or measures discriminating in favour of domestic suppliers or otherwise influencing free market forces;
- the lack, discriminatory application or inadequate enforcement of bankruptcy, corporate or property laws;
- wage costs being distorted;
- access to finance granted by institutions which implement public policy objectives or otherwise not acting independently of the state.

⁶²³ See Stéphanie Noël and Weihuan Zhou, ‘EU’s New Anti-Dumping Methodology and The End of The Non-Market Economy Dispute?’ (2019) 14 Global Trade and Customs Journal <<https://papers.ssrn.com/abstract=3424435>> accessed 9 July 2020.

⁶²⁴ See *ibid.*

the expression of surrogate country is removed from discriminatory treatment and ‘normal value shall be constructed exclusively on the basis of costs of production and sale reflecting undistorted prices or benchmarks’ as long as a “significant distortion” is proved. A list of referential sources is provided by the 2017 Regulation for the construction of normal value.⁶²⁵ In this regard, the EU 2017 Regulation seeks to apply Article VI: (b) of the GATT1994 and Article 2.2 of the ADA to justify discriminatory treatment in an anti-dumping investigation. Therefore, it is required to assess the EU 2017 Regulation and its conformity with WTO standards.

Concerning the countervailing perspective, it is required to clarify the determination of subsidy through the interpretation of the WTO countervailing rules. The determination of subsidy has been embodied by the “public body” issue. In this regard, necessary instructions and substantial references are absent for identifying the “public body” under the ASCM, which leaves potential controversy on the determination of subsidy. In the *United States-Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* Case, one major debate is whether China’s SOEs and SOCBs belong to “public bodies” and whether their behaviours comply with countervailing law.⁶²⁶ In other words, does an entity link with state qualifies to provide a subsidy under WTO rules? China filed a complaint at the WTO rebutting US’s affirmative determination of China’s state-owned banks and SOEs being “public bodies”, which were qualified to conduct subsidization under the ASCM. The Panel sided with the US,

⁶²⁵ The sources the Commission may use include:

- corresponding costs of production and sale in an appropriate representative country with a similar level of economic development as the exporting country, provided the relevant data are readily available; where there is more than one such country, preference shall be given, where appropriate, to countries with an adequate level of social and environmental protection;
- if it considers appropriate, undistorted international prices, costs, or benchmarks; or
- domestic costs, but only to the extent that they are positively established not to be distorted, on the basis of accurate and appropriate evidence, including in the framework of the provisions on interested parties in point (c).

⁶²⁶ See Panel Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/R, adopted 22 October 2010. Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011.

but the Appellate Body held opposite view (in respect of SOE), it declared that ‘the precise contours and characteristics of a public body are bound to differ from entity to entity, State to State, and case to case’.⁶²⁷

The WTO tribunals’ decision clarifies only limited Chinese firms that may belong to “public bodies”. And even for those confirmed “public bodies”, such as SOCBs, there still has controversy. According to the tribunal, BOC is a “public body” based on several factors such as state ownership; relevant Chinese commercial banking law; and risk management and analytical skill of SOCBs. For example, Article 34 of China’s Commercial Banking Law stipulates that banks must ‘carry out their loan business upon the needs of the national economy and the social development and under the guidance of State industrial policies’.⁶²⁸ According to the tribunal, the BOC is a “public body” because its governmental factor is formally acknowledged by Chinese law. Nonetheless, commentators remain sceptical of the tribunal’s arguments noting that ‘a lack of business flair, as illustrated by inadequate risk management and analytical skills and poor loan-making practices, has little to do with whether SOCBs are exercising government authority’ and that ‘Article 34 of the Commercial Banking Law is a very general statement and its implications to the SOCBs’ loan business are not clear’.⁶²⁹

Compared with the SOCBs, many Chinese firms, especially the SOEs, may not have formal links with the state like the BOC. Potential controversy may arise, for example, would SASAC’s ability to remove the firm’s top management suffice to render the firm a “public body”? For now, the Appellate Body is relying on “government authority” standard and does not clarify what is necessary to demonstrate such authority.⁶³⁰ Nevertheless, the WTO cannot avoid these questions. Since the *United States* -

⁶²⁷ See Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011, at para 317.

