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Ten Years Behind NME Lines, and Beyond: Reviewing China's changing role in the Global Economy through the issue of Trade Remedies in the World Trade Organization.

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ABSTRACT

This paper discusses the 2001 accession of the People's Republic of China to the World Trade Organization and its consequences. In the first chapter, the paper provides a historical review of the accession negotiations which spanned from 1986 to 2001. It discusses the political constraints faced by the parties to the negotiations, with a special emphasis on the relationship between China and the United States. In the second chapter, this paper reviews the issue of trade remedies, i.e. antidumping and anti-subsidization, in the perspective of China's relations to the global trading system. It aims to substantiate some claims that these instruments have a protectionist bias. This chapter then assesses in detail the special provisions which can be applied by other WTO Members to imports from China under the terms of its Protocol of Accession, and in particular China's status as a 'non-market economy' in trade remedies proceedings. Finally, this paper assesses the impact of these provisions on Chinese trade in the last ten years, and the strategies deployed by China to counteract their negative impact.

The present study finds a strong potential for discrimination against China in the provisions under review. These can be explained by a perceived necessity for the Chinese leadership to conclude negotiations at whatever cost. As to the rationale underlying the discriminatory provisions, this paper implies that the China-specific rules represent an attempt to reconcile the opposite objectives of enforcing market access to the Middle Kingdom, while retaining the possibility to impose contingent protection on Chinese exports in a manner contrary to the most-favored-nation principle embodied in WTO law.

This paper concludes that the strategy adopted by (mostly industrialized) trading powers against China has been unsuccessful as it has been captured by protectionist interests. It has reduced incentives for necessary reforms of inefficient industries in the western countries and undermined the legitimacy of the WTO as a whole. Furthermore, this strategy could lead to an escalation of retaliatory actions by China.

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It is an always delicate task than to write truthful acknowledgments for projects which have occupied one's mind for several months, if not longer. As I stand tonight with the finished product before my eyes, I have a hard time believing that sending it out (in a few minutes) will be the concluding point of a project which began almost two years ago.

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Brussels,
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DECLARATION

This master thesis has been written in partial fulfilment of the Master of International Law and Economics Programme at the World Trade Institute. The ideas and opinions expressed in this paper are made independently, represent my own views and are based on my own research. I confirm that this work is my own and has not been submitted for academic credit in any other subject or course. I have acknowledged all material and sources used in this paper.

INTRODUCTION

On December 11th, 2001, the People's Republic of China became the 143rd Member of the World Trade Organization. The accession of China took place after fifteen years of intense, rollercoaster negotiations which on several occasions appeared on the brink of derailment, and procured the global trading community with a sense of immense accomplishment. On one hand, the recently-created WTO had made a huge stride towards its paramount objective of universal membership. On the other hand, efforts to commit the Chinese giant to a rule-based system had finally been successful.

The entry of China in WTO has repeatedly been hailed as 'the most important trade event in the century'[1]. This statement stands in sharp contrast to the declaration by United States President William J. Clinton that the accession agreement with China was 'the most one-sided trade deal in history'[2]. The interplay between these two perspectives forms the underlying basis for this paper.

A first look at China's Protocol of Accession seems to confirm former President Clinton's assessment. The terms and conditions of 'China's WTO' appear surprisingly unbalanced, if not even discriminatory. A first question that may arise is what has led the Chinese leadership to commit to such an extensive package of obligations which does not entail a corresponding set of rights or benefits. Secondly, one wants to look at the effects this framework has produced, both on global trade relations and on the WTO system. Thirdly, the issue of whether the strategy of differentiating China was appropriate can be assessed in retrospect.

The importance of the Chinese accession case study is given in a few regards. At the outset, it sheds light on some shady areas of WTO. While the system relies on fundamental principles such as non-discrimination and most-favored-nation ('MFN') treatment, one-country-one-vote, or the single undertaking of all obligations by every Member in an identical manner, the accession process has been much less transparent. Acceding Members are now systematically required to undertake extensive additional commitments as a condition for entry, which precludes them from enjoying *de facto* similar treatment once they gain access to a *de jure* equal Member status. As WTO is closing in on virtually-universal membership (with the long-awaited accession of Russia apparently in its final stages), this analysis may not be of much practical relevance to future accessions. It nonetheless retains its importance as it helps to understand how differential treatment continues to exist under the non-discriminatory

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[1] *See*, e.g., Jackson (2003) at 19; Remarks by the Representative of Japan in WTO Trade Policy Review Body, *Trade Policy Review – People's Republic of China*, Minutes, 19 and 21 April 2006, WT/TPR/M/161, § 48.
[2] Reported by Bhala (2000) at 1530.

surface of WTO. At last, the story of China's accession is a sharp reminder that what countries say and what they actually do is often very different.

More significantly, the example of China's accession provides a formidable insight of the major shifts that the global economy has witnessed in the last 25 years. With the increasing irrelevance of tariffs and the rise of global supply-chains fueled by emerging economies, the industrialized nations have been struggling to maintain their dominant position in sectors where they no longer have a comparative advantage. A minor economy in 1980, China has since grown at a sustained rate to become the world's second largest trader in 2009. Trade relations between China and the world reflect these changing economic dynamics, and also exemplify changing political discourses from both sides. At the core, the issue underlying these changes is how to deal with the Chinese 'hybrid' economy and its gargantuan proportions. One of the goals of this paper is to show that powerful actors have attempted to use the multilateral trading system to curb the Chinese expansion, and to discuss the shortcomings of this approach. Finally, this case study depicts the growing assertiveness of China in an increasingly multipolar world and the implications it may entail, should protectionist approaches be pursued from now on.

With a view to examine these questions, this paper will first address the process of accession in a historical perspective. The first chapter describes the Chinese political context and trade relations, in particular with the United States, during the negotiations. The chapter concludes by an outline of China's Protocol of Accession. The second chapter addresses trade remedies (i.e. antidumping and anti-subsidization) in 'China's WTO'. By reviewing the economics, politics and regulations of antidumping and countervailing duties, this paper shows that they can be strongly presumed to be used towards protectionist ends. This chapter discusses in detail the specific provisions of the Protocol of Accession which may be used against Chinese imports, with a particular emphasis on China's 'non-market economy' ('NME') status, and finds that these have a strong discriminatory bias. Finally, the second chapter takes stock of the different strategies adopted by China in response to its differential treatment in trade remedies investigations.

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1 THE ACCESSION PROCESS

The process of China's accession to GATT/WTO spanned over fifteen years, encompassing two (for some countries three) generations of leaderships and overseeing the creation of WTO and the expansion of the very subject-matter parties were negotiating. More importantly, these fifteen years witnessed radical changes in the global economy, not least due to the collapse of the Soviet bloc and the boom in information technology. Not surprisingly, then, the following discussion of the political economy underlying China's entry into WTO needs to acknowledge the dynamic nature of the motivations and goals of such a process.