⁶²⁸ See Panel Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/R, adopted 22 October 2010.

⁶²⁹ See Ming Du, ‘China’s State Capitalism and World Trade Law’ (2014) 63 *International & Comparative Law Quarterly* 409, 439.

⁶³⁰ See Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011.

Definitive Anti-Dumping and Countervailing Duties on Certain Products from China Case, the “public body” question has raised three disputes.⁶³¹ Even without China as party at issue, there still has a high percentage that occurs. For example, in the *United States – Countervailing Measures on Certain Hot-rolled Carbon Steel Flat Products from India* Case, the tribunal rejected the US argument that one can identify whether a firm is a “public body” on account of whether the government can employ the resources of an entity that it controls as its own.⁶³²

Therefore, the systematic and comprehensive countermeasures of the “double remedy” issue are required where the interpretations of legal basis of the “non-market economy treatment” and “public body” determination are major concerns.

7.2 How to regulate the trade remedies in the context of the “double remedy” issue under the WTO legal system

The findings of this research have proposed four points to deal with the “double remedy” issue. First, the “double remedy” issue should be thoroughly prohibited by the WTO law as long as it leads to a duplication of duties. Second, compared with offsetting the damage of the “double remedy” issue, prevention of such issue is an efficient alternative. Third, to prevent the abuse of “double remedies” from countervailing perspective, a new definition of the “public body” has been proposed. Last but not least, to avert the abuse of “double remedies” from anti-dumping perspective, a procedure to determine the normal value has been provided.

⁶³¹ Appellate Body Report, *United States – Countervailing Measures on Certain Hot-rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R, adopted 8 December 2014. Panel Report *United States – Countervailing Duty Measures on Certain Products from China*, WT/DS437/R, adopted 14 July 2014. Appellate Body Report, *United States – Countervailing Duty Measures on Certain Products from China*, WT/DS437/AB/RW, adopted 16 July 2019.

⁶³² Appellate Body Report, *United States – Countervailing Measures on Certain Hot-rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R, adopted 8 December 2014, at paras 4.27 – 4.29.

7.2.1 The “double remedy” issue should be regulated by the WTO law

To begin with, as analysed in Chapter 2 of this research, it is necessary to highlight that the “double remedy” issue should be regulated by the WTO law, specifically, Article VI of the GATT 1994. In contrast with the regulations for export subsidies in Article VI: 5 of GATT 1994, WTO law does not literally prohibit the issue of “double remedies” raised by domestic subsidy. The Panel, in the *United States-Definitive Anti-Dumping and Countervailing Duties on Certain Products from China* Case, considered that ‘these terms are self-explanatory in their intention to limit the scope of the prohibition in Article VI: 5 to situations involving export subsidy’.⁶³³ The Panel considered that, because the explicit prohibition in Article VI:5 is limited to potential “double remedy” issue in respect of export subsidies, Members could not have intended to prohibit the issue of “double remedies” in respect of domestic subsidies in Articles 19.3 or 19.4 of the ASCM.⁶³⁴

However, the issue of “double remedies” under domestic subsidy shall not be left blank and interpreted as absent based on WTO law. According to the Appellate Body, when interpreting Article VI of the GATT 1994, ‘omissions in different contexts may have different meanings’⁶³⁵ and the phrase ‘same situation: is central to an understanding of the rationale underpinning the prohibition contained in Article VI:5’.⁶³⁶ “Same situation” is explained by the Appellate Body as being where an export subsidy results in a pro - rata reduction in the export price of a product, but will not affect the price of domestic sales of that product, thus the situation of subsidization and the situation of dumping are the “same situation”.⁶³⁷ The “same situation” here, then, refers to the determination of subsidization and dumping by investigation relying simply on export subsidy.