In the following sections, this chapter first recalls the historical background of China in WTO and describes the state of play at the beginning of the negotiations and identifies some possible grounds motivating China's drive for GATT/WTO accession (1.1). The next section gives an account of the negotiations and of the major players' position throughout the process, firstly under the perspective of a (re-)entry to GATT and then in the period following the creation of WTO and spanning until China's accession in 2001 (1.2) The following sections sums up China's concessions and commitments contained in the Accession Protocol and the Working Party Report (1.3). Finally, the last section discusses the results of the negotiations and infers some plausible objectives of China's trading partners for its accession (1.4).

1.1 HISTORICAL BACKGROUND: CHINA AND GATT

1.1.1 CHINA'S RELATIONS WITH GATT UNTIL 1986

China was a signatory to the Havana Charter and an original contracting party to the GATT 1947. However, in the aftermath of the internal struggles leading to the establishment of the People's Republic of China on October 1st, 1949, the ousted Kuomintang leadership later notified the United Nations Secretary-General of its intention to withdraw from GATT. The withdrawal became effective on May 5th, 1950, in spite of claims by the PRC authorities that the withdrawal ought to be regarded as null and void given the absence of any former government's legitimacy over mainland China.

In 1971, a UN General Assembly resolution recognized the PRC as the sole entity entitled to the rights pertaining to 'China', which had been held thus far by Taiwan. Following this decision, GATT revoked Taiwan's status as an observer; the question of the withdrawal validity remained nonetheless undecided. Moreover, at that time, the PRC seemed not interested in further involvement with the international trade community. The years 1966 to 1976 were indeed marked by Chairman Mao's 'Cultural Revolution' which was grounded in ideals of self-sufficiency and inward-looking economic development.

Perspectives were to change from 1978 on, as Deng Xiaoping took on a leading political role in the PRC and initiated possibly the most extensive economic reform witnessed in recent history under his 'Open Door' policy. Deng's reform programme purported to transform the Chinese system from a centrally-planned economy into a 'socialist market economy', a form of hybrid capitalism which relied importantly on ending China's isolation by opening up to foreign trade and investment and reforming its lagging and heavily inefficient State-owned sector[3].

While trade liberalization implied that efficient Chinese actors could expand on foreign markets, it also led inefficient State-owned enterprises ('SOE') to face increased competitive pressure at home, forcing them to adapt, merge, downsize or shut down – arguably, one of the key objectives in Deng's market reforms[4]. Between 1980 and 2000, the share of SOEs in national gross industrial output decreased from 76% to 28%, along with the share of urban workers employed by SOEs (from 76% to 36%)[5]. The reform of the State-owned sector remains however an extremely controversial – and disputed point – in Chinese domestic politics upon which progress is only ever made at the expense of social order and embattled bureaucratic resistance[6].

In 1982, the PRC revised its Constitution and allowed – through narrow language – development of the private economy 'in support of' the socialist State economy[7]. The new Constitution also provided e.g. for the protection of foreign investment. That same year, the PRC was granted observer status by GATT.

China became a regular observer at GATT and even an active participant at times, such as when it signed the revised Multi-Fiber Agreement in 1983 (which entered into force in 1984). As the opening of a new round of trade negotiations was looming, China formally requested on July 10th, 1986 to resume its membership as a GATT contracting party. Following the launch of the Uruguay Round by the Punta del Este declaration, the PRC became a full participant to the talks while its application was now dealt with within the GATT Working Party on China's Status as a Contracting Party.

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[3] *See*, generally, Lardy (2002); *See also* Hsieh (2009) at 374. For an overview of the China 'SOE problem', *see* Qin (2004) at 871.
[4] The reform of SOE sectors in China has been, and still is, a hot topic since 1978. *See*, e.g., Hufbauer (1998) at 49.
[5] Statistics used and quoted by Qin (2004) fn 35 at 872.
[6] *See*, e.g., the account by Bhala (2000) at 1482; specifically on WTO accession, *see* Potter (2001) at 595, or Fewsmith (1999).
[7] The first reference to private enterprises was introduced in the 1988 revision of the Constitution; *see* Lardy (2002) at 19.

1.1.2 RESUMING GATT MEMBERSHIP: AN OUTLINE OF THE CHINESE POLITICS OF ACCESSION

Increased market access, and market access security

At the outset, there were obvious reasons why China applied to resume its membership with GATT. First and foremost, the PRC needed to secure access to the market(s) that its economy would need to develop to its full potential[8]. This assertion implied both that Chinese exporters should face lower tariffs, but also that China sought to be sheltered from unilateral backpedalling from its trading partners by gaining the legal security embodied in GATT rules and concessions[9].

The latter was of particular importance, considering in particular that China's western trading partners often coupled their trade policy towards the Middle Kingdom to other issues, such as its human rights or environmental record. Thus, normal trading relations[10] with the United States were subject to an annual presidential waiver of §402 of the Trade Act of 1974 (i.e. the Jackson-Vanik Amendment) that was frequently imperiled by human rights debates during its Congressional review[11]. Although the US-China trade relation was not then the behemoth it would later become, its importance was already not to be underestimated: A study from 1997 showed losses likely to follow a withdrawal of MFN status to amount as high as US$ 6 billion per year for China, and US$ 420 million per year for the United States, absent *any* retaliation on the Chinese part[12].

On the contrary, membership with GATT/WTO meant unconditional and permanent MFN treatment, clearly defined market access concessions and, perhaps most importantly, the power to participate (or block) decision-making in cross-border trade matters, including the possibility to seek market access improvements[13].

SOE reforms, continued and locked-in

As already mentioned above, a major roadblock on the way to modernizing China lay with its inefficient State-owned sector. The gargantuan task of restructuring thousand of ailing SOEs was not the sole issue in that regard: Decades of mismanagement had led bureaucrats,

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[8] Bhala (2000) at 1479; Hsieh (2009) at 375.
[9] Ianchovichina & Martin (2001) at 1209.
[10] This, in the case of China, meant MFN treatment by virtue of the 1979 China-US Trade Agreement.
[11] The presidential waiver could be rejected by Congress. This rejection could then be vetoed by the President. Overturning the veto required a two-third majority in both the House of Representatives and the Senate. *See* Lawrence, Devereaux & Watkins (2006) at 257. *See also* Abbott (1998) at 38; Hoekman & Kostecki (2009) at 568.
[12] *See* Ianchovichina & Martin (2001) at 1208.
[13] Ianchovichina & Martin (2001) at 1209.

both at provincial and central-government levels to flourish amidst State-owned strongholds[14]. Social unrest was also to be feared, whereas SOEs were still the backbone of the Chinese economy in poor provinces[15]. As QIN put it,

> "[i]*n a sense, China's WTO accession is all about opening its inefficient sector to foreign competition, thereby accelerating the SOE reform*"[16]

Two benefits were seen to arise from WTO accession in that regard: The first one, deriving from classical economic theory, which predicted that, under competitive pressure, inefficient actors would exit the market, leaving the market to efficient actors which may in turn develop and expand[17]. A second benefit was the possibility for modernizers to use GATT/WTO accession as a lever for reform. The domestic reforms could hence be presented as 'necessary' for the PRC to succeed in its Geneva endeavors, and could be packaged to show the *overall* gains arising out of accession[18]. More importantly, the commitment to an international organization (be it a *de facto* organization such as GATT, even) permitted to 'lock-in' the reforms and entrench China firmly on the path to market economy[19].