⁶³³ See Panel Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/R, adopted 22 October 2010, at para 14.117.

⁶³⁴ See *ibid*, at para. 14.118.

⁶³⁵ See Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011, at para. 567.

⁶³⁶ See *ibid*.

⁶³⁷ See *ibid*, at para. 568.

What is more, the “same situation” may have a further interpretation based on the rationale of “double remedy” issue. Since an export subsidy leads to the implementation of an anti-dumping measure and a countervailing measure, it leads to a duplication of duties. Then, the “same situation” can also refer to any situation that has the same effect as “double counting”. In other words, it is not the “export” or “import” subsidy that violates the law, but the “double remedy” issue itself is inconsistent with Article VI: 5 of the GATT 1994. In any case, the issue of “double remedy” under domestic subsidy should be under the guidance of WTO law.

The Appellate Body further reaffirmed the illegality of “double remedy” issue by contending that it violated requirements in Article 19.3 of the ASCM.⁶³⁸ Article 19.3 of the ASCM requires that the countervailing duty shall be levied ‘in the appropriate amounts in each case’. According to the Panel, “the imposition of anti-dumping duties calculated under an NME methodology has no impact on whether the amount of the concurrent countervailing duty collected is ‘appropriate’ or not”.⁶³⁹ However, the Appellate Body disagrees with the Panel’s analysis that Article 19.3 of the ASCM does not address the issue of “double remedies”. In contrast, the Appellate Body contends that the evaluation of the amount of the countervailing duty cannot ignore anti-dumping duty imposed on the same product to offset the same subsidization.⁶⁴⁰ Therefore, the amount of the countervailing duty cannot be “appropriate” without having regard to anti-dumping duty connected with the same subsidization. In this regard, the Appellate Body finds that the imposition of “double remedies” based on “non-market economy treatment” is inconsistent with Article 19.3 of the ASCM.⁶⁴¹

7.2.2 Compared with offsetting the damage of the “double remedy” issue, prevention of such issue is an effective alternative

⁶³⁸ See *ibid.* at para. 582.

⁶³⁹ See *ibid.* at para. 583.

⁶⁴⁰ See *ibid.* at para. 582.

⁶⁴¹ See *ibid.* at para. 583

Offsetting the damage of the “double remedy” issue is considered as mainstream solution to the issue of “double remedies”. For example, calculating the overlap of duties (the “pass-through” rate)⁶⁴² and reduce the duplication of duties is proposed by experts.⁶⁴³ Theoretically, a scientifically calculated “pass-through” rate could reduce the injury of “double remedy” issue by eliminating price discrimination under subsidization, and this is reflected in US GPX law.⁶⁴⁴

However, it is in practise difficult to calculate the influence of subsidy on a relevant price and separate it from anti-dumping duty. According to the *GPX Int'l Tire Corp. v. United States* Case, the US Department of Commerce (DOC) expressed that it did not have a method for identifying overlapping remedies, the Court also admitted that it is difficult for the Commerce to decide the degree and extent of potential “double remedy” issue.⁶⁴⁵ Besides, the “pass-through” method belongs to a remedy behaviour, which means it aims to eliminate the injury of unfair trade remedy measures. Comparatively, a preventative method is preferential as it predicts the risk and prevents the existence of future injury by providing transparent regulations through the interpretation of law.

Four scenarios that a product may receive trade remedies⁶⁴⁶

	Whether	Implementation	Whether	Implementation	Whether
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⁶⁴² “Pass-through” rate, in the context of “double remedy” issue, refers to the extent that a subsidy is passed through to the price and reflected in the calculation of dumping margin.

⁶⁴³ See for example, Thomas J Prusa and Edwin Vermulst, ‘United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China: Passing the Buck on Pass-Through’ (2013) 12 World Trade Review 197; Thomas J Prusa, ‘NMEs and the Double Remedy Problem’ (2017) 16 World Trade Review 619; Brian D Kelly, ‘Market Economies and Concurrent Antidumping and Countervailing Duty Remedies’ (2014) 17 Journal of International Economic Law 105.