In spite of the powerful (economic and political) arguments in favor of SOE reform, the battle was yet a hard one, and not for bad reasons only. BHALA accurately describes the macroeconomic risks facing the PRC's economy in tackling the SOE issue through GATT/WTO concessions, with Chinese banks bearing the dual burden of increased foreign competition and non-performing SOE loans[20]. For these reasons, the Chinese leadership decided to progressively reform the State-owned sector, in stark contrast to the mass privatization which had taken place in central Eastern Europe following the collapse of the soviet bloc[21].

Fighting off conservative foreign policy through the prestige of restored grandeur

Bureaucratic interests in the State-owned sector found a natural ally within the Chinese military, which wanted to retain control over strategic industries such as telecommunications or steel production, and approached trade liberalization in a conservative and overly suspicious manner[22]. The military rhetoric often relied (and still does) on heavy nationalistic arguments and portrayed China as the victim of neo-imperialist discrimination in not being

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[14] A particularly telling account in that regard is which of the final stages leading to the Nov. 15th, 1999 US-China Bilateral Agreement by Fewsmith (1999).
[15] Bhala (2000) at 1482; Qin (2004) at 874. *See also* Potter (2001) at 592, 593.
[16] Qin (2004) at 874. *See also* Potter (2001) at 593.
[17] As illustrated in Rumbaugh & Blancher (2004).
[18] Ianchovichina & Martin (2001) at 1213.
[19] Hoekman & Kostecki (2009) at 41; Halverson (2004) at 333; Hsieh (2009) at 374.
[20] Bhala (2000) at 1491, 1523.
[21] Qin (2004) at 872.
[22] *See*, e.g., Bhala (2000) at 1490.

treated as an equal by great powers[23]. In turn, these arguments often echoed strongly with the Chinese Street and some of the *intelligentsia*[24], not least because international trade is read in China against the background of its 'Century of Humiliation' – when China was coerced into one-sided trade agreements such as the Treaties of Nanjing (1842) and of Wangxia (1844) with the UK and the US, respectively[25]. Military-backed nationalism, coupled with various Sino-American crises in the 1990's, complicated the task of the political leadership as the major roadblock to GATT/WTO Accession was the necessary bilateral agreement with the US.

Another strong argument in favor of accession may then certainly have been the prestige that the leadership could derive from membership. As many authors point out, accession was a signal to the international community that China had now resumed its status amongst world leaders and was ready to assume more responsibilities (and certainly less likely to suffer bashing)[26]. A place at the table of great powers would effectively wipe out memories of the 'Century of Humiliation' and generate immense political clout for the leadership leading the Chinese people to the international recognition that it had been longing for. In turn, GATT/WTO membership also implied recognition of the success of Deng Xiaoping's reform agenda, both at home and abroad[27]. The Organization (and its predecessor) is, after all, the standard-bearer of free trade and free market ideology on a global level.

1.2 A HISTORY OF ACCESSION

1.2.1 GATT/WTO ACCESSION IN GENERAL

Accession to the GATT (and to the succeeding WTO) is open to any State or custom territory with an autonomous external commercial policy. The legal basis providing for accession (GATT XXXIII and, now, WTO XII) being of a relatively vague nature, practice developed during GATT years so as to fill in the gaps in this provision[28].

Essentially, GATT/WTO accession is a two-track process[29]. Firstly, every interested Member[30] may request to enter bilateral negotiations with the accession candidate. In this

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[23] On China's 'dilemma of dependency' in the international political economy, *see* the references quoted by Potter (2001) fn 2 at 593.
[24] *See*, e.g., Fewsmith (1999) at 33.
[25] These treaties provided, e.g., for unilateral MFN treatment clauses; *see* Hsieh (2009) at 372; *also* Halverson (2004) at 331.
[26] Hsieh (2009) at 374; Bhala (2000) at 1480; Halverson (2004) at 332.
[27] Lardy (2002) at 11.
[28] Bhala (2000) at 1472.
[29] The following draws on Hoekman & Kostecki (2009) at 75 and Bhala (2000) at 1471.

context, Members negotiate the relevant market access concessions or commitments they would want to obtain from the candidate to accession. These negotiations may cover tariff as well as non-tariff issues. The outcomes of individual negotiations are then 'multilateralized' by virtue of the most-favored-nation treatment principle embodied in the GATT/WTO system.

Secondly, whether in parallel or sequential order to the bilateral negotiations, the candidate negotiates on a multilateral level with the Working Party established by the Membership to deal with the accession process. The task at the multilateral level is to evaluate the trade regime of the candidate[31] and to provide its 'terms of entry' to the GATT/WTO, i.e. country-specific rules which will modify or amend the general agreement in question. The results of the multilateral track are contained in the candidate's Protocol of Accession, a document binding on all parties and effectively incorporated to the GATT/WTO legal order[32]. Importantly, there are no limitations on the subject-matter that can be included in a Protocol of Accession[33]. The candidates' Schedule of Concessions (and also, under WTO, its Schedule of Specific Commitments pertaining to GATS), obtained through the combination of all results from individual negotiations, is annexed to the Protocol. Following GATT XXXIII/WTO XII, the decision on the accession of a new Member is taken by the Membership under a two-third majority rule. Any Member may decide to 'opt-out' and exclude the application of the Agreement to the acceding Member (GATT XXXV/WTO XIII).

The accession process expanded radically from GATT to WTO periods. In the years prior to the creation of the Organization, negotiations were guided by pragmatism and so-called 'high politics', namely other foreign policy interests. HALVERSON provides in that regard an interesting account of State-planned economies' accession in the 1960's and 1970's, where economic reforms were secondary at best to other concerns such as security politics, resulting in a condition of 'relative autarky' of the newcomers within GATT[34].