⁶⁴⁴ On March 6, 2012, US Congress enacted anti-dumping provisions (GPX Law), which provided the US Department of Commerce with a legal basis to apply anti-dumping duties and countervailing duties to China’s products; and through providing adjustments (by calculating pass-through rate) to anti-dumping duties to avoid the situation of “double remedies”. See Public Law 112–99, 112th Congress, 126 STAT. 265 (MAR. 13, 2012).

⁶⁴⁵ Based on the case, the Commerce explained that “it would not allow a constructed export price (‘CEP’) offset or a circumstances of sales (‘COS’) adjustment in this investigation because Commerce ‘cannot accurately determine the specific indirect selling expenses incurred on sales reflected in the surrogate financial statements’”. The Court, in its latter analysis, stated that “it is too difficult for Commerce to determine, using improved methodologies, and in the absence of new statutory tools, whether and to what degree double counting is occurring”. See *GPX Int'l Tire Corp. v. United States*, 715 F.Supp.2d 1337, 1345 (CIT 2010) (“GPX III”).

⁶⁴⁶ The four scenarios based on the hypothesis that if there exists a subsidization or dumping behaviour, there is a causal link between the behaviour and the damages.

	subsidization exist	of CVD	dumping exist due to the effect of subsidization	of AD	there is an issue of “double remedies”
1	✓	✓	✓	✓	✓
2	×	×	✓	✓	×
3	✓	✓	×	×	×
4	×	×	×	×	×

The above table illustrates four scenarios that a product may receive from trade remedies. Among four scenarios, there is only one scenario that the issue of “double remedies” may inevitably occur and should consider the offsetting solution. More scenarios relate to single anti-dumping or countervailing duty issues. And this thesis focusses more on the other three scenarios that should not, but indeed, result in disputes of “double remedies” due to the vague WTO trade remedy provisions.

Accordingly, this research advocates preventing the “double remedy” issue through interpreting the WTO provisions. When confronting a dispute of the “double remedies”, it is preferable to first identify the existence of subsidization and determine the legality of the related countervailing measure. Then move to deal with the anti-dumping investigation based on the “non-market economy” methodology. The specific proposals from anti-dumping and countervailing perspectives are provided in the following section.

7.2.3 To prevent the abuse of trade remedies from countervailing perspective: the interpretation of countervailing law on the “public body” issue

Chapter 4 analyses factors for “public body” identification. Accordingly, a “public body” refers to an entity that exercises any regulatory, administrative, or other governmental

authority that the Party has directed or delegated to such an entity.

Footnote 1: Examples of ‘exercising any regulatory, administrative or other governmental authority’ include: the power to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees, or other charges.

Footnote 2: The determination of a “public body” shall focus on ‘whether the entity itself possesses the core characteristics and functions’ that constitute a “public body”, and follow the principle to ‘avoid focusing exclusively or unduly on any single characteristic without affording due consideration to others that may be relevant’. In this regard, state intervention, as well as the scope and content of government policies relating to the sector in which the investigated entity operates.

Footnote 3: Approaches to demonstrate “public body” may include, but not be exhausted by:

- (a) A state or other legal instrument expressly vests authority in the entity concerned;
- (b) An entity is exercising governmental functions may serve as evidence, particularly where such evidence points to a sustained and systematic practice;
- (c) A government exercises meaningful control over an entity in certain circumstances; (Formal indicia of government control are manifold, and there is evidence that such control has been exercised in a meaningful way.)

The findings also highlighted that SOEs in China, especially Chinese central SOEs (Yang Qi), are potentially “public bodies” when serving specific responsibility, for example, stabilizing supply and ensuring security of relevant industries through strictly following national macro-control measures. However, it may be impossible to identify the Yang Qi as a whole “public body” due to its diversified functions and responsibilities, further feedback and more evidence through questionnaires could help

to refine the evaluation during the “public body” investigation.