Whereas accessions under GATT were generally swift and straightforward, pertaining mostly to tariff bindings and some technical barriers to trade, negotiations under WTO have become highly resource-intensive and time consuming. China's accession process lasted fifteen years, Saudi Arabia's accession took over ten years, and, at the time of writing, Russia's accession finally appears poised to succeed after 18 years of acrimonious negotiations. HOEKMAN & KOSTECKI list three reasons which may explain the extension of the

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[30] Under GATT 1947, the proper terminology was to refer to States part to the Agreement as 'Contracting Parties', whereas under the WTO, they are now referred to as 'Members'. For the sake of convenience, the author will hereinafter solely use 'member(s)'.
[31] This assessment is made on the basis of a memorandum on the candidate's trade regime, which contains extensive information on that State's laws, regulations, but also technical or safety requirements, along with detailed economic indicators; *see* Hoekman & Kostecki (2009) at 75.
[32] *See* below section 1.3.
[33] Qin (2003) at 487; Abbott (1998) at 6.
[34] Halverson (2004) at 339.

process[35]. Firstly, the coverage of WTO is considerably more extensive than which of GATT, as it now deals with trade in services and other topics such as intellectual property rights. Secondly, these authors underline the shift of major traders – such as the US – from 'high politics' to the pursuit of national economic interest (i.e. increasing 'commercially meaningful' market access and shielding domestic industries from foreign competition), which occurred in the 1990's. Interestingly, this shift can also be plausibly advanced as having taken place in China at the same period[36]. Thirdly, large trading powers would now tend to perceive WTO Membership as a means to limit State interventionism. Such a trend could explain demands to transition economies such as China and Vietnam purporting to the liberalization of their State-owned sectors, whereas such concerns seem to fall outside the scope of WTO.

Amongst scholarship, the most recurrent critiques of WTO accession generally rely on its asymmetric nature: the acceding country is in no position to formulate demands or extract any supplementary concession from other Members whilst the 'price' it pays to join the Organization is generally much higher than corresponding obligations of similarly situated parties within the WTO[37]. Such assertion gained further emphasis as most acceding Members under WTO are developing countries. A careful analysis of the channels through which accession affects countries is unfortunately beyond the scope of this paper; however, a growing consensus in the literature sustains that most gains of WTO accession can be obtained through its coupling with domestic reform efforts, as well as the undertaking of reciprocal commitments (i.e. no or minimal special and differential treatment)[38].

1.2.2 GATT YEARS (1987-1989) AND THE BID FOR WTO ORIGINAL MEMBERSHIP (1992-1994)

The GATT Working Party on China's Status as a Contracting Party was established by the GATT General Council on March 4th, 1987. On the multilateral track, key issues of the PRC's trade regime under review were mainly the tariff barriers averaging 40%[39], the lack of transparency in rulemaking and administration of laws, subsidies to the State-owned sector, liberalization of financial services, intellectual property rights enforcement and currency issues. A constant preoccupation on the Chinese side was to obtain developing country status so as to avail itself of the special and differential treatment provisions contained in the agreements and under negotiations at the time[40]. Another aspect of the multilateral track was that China actively participated in the Uruguay Round negotiations. PRC accession

[35] Hoekman & Kostecki (2009) at 77.
[36] Bhala (2000) at 1479.
[37] *See*, generally, Hoekman & Kostecki (2009) at 77, 567; On China: Halverson (2004) at 332.
[38] Hoekman & Kostecki (2009) at 575.
[39] Sally (2010) at 4.
[40] Bhala (2000) at 1481.

negotiators were therefore aware of the forthcoming possibilities for carve-outs and exceptions which would later be available to developing countries.

On the bilateral track, China was requested to enter into market access negotiations by forty-four existing GATT Members[41]. These included all the major trading economies in the world, namely the United States, the then-fifteen Member States of the European Communities, Canada, Japan, Australia, Switzerland and New Zealand, but also the upcoming large developing economies, Brazil and India.

The main concerns which drove the attitude of trading partners towards China during the accession process, both on the bilateral and multilateral tracks, were mostly due to the size and nature of the Chinese economy[42]. Most Members were adamant as to the necessity for the PRC to demonstrate that its economy was sufficiently market-oriented before joining in GATT. This sentiment was reinforced by the size of the Chinese economy and its near-future potential, increasingly revealed by its rapid growth in the 1980's[43]. The 'SOE-problem' was an issue of contention from the beginning on, with the US taking a rigid stance towards sufficient market orientation, which it considered as a bottom-line requirement to accession[44]. The perceived threat of losing contingent protection (i.e. origin-based) against Chinese products as a result of the application of MFN treatment fueled this cautious approach, especially since the PRC's economy was characterized by its labor-intensive, export-oriented industries[45]. As a result, negotiations bore not only upon commitments and concessions between parties, but also on domestic reforms within the PRC[46].

As talks of an emerging new international organization following the results of the Uruguay Round were gaining momentum, the PRC leadership set a deadline for entry at January 1, 1995[47]. From 1987 to 1989, substantial progress was accomplished on both tracks, with in particular the US-China bilateral agreement reportedly close to a successful completion[48]. However, non-trade related events were to complicate this process. In the spring of 1989, the Chinese government's crackdown on protesters on Tiananmen Square in Beijing brought all negotiations to a halt[49], as 'high politics' took over trade interests. Activity was resumed in mid-1992, with Deng Xiaoping's call for accelerating reforms and deepening China's economic integration[50]. A coincident factor was the resolution of a long-standing

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[41] Gertler (2003) at 57.
[42] *See*, e.g., Abbott (1998) at 41.
[43] Hoekman & Kostecki (2009) at 567; Halverson (2004) at 325.
[44] As did most countries, with maybe the exception of the EC and Japan which seemed ready to accept less strict requirements for entry, with more commitments to be undertaken upon accession through transitional periods; *see* Bhala (2000) at 1482.
[45] *See* e.g. Hoekman & Kostecki (2009) at 571.
[46] Hoekman & Kostecki (2009) at 567; Gertler (1998) at 68.
[47] Bhala (2000) at 1481.
[48] Gertler (1998) at 66.
[49] Halverson (2004) at 324.
[50] Potter (2001) at 596,

dispute between the US and China revolving around non-tariff barriers through the signing of a Memorandum of Understanding. Under its terms, China was to effectively remove the challenged measures within five years, in exchange for the US support of the PRC's accession and the removal of certain export restrictions[51].

The year 1992 thus marked the start of the PRC's second package of unilateral economic reforms[52]. WTO accession requirements and negotiations were used to leverage concessions from the domestic military-industrial complex and conservative hardliners of the Chinese Communist Party. Amongst central points of this 'second-gear' phase of reforms were the extension of private ownership and of private enterprises, the reduction of subsidies to SOE, the progressive (yet fast) abandon of price control in most sectors[53], but also a rapid phasing-out of non-tariff barriers along with a decrease in tariffs[54]. IANCHOVICHINA & MARTIN find that the average tariff rate was brought down from 42.9% in 1992 to 24.3% in 1997[55]. By that time, China had become the world's sixth largest exporter, and seventh largest importer. Its trade had increased over seven-fold between 1980 and 1997[56], mostly through exports of labor-intensive products such as apparel, footwear and toys[57].