7.2.4 To prevent the abuse of trade remedies from anti-dumping perspective: the interpretation of anti-dumping law relating to the non-market economy methodology

As analysed in Chapter 5 of this research, despite the CAP directly and expressly stipulating a discriminatory treatment to China in its Article 15, WTO Members cannot resort to the CAP applying a surrogate method to calculate dumping margins for China’s products in the wake of expiry of provisions of Article 15. And especially, such discriminatory treatment for China cannot be based on its special market status.

In detail, based on textual and contextual analysis of Article 15 of the CAP, WTO Members may not resort to remaining provisions of Article 15 (a) to apply the “non-market economy treatment” to China in anti-dumping investigation. Besides, the first and third sentences of Article 15 (d) may not justify a surrogate method on China’s products. At least, China is not obliged to prove a market economy condition to justify market economy treatment to WTO Members if it is not true that their national law ‘contains market economy criteria as of the date of (China’s) accession’. The preparatory resources of Article 15 of the CAP, such as the Sino-US bilateral WTO agreement⁶⁴⁷ and the working paper on the accession of China⁶⁴⁸, indicate that the market status of China cannot justify a continuance of NME treatment, and such a treatment is not recommended for modern China and preferable to be terminated in the wake of the expiry of Article 15 (a)(ii). Based on the analysis of international cases, the *EC-Fasteners Case*⁶⁴⁹ and the *Rusal Armenal ZAO V Council of the European Union*

⁶⁴⁷ See ‘U.S. - China Bilateral WTO Agreement’ (1999) <<https://clintonwhitehouse4.archives.gov/WH/New/WTO-Conf-1999/factsheets/fs-004.html>> accessed 13 July 2020.

⁶⁴⁸ See Doha WTO Ministerial Conference Fourth Session, ‘Report of the Working Party on the Accession of China’ <<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/Min01/3.pdf&Open=True>> accessed 10 July 2020.

⁶⁴⁹ See Appellate Body Report, *European Communities - Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, 15 July 2011.

Case,⁶⁵⁰ the remaining provisions of Article 15 (a) and (d) cannot justify the “non-market economy treatment” for China. And China’s market status cannot support an exception to treat China differently in anti-dumping investigations.

However, as discussed by several commentators, ‘this does not mean that the EU or other markets will have no defence against genuine Chinese dumping practices’.⁶⁵¹ Article 2 of the ADA and Article VI of the GATT 1994 have stipulated the determination of dumping margins in special situations. And the interpretations of the CAP do not preclude WTO Members applying the general rules set out in Article 2 of the ADA and Article VI of the GATT 1994.⁶⁵² As a very creative practitioner in this regard, the EU has made revisions to its anti-dumping regulations and ‘use certain techniques when calculating normal value such as making adjustments to the prices of certain inputs that they consider do not reflect market prices’.⁶⁵³ In particular, the EU 2017 anti-dumping regulation is enacted to regulate dumping issues relating to WTO Members with a special domestic market. It particularly deals with the dilemma that its non-market economy provisions of 2016 Regulation may not be efficient in the wake of Article 15(a)(ii) CAP’s expiry in December 2016.⁶⁵⁴ Nonetheless, the special treatment in 2017 Regulation may not conform to WTO regulations. Regarding the thresholds for discriminatory treatment, the “significant distortion” relying on “substantial government intervention” does not satisfy the interpretations of two standards of WTO rules: “in the ordinary course of trade” and “particular market situation”. Moreover, for approaches to construct normal value, a constructed normal value without distortion

⁶⁵⁰ See Case T-512/09 *Rusal Armenal ZAO v Council of the European Union* [2013] ECLI:EU: T: 2013:571.

⁶⁵¹ See Edwin Vermulst, Juhi Dion Sud and Simon J Evenett, ‘Normal Value in Anti-Dumping Proceedings against China Post-2016: Are Some Animals Less Equal than Others’ (2016) 11 *Global Trade and Customs Journal* 212, 224; Stéphanie Noël and Weihuan Zhou, ‘EU’s New Anti-Dumping Methodology and The End of The Non-Market Economy Dispute?’ (2019) 14 *Global Trade and Customs Journal* <<https://papers.ssrn.com/abstract=3424435>> accessed 9 July 2020.