By late 1994, the PRC had signed the Final Act Embodying the Results of the Uruguay Round, but had not reached any bilateral agreement with the United States. The outstanding points of dissent remained lack of transparency in the PRC trading regime, some tariff peaks, phasing-out periods for non-tariff barriers, subsidization of SOEs, trading rights and national treatment of foreign enterprises, agricultural market access, intellectual property rights, along with discussion of a tailor-made special safeguard designed to protect import-competing industries against surges in Chinese imports[58]. The latter point of view was shared by many negotiating States within the Working Party, both industrialized and developing.

On the US domestic political front, a bipartisan coalition of interests was disavowing China's attempt to accede. Democrats were fiercely arguing on the threat of mass unemployment for American workers, backed by trade unions, whereas corporate America expressly conditioned its support to the conclusion of a 'commercially meaningful' agreement on market access, i.e. the opening of the Chinese market to American exporters[59]. In the background were a conglomerate of human rights, consumer, religious or environmental activists which were all opposed for various reasons to the United States granting 'permanent

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[51] Bhala (2000) at 1485.
[52] *See* Sally (2010) at 4.
[53] *See* Lardy (2002) at 25.
[54] Xiaobing (1998) at 53. For a numerical summary of actual tariff cuts which took place from 1992 to 2001 in the PRC, *see* Lardy (2002) at 35.
[55] Ianchovichina & Martin (2001) at 1213.
[56] These numbers come from Xiaobing (1998) at 55.
[57] Lardy (2002) at 61.
[58] Bhala (2000) at 1487.
[59] Lardy (2002) at 2; Bhala (2000) at 1487; Fewsmith (1999) at 26.

normal trade relations' to China[60]. In order to overcome this political deadlock, any bilateral agreement would have to guarantee market-economy commitments from the PRC, with thorough specific monitoring and readily-enforceable defensive measures[61]. These points were to become more salient throughout the 1990's, with growing trade imbalance between the US and the PRC – which was used as irrefutable proof of unfair trade practices and currency manipulation from the Chinese side[62].

In China, the push for increased reforms of the early 1990's had been accompanied by a renewal of strong interest in becoming an original Member of the WTO. In spite of the political impetus given by modernizer President Jiang Zemin, efforts to bridge the remaining gaps in accession negotiations failed, and so did China's bid to become a founding Member of the Organization.

1.2.3 THE WTO YEARS (1995-2001)

Following the disappointment of the failed attempt to become a founding Member of the WTO, mixed signals started to emanate from the Chinese leadership[63]. Sound macroeconomic policies had brought inflation under control and, by 1996, the implementation of the so-called 'Osaka package' of unilateral tariff reductions had generated a new boost in export processing and trade volumes[64]. Accordingly, serious questioning as regards the true benefits of an accession started to arise within the PRC, led in part by then-Premier Li Peng, a declared champion of the Communist Party's old guard[65].

The United States demands were also increasingly perceived as unreasonable. The Beijing leadership had offered large concessions in 1996-1997 such as cutting average tariffs to 15% by 2000, phasing out all non-tariff barriers (e.g. quotas) by 2005, removing the joint-venture requirements for foreign undertakings and liberalizing domestic trading rights, enforcing TRIPS, partially liberalizing financial services, and limiting the overall level of special and differential treatment the PRC would request. Still, the United States negotiators maintained the offer was not 'commercially meaningful'[66]. The American position had strong political backing at home: Trade imbalance with China was ballooning (from 6.2 billion US$ in 1989 to 39.5 billion US$ in 1996)[67], the PRC was seen as a 'piracy paradise' by the entertainment lobby, and its human rights and political record were deemed incompatible with normal trade relations between the two countries.

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[60] *See*, generally, Bhala (2000) at 1520, 1528; Hoekman & Kostecki (2009) at 568.
[61] *See* Halverson (2004) fn 11 at 322.
[62] Bown & McCulloch (2009) at 4.
[63] Bhala (2000) at 1490.
[64] Lardy (2002) at 18, Xiaobing (1998) at 56.
[65] Bhala (2000) at 1491; Fewsmith (1999) at 26.
[66] Bhala (2000) at 1493.
[67] Lawrence, Devereaux & Watkins (2006) at 254.

On the multilateral track however, the Chinese position was gaining momentum as New Zealand announced in late 1997 that the two States had reached an agreement on market access commitments. More importantly, the EU was now indicating that it could be satisfied with partial commitments at entry and follow-up concessions to be implemented through transitional periods[68].

More factors were tilting the balance in favor of accession. The appointment of Zhu Rongji as Premier in September 1997 in replacement of Li Peng[69] was a strong support afforded to the modernizers. Whereas Zhu displayed initially a certain lack of interest in WTO matters, this was to change as he realized the potential of accession as a lever for his core agenda i.e. the reform of SOEs[70]. The Asian crisis of 1997-1998 also entailed a major slowdown of the PRC's economy – even though it remained afloat during that period. The need for new export markets and the security associated with rule-based market access became very powerful arguments in favor of accession[71].

The situation for the reformer leadership became precarious, at best. Having already extended their political credibility to push forward a swath of unilateral reforms since the early 1990's, the leadership needed now to accommodate opposed interests at home – as a stalemate was looming on the WTO front. By 1998, the discourse had moved to a take-it-or-leave-it stance, when recently-appointed Premier Zhu Rongji expressly conditioned China's accession to reasonable terms of entry[72].

In early 1999, however, both American and Chinese leadership seemed ready for an agreement. According to FEWSMITH, political impetus was provided through the good relations between Presidents Clinton and Jiang, with the former stating his intent to conclude negotiations in 1999[73]. As Zhu Rongji was preparing a State visit to the United States in April 1999, Geneva and Washington D.C. were swarming with rumors of a far- and wide-reaching Chinese offer. The concessions offered during Zhu's trip were indeed sweeping. The PRC offered tariff cuts below 10% by 2005, the phase out of all import quotas and comprehensive trading and distribution rights for foreign corporations. Purchases by SOEs would not be considered as government procurement. Financial services would be liberalized, especially the provision of foreign currency services. Foreign telecommunication operators could enter the Chinese market through joint-ventures. As regards agriculture, China would bind its tariffs below 17% by 2004, and repeal many sanitary and phytosanitary measures which the US deemed unjustified[74].

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[68] Bhala (2000) at 1489, 1496.
[69] Although the latter formally remained n°2 in the CCP Politburo, his influence was diminished.
[70] Lardy (2002) at 20; Fewsmith (1999) at 27.
[71] *See* Lardy (2002) at 17; Fewsmith (1999) at 28.
[72] Lardy (2002) at 20; Bhala (2000) at 1492.
[73] Fewsmith (1999) at 28.
[74] This list draws on Bhala (2000) at 1498.

The magnitude of the offer was unprecedented. The concerns and requirements set forth by the United States in the course of thirteen years of negotiations had been catered to, and most analysts expected the breakthrough agreement to be finally announced[75]. However, under pressure from his domestic advisors, President Clinton backed away from signing a deal, fearing strong resistance from Congress[76]. Worst even than the humiliation of coming home empty-handed, Premier Zhu moreover had to face the publication of the alleged Chinese concessions by USTR on its website[77]. Outraged, the Chinese leadership immediately denounced the document as not binding and of no value, representing only a work in progress[78].

On the Chinese domestic front, opponents to WTO accession reacted in outbursts against what was then perceived as a hostile attempt by the US to publicly humiliate China. The USTR's miscalculation went even further: as the document was revealed, it also permitted a first look at the whole accession package for many interest groups in China. Upon return in China, Zhu was abused by both political opponents and the media and his credibility was hence much diminished. Many amongst the old guard questioned whether the Premier had indeed exceeded his mandate in offering more than he was allowed to conclude the negotiations[79]. Feeling the heat, President Jiang himself had to temper the necessity of WTO accession in his discourse[80].

Adding to the very negative climate surrounding the failure of Premier Zhu's April visit, an American airstrike mistakenly hit the Chinese embassy in Belgrade on May 7th, 1999, killing three and injuring some thirty more, mostly civilians. It took three days to the Chinese leadership to react and put an end to the public displays of violence against American interests in China[81]. Even though the reaction was a moderate one, calling for a mutually amicable and cooperative relationship, an agreement between the two countries seemed (light) years away.

In July 1999, Japan and China concluded their bilateral agreement on market access. Japan, the first member of the 'Quad' to sign a deal with the Middle Kingdom, had finally reduced its demands on market access in the telecom sector, although these ranked high on the Japanese list of priorities[82].

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[75] Fewsmith (1999) at 23; Bhala (2000) at 1500.
[76] Fewsmith (1999) at 24; Bhala (2000) at 1501.
[77] Fewsmith (1999) at 30; Bhala (2000) at 1502.
[78] Fewsmith (1999) at 32; Bhala (2000) at 1502.
[79] Fewsmith (1999) at 34.
[80] *See*, the fascinating account of the April events by Fewsmith (1999) at 30.
[81] Bhala (2000) at 1503; Fewsmith (1999) at 33.
[82] Bhala (2000) at 1505.

1.2.4 THE 1999 US-CHINA BILATERAL AGREEMENT ON MARKET ACCESS

By the fall of 1999, WTO accession was back on top of the PRC agenda. A certain sense of urgency pervaded the leadership's decision to offer one last round of concessions, for which the United States seemed finally ready[83]. Other arguments are often invoked to explain the readiness of reformers to battle their domestic opponents once again over WTO matters.

Firstly, it is recurrently argued that the nearing end of President Jiang's rule may have encouraged him in an attempt to leave a lasting legacy through WTO accession, whereas his term until then had seemed void of any ideological or historical milestone – in stark contrast to the rule of his immediate predecessor, Deng Xiaoping[84]. Secondly, the leadership's very recent stint at crisis management did probably convince most stakeholders in Beijing of the necessity to speed up the domestic reform process and to rapidly shift resources towards internationally competitive and efficient activities[85]. A third key factor in late 1999 was the launch of the so-called 'Millennium Round' of trade negotiations, scheduled to be announced at the Seattle Ministerial conference on the last week of November. Chinese leaders knew that the PRC would have to be a WTO Member at the beginning of the new round, under penalty of seeing the costs of its accession rise even further as WTO Members engage in new liberalization 'within the club'[86]. This situation had already happened during the Uruguay Round, with the mandate of the Working Party on China's Accession constantly expanding to encompass the new disciplines under negotiation. The PRC's offers and concessions may well then have been guided by the worrying prospect of perpetually rising costs of entry[87].

The Seattle Ministerial turned out to be the debacle that attracted worldwide attention on the WTO[88], but in early November 1999, the threat of a looming new round was credible for Chinese negotiators. Following *rapprochement* and positive signals in September, President Clinton then decided to send US Trade Representative Charlene Barshefsky and National Economic Advisor Gene Sperling to Beijing on November 8th to try and hammer out a deal with Chinese negotiators. On November 16th, 1999, a bilateral agreement between the United States and China was finally reached, just two weeks prior to the opening of the Seattle ministerial.

The content of the US-China bilateral agreement contains far-reaching commitments from the PRC[89]. Amongst its most noticeable market-access features were the reduction of average tariffs (on both industrial and agricultural products) to 17%, with industrial products

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[83] President Clinton's decision to walk out of the April deal had been met by with very vocal criticism from corporate America, a big chunk of the political class and some within the administration.
[84] Halverson (2004) at 333; Fewsmith (1999) at 39; Bhala (2000) at 1505, 1511.
[85] Lardy (2002) at 16; Bhala (2000) at 1505.
[86] Bhala (2000) at 1474, 1505.
[87] Halverson (2004) at 332.
[88] *See*, e.g. Hoekman & Kostecki (2009) at 139.
[89] The following draws on Bhala (2000) at 1512.

of interest to US exporters bound as low as 7.1%, the elimination of all import quotas by 2005 (most of it by 2002), full trading and distribution rights to foreign ventures within three years upon accession. The rule-based commitments included the phasing out of all agricultural export subsidies[90], granting of a special textile safeguard until the end of 2008 (i.e. exceeding the duration of the *WTO Agreement on Textile and Clothing*), and another, product-specific, safeguard designed to last until the end of 2013 which permits the imposition of a safeguard on sudden imports of Chinese goods under more lenient conditions than under GATT XIX and the *WTO Agreement on Safeguards*. Moreover, China agreed not to challenge the United States in using non-market economy methodologies when calculating antidumping and countervailing duties until 2016. Sector-specific liberalization of services included important concessions in telecom, financial, tourism, accounting and legal services.

The US-China agreement paved the way for other bilateral negotiations to come to a satisfactory closure. On November 26th, 1999, Canada and China announced the completion of their market access agreement, which – although roughly identical in substance to the US-China agreement – provides for further tariff reduction on Canadian priority industrial and agricultural products, down to 5.1% [91]. In the spring of 2000, China concluded negotiations with prominent developing countries such as Brazil, Indonesia and India. As agreements were multiplying, actors could focus on their priority targets, whilst every prior bilateral concession was being multilateralized. For instance, India obtained wider market liberalization for software developers and other IT services in its bilateral agreement[92], while Switzerland brought tariffs on watches from 25% to 12% and secured three licenses for Swiss insurance providers[93].