⁶⁵² See Weihuan Zhou, ‘China’s Litigation on Non-Market Economy Treatment at the WTO: A Preliminary Assessment’ (2017) 5 *Chinese Journal of Comparative Law* 345.

⁶⁵³ See Edwin Vermulst, Juhi Dion Sud and Simon J Evenett, ‘Normal Value in Anti-Dumping Proceedings against China Post-2016: Are Some Animals Less Equal than Others’ (2016) 11 *Global Trade and Customs Journal* 212, 224.

⁶⁵⁴ See Christian Tietje and Vinzenz Sacher, ‘The New Anti-Dumping Methodology of the European Union – A Breach of WTO-Law?’ in Marc Bungenberg and others (eds), *The Future of Trade Defence Instruments: Global Policy Trends and Legal Challenges* (Springer International Publishing 2018) <<https://www.springer.com/gp/book/9783319953052>> accessed 14 July 2020.

may be contrary to the Appellate Body's decision in the *European Union - Anti-Dumping Measures on Biodiesel from Argentina* Case.⁶⁵⁵ And it may further lead to an increase in dumping margin and a "double remedy" issue.

Therefore, as analysed in Chapter 6 of this research, when conducting anti-dumping investigations of either market or non-market economies, the primary choice in determining the normal value shall be based on the actual cost of production, even though such cost is considered to be "distorted". When the construction of a normal value is necessary, all factors related to the costs in that country, including "price distortions" should be considered 'as long as they reflect the prevailing conditions in the market of exportation'.

Noticeably, China initiated consultations and later a dispute with EU after 12 December 2016, arguing that 'the determination of normal value for "non-market economy" countries in anti-dumping proceedings involving products from China' contrary to WTO law.⁶⁵⁶ China claimed that the EU's determination of normal value appeared to be inconsistent with Article 2.1 and 2.2 of the ADA and Article I:1 and Article VI:1 of the GATT 1994. However, for unknown reasons, China requested the panel to suspend its proceedings after 7 May 2019. As a result, the legality of the EU's method remains unsettled under the WTO anti-dumping agreement.⁶⁵⁷ And during this period, "market distortions" criteria 'essentially serve to continue the distinction between MEs and NMEs in AD actions'.⁶⁵⁸

7.3 Development for future research

⁶⁵⁵ Appellate Body Report, *European Union - Anti-Dumping Measures on Biodiesel from Argentina*, WT/473/AB/R, adopted 6 October 2016, at para. 7.3.

⁶⁵⁶ See *European Union – Measures Related to Price Comparison Methodologies* (DS516), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds516_e.htm.

⁶⁵⁷ See Stéphanie Noël and Weihuan Zhou, 'EU's New Anti-Dumping Methodology and The End of The Non-Market Economy Dispute?' (2019) 14 *Global Trade and Customs Journal* <<https://papers.ssrn.com/abstract=3424435>> accessed 9 July 2020.

⁶⁵⁸ See *ibid.*

Based on the findings of this research, a follow-up research is expected relating to the the trade remedies in the context of “non-market economy treatment”. As official decisions by the WTO tribunals are still rare and ambiguous, it is foreseeable that more discussions and cases will be raised in future. In this regard, there are some potential topics that around this research. For example, since China has found that “non-market economy” conditions exist in the US energy and petrochemical sector, and accordingly adjusted the US expert’s cost in calculating the dumping margin, what will the US response to its “non-market economy treatment” and what if the US suffered from the “double remedy” issue become the questions.⁶⁵⁹ And to recall, the US is the landmark “double remedy” conductor to China.⁶⁶⁰