The EU was the last member of the 'Quad' to reach an agreement with China, on May 19th, 2000. Amongst the very few remaining points of contention, the EU obtained significant reduction on 300 to 400 products of special interest, along with insurance and financial services licenses for European firms and shorter transitional periods for the phasing out of some restrictions on telecom foreign ownership[94].

In September 2000, President Clinton's 'all-out effort' to pass permanent normal trade relations for China in the US Congress was successful. China would therefore be able to enter WTO without the US suspending the application of the WTO Agreement – and suffering the ensuing (likely) Chinese retaliation[95]. The last bilateral agreement was concluded with Mexico in September 2001, after being held up over the question of the more than 1000

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[90] Although this commitment was the subject of a controversy. *See* Lardy (2002) at 93.
[91] Potter (2001) at 598.
[92] Bhala (2000) at 1531.
[93] Lardy (2002) at 3.
[94] Bhala (2000) at 1533. *See also* Potter (2001) at 598.
[95] On the subject of the 'Battle for PNTR', *see*, generally, Lawrence, Devereaux & Watkins (2006); Bhala (2000) at 1528, 1530.

antidumping measures imposed by Mexico against Chinese products since 1993. The agreement between the two countries gave Mexico six years to phase out the WTO-inconsistent duties[96].

On the multilateral track, efforts remained to be made in order to 'clean-up' China's consolidated Schedules, but these issues were mostly administrative and straightforward[97]. The results of the multilateral process are discussed in the next part of this paper. On October 1st, 2001, the WTO Working Party on the Accession of China submitted its report, which lays out China's commitments in detail. On November 10th, 2001, the WTO Ministerial Conference gathered in Doha, Qatar, approved the decision on Accession and the appended Protocol.

On December 11th, 2001, after more than fifteen years of negotiations and following its ratification of the terms of accession, China became the 143rd Member of the WTO.

1.3 THE RESULTS OF CHINA'S ACCESSION NEGOTIATIONS: THE ACCESSION PROTOCOL AND THE WORKING PARTY REPORT.

China's obligations under the WTO agreements are governed by the provisions contained in its Protocol of Accession ('PA'), which sets out '*the terms and conditions*' of China's accession[98]. Pursuant to 1.2 PA,

> *"This Protocol, which shall include the commitments referred to in paragraph 342 of the Working Party Report, shall be an integral part of the WTO Agreement."*

Through this provision, all obligations contained in the Protocol and §342 of the Working Party Report ('WPR') are also subject to review and enforceable under the *WTO Understanding on Rules and Procedures Governing the Settlement of Disputes* ('DSU')[99], which provides in DSU 1.1 that

> *"The rules and procedures of this Understanding shall also apply to consultations and the settlement of disputes between Members concerning their rights and obligations under the provisions of the [WTO Agreement] […]".*

1.3.1 MARKET ACCESS VERSUS RULE-BASED COMMITMENTS

The Chinese Protocol contains commitments which can be broadly defined as either rule-based, i.e. purporting to dictate a certain conduct, or as pertaining to define market

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[96] Lardy (2002) at 126. That transitional period was later extended until the end of 2011.
[97] Gertler (2003) at 58.
[98] *Accession of the People's Republic of China*, Decision of 10 November 2001,WT/L/432.
[99] Qin (2004) at 883.

access[100]. At the outset, the presence of these two distinct sets of rules does not run counter the systematic of WTO law, which provides for both within the WTO agreements[101]. Under the general system of WTO law, rule-based obligations of WTO Members are uniform, whereas market access commitments are individually set for each Member[102]. Furthermore, amendments to the rule-based obligations require following the strict procedure set up by WTOA X, while market access commitments can be renegotiated as provided under e.g. GATT XXVIII:1 or GATS XXI, that is under reciprocal terms[103]. Hence, market access obligations have been said to provide the necessary flexibility to cover rapidly-changing dynamics of international trade whereas rule-based obligations provide legal security and a stable framework in which to address relations[104]. In line with this theoretical approach, WTO Protocols of Accession until China's entry consisted in a standardized form which never exceeded two pages and only addressed some necessary technical adaptations, while a standard *renvoi* provision would incorporate specific rules of conduct included in the Working Party Report[105]. The rules of accession were thus, to a certain extent, also uniform.

China's Protocol of Accession departs from the prior practice of WTO accessions as regards both subsets of obligations. The Protocol itself is 11 pages long plus nine annexes and the more than 140 paragraphs of the Working Party Report which are incorporated through the *renvoi* mechanism of PA 1.2 and WPR §342. On market access, the Chinese commitments were 'unprecedented', when taking into account the size of its economy and level of development at the time of entry[106]. Concerning rule-based undertakings, China's accession gave rise to unique norms legitimizing the use of contingent protection and differential treatment[107]. The following sections expand on these salient features of China's Protocol of Accession.

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[100] Lardy (2002) at 65.
[101] Which represent a shift from GATT-era exclusively negative regulation to more positive regulation, the best example being the *WTO Agreement on Trade-Related Aspects of Intellectual Property Rights*. *See*, e.g., Ostry (2003) at 31.
[102] Qin (2003) at 485.
[103] Qin (2003) at 485.
[104] Qin (2003) at 485.
[105] *See,* e.g. Qin (2003) at 488, who assesses the content of the 16 Protocols which have been established for acceding countries between 1995 and 2002.
[106] Halverson (2004) at 326; Lardy (2002) at 80.
[107] Hoekman & Kostecki (2009) at 570; Lardy (2002) at 80; Qin (2003) at 490.

1.3.2 MARKET ACCESS COMMITMENTS

Trade in goods

As regards industrial products, China agreed to lower the unweighted average bound tariff rate from almost 22% to circa 9% by 2005[108]. On some of the products of 'special interest' to its trading partners, the PRC agreed to eliminate tariffs altogether, most of them by 2003[109]. China also agreed to remove all non-tariff barriers (e.g. import quotas, licensing requirements) by 2005, and in some specific sectors immediately upon accession[110].

China's commitments on agricultural products are equally impressive. The erstwhile average tariff rate of more than 35% was reduced to some 15%, with some key products such as rice, wheat and cotton benefitting of rates as low as 1% (within the 'entry' quota provided for by China's tariff-rate quotas)[111]. All non-tariff barriers were subject to 'tariffication', whilst a tariff-rate quota system was set up for ten commodities of 'special interest' to the negotiating parties to the accession[112]. Importantly, LARDY shows that the low-duty within-quotas represent volumes four to five times superior than that of Chinese imports of the same commodity in 1998[113]. It is therefore unlikely that the quota would get fulfilled within the foreseeable future. At the same time, above-quota rates – already very low in comparison with other WTO members – were to be brought down by 2004-6 to around half of their original levels[114].