In addition, there are loopholes in determining the normal value, albeit the WTO tribunals in three cases (the *European Union - Anti-Dumping Measures on Biodiesel from Argentina* Case, the *Ukraine - Anti-Dumping Measures on Ammonium Nitrate*, Case and the *European Union – Cost Adjustment Methodologies and Certain Anti – Dumping Measures on Imports from Russia* Case) have affirmed that normal value shall base on the actual cost of production, and the out-of-country sources shall reflect the costs in the country of origin.⁶⁶¹ In the recent *European Union – Cost Adjustment Methodologies and Certain Anti – Dumping Measures on Imports from Russia* Case,

⁶⁵⁹ See On 17th July 2020, the Ministry of Commerce of the PRC (MOFCOM) published its preliminary determination on the imposition of antidumping duties on imported propanol from the United States. Accordingly, China found that non-market economy conditions exist in the US energy and petrochemical sector. Besides, China has initiated another anti-dumping investigation involving NME allegations of Australia’s products. See Henry Gao, ‘The US Is Now Officially a Non-Market Economy, According to China’ (*International Economic Law and Policy Blog*) <<https://ielp.worldtradelaw.net/2020/07/the-us-is-now-officially-a-non-market-economy-according-to-china-.html>> accessed 10 July 2020; Zhiguo Yu and Sandeep Thomas, ‘The US Is Now a “Non-Market Economy” – Anti-Dumping Ruling by China’ (*International Economic Law and Policy Blog*) <https://ielp.worldtradelaw.net/2020/07/the-us-is-now-a-non-market-economy-anti-dumping-ruling-by-china.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+ielpblog+%28International+Economic+Law+and+Policy+Blog%29> accessed 10 July 2020; Zhiguo Yu and Jesse Kreier, ‘China and Distortions - Bis’ (*International Economic Law and Policy Blog*) <<https://ielp.worldtradelaw.net/2020/08/china-and-distortions-bis.html>> accessed 20 August 2020. The ruling is available only on the Chinese webpage of MOFCOM. Direct link to the ruling <http://images.mofcom.gov.cn/trb/202007/20200717145528534.pdf>.

⁶⁶⁰ See the Panel Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/R, adopted 22 October 2010; the Appellate Body Report, *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011.

⁶⁶¹ See Appellate Body Report, *Ukraine - Anti-Dumping Measures on Ammonium Nitrate*, WT/493/AB/R, adopted 12 September 2019; Appellate Body Report, *European Union - Anti-Dumping Measures on Biodiesel from Argentina*, WT/473/AB/R, adopted 6 October 2016; Pane Report, *European Union – Cost Adjustment Methodologies and Certain Anti – Dumping Measures on Imports from Russia*, WT/494/R, adopted 24 July 2020.

the Panel mentions the term “normally” in Article 2.2.1.1 of the ADA does not ‘exhaust the circumstances in which costs reflected in the records of the producer or exporter under investigation may be rejected’, and the term “normally” is also appeared in the first subparagraph of Article 2 (5) of the EU anti-dumping regulation.⁶⁶² The Panel, however, does not provide further analysis with the reason that the EU’s determination is based on the second condition prescribed in Article 2 (5) rather than an explanation of the term “normally”.⁶⁶³

Nonetheless, invoking the use of the terminology “normally” as a defence may occur in future. As highlighted by Jesse Kreier, the WTO tribunal left the possibility that a WTO member may disregard reported costs in the dumping margin calculation.⁶⁶⁴ The solution of this question has significant implications on the future anti-dumping measures relates to the price margin and government interventions in the market that may beyond the subsidies.

⁶⁶² See Pane Report, *European Union – Cost Adjustment Methodologies and Certain Anti – Dumping Measures on Imports from Russia*, WT/494/R, adopted 24 July 2020, at para 7.103.

⁶⁶³ See *ibid* at para 7.106.

⁶⁶⁴ See Jesse Kreier, ‘Distorted Input Prices - Still in the Dark’ (*International Economic Law and Policy Blog*) <<https://ielp.worldtradelaw.net/2020/07/distorted-input-prices-still-in-the-dark.html>> accessed 20 August 20220.

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