It is easier to properly appreciate the PRC's effort of opening its markets for goods when it is compared with others. China's bound tariff rate on industrial products stands in sharp contrast to which of other large developing economies such as India (32.4%), Brazil (27%), Indonesia (36.9%) or Argentina (30.9%)[115]. Moreover, China's commitments are also exceptional in terms of coverage, by binding every tariff line (whereas e.g. India only binds two thirds of its tariffs)[116]. The unique scope of China's commitments also withstands a comparison with other WTO accessions completed during the same period, although

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[108] *See* Martin quoted by Hoekman & Kostecki (2009) at 569 (citing the average to be at 9.1%); Rumbaugh & Blancher (2004) at 8 (9%); Lardy (2002) at 65 (8.9%).
[109] Lardy (2002) at 65.
[110] Lardy (2002) at 65.
[111] *See* Martin (2005) quoted by Hoekman & Kostecki (2009) at 569; Lardy (2002) at 76.
[112] Halverson (2004) at 327 and fn 35.
[113] Lardy (2002) at 77.
[114] Lardy (2002) at 78.
[115] Lardy (2002) at 79, also referring to an undated manuscript from then-US Trade Representative Charlene Barshefsky reportedly stating that "very few countries have done this" (i.e. committed that broadly).
[116] Lardy (2002) at 79. *See*, generally, Hoekman & Kostecki (2009) at 192.

differences are narrower[117]. The picture is however clear as regards agriculture[118], where acceding countries have generally agreed to very little or no agricultural liberalization[119].

Trade in services

China agreed to liberalize extensively a vast array of services, including politically sensitive ones. Remarkably, China made commitments under every sector covered by GATS[120], unlike most WTO Members[121]. Moreover, these commitments have generally been hailed as deep and meaningful[122].

On the horizontal scale, China agreed to eliminate every restriction to full trading rights (e.g. right to import, to export or to sell) in all sectors, except for a few State monopolies, and to achieve full liberalization of the distribution sector by 2005[123]. Specific Chinese commitments include liberalization in the telecom sector, by e.g. allowing foreign ownership of up to 49% of domestic telephone or internet providers, but also, in line with joining the *WTO Agreement on Basic Telecommunications*, by adopting cost-based pricing method and recognizing the right to interconnection[124]. The PRC also agreed to open its financial services market to foreign banks, financial institutions or insurance companies. Under the terms of its accession, China e.g. undertook to phase out all non-prudential restrictions within its banking sector, thus permitting foreign banks to start unrestricted operations in China from 2005[125]. More broad commitments were made in audiovisual, legal and accounting services[126].

1.3.3 RULE-BASED COMMITMENTS

Commitments on existing WTO rules

A first set of commitments bear on rules which are part of the WTO agreements. These obligations generally identify specific domestic measures to be brought in conformity, or pertain to transitional periods for applying WTO rules – i.e. by either modifying existing

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[117] While other acceding countries also accepted to bind all of their tariff lines, they however often managed to bind tariffs well above their applied rate. *See* Lardy (2002) at 80; Hoekman & Kostecki (2009) at 575.
[118] Lardy (2002) at 79 makes an interesting comparison between the very favourable system afforded to Japan for the protection of its most sensitive agricultural product, and that granted to China as regards wheat (i.e. the PRC's most sensitive agricultural commodity).
[119] Hoekman & Kostecki (2009) at 575.
[120] Halverson (2004) at 327.
[121] Lardy (2002) at 79.
[122] *See*, e.g., Hoekman & Kostecki (2009) at 568; Rumbaugh & Blancher (2004) at 9; Halverson (2004) at 327; Lardy (2002) at 80.
[123] PA 5; *See also*, e.g. Lardy (2002) at 72.
[124] Lardy (2002) at 66.
[125] Although some restrictions remained until 2008. *See* Halverson (2004) at 327, fn 34; Lardy (2002) at 70.
[126] For an overview of the subject matter, as dealt with under the US-China bilateral agreement on market access, *see* Bhala (2000) at 1515.

flexibilities (and often eliminating them) or granting temporary exemptions or adaptations where they are not provided for by the text of the agreements[127].

In the case of the PRC accession, importantly, China agreed not to invoke many of the transitional periods afforded by the agreements to developing countries. For example, China agreed to eliminate all subsidies prohibited under the *WTO Agreement on Subsidies and Countervailing Measures* ('SCM') immediately upon its accession, and not to claim for a transitional period under SCM 27[128].

WTO-plus commitments

A second set of commitments consists of so-called 'WTO-plus' obligations. Under such rules, the acceding country agrees to abide by rules which go beyond the WTO agreements[129]. Prior to China's accession, such commitments usually included provisions regarding domestic privatization efforts or participation in plurilateral trade agreements (e.g. on government procurement or trade in civil aircrafts), and had already been controversial[130]. In the case of China, the number and scope of these commitments were unprecedented, while a number of them were unique[131].

China undertook broad transparency obligations, especially as regards access to (and even review of) its laws and regulations[132]. The PRC agreed to establish independent tribunals to review administrative activity pertaining to the covered agreements, and to provide for an appeal procedure hitherto[133]. In order to ensure the uniform application of its trade regime, China agreed to set up a unique 'complaint mechanism', whereby individuals and companies may request the Chinese authorities to take action and be provided follow-up information[134]. Further important WTO-plus commitments include national treatment obligations for foreign investments or the already mentioned full right of trade – which clearly exceed the scope of both the *WTO Agreement on Trade-Related Investment Measures* and GATT III[135]. The PRC also undertook several commitments to achieve market economy, which are discussed in the following chapter.

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[127] Qin (2003) at 488, 490.
[128] *See* PA 10.3. However long the transition period – which is intended for developing countries – may have been remains a debated point amongst WTO Members, in spite of the clear wording of WTOA XIV:2. Two countries having acceded prior to China, Bulgaria and Kirgizstan, benefitted from the remainder of the period indicated by SCM 27.3 i.e. until December 31st, 2002, to phase out all export subsidies; Polouetkov (2002) at 27. *See also* Qin (2004) at 886.
[129] These are possible by virtue of the very wide scope of WTOA XII. *See* section 1.3 above.
[130] Hoekman & Kostecki (2009) at 77; Qin (2003) at 489.
[131] Qin (2003) at 490.
[132] *See*, generally, Halverson (2004) at 345; Potter (2001) at 602. *See also*, Qin (2003) at 492.
[133] Halverson (2004) at 354; Qin (2003) at 496.
[134] Qin (2003) at 498; *see also* Halverson (2004) at 352, who negatively assesses the likelihood of a uniform application of the trade regime given the specificities of Chinese law and decentralized administration.
[135] Qin (2003) at 500, 501.

Finally, China agreed to a ten-year annual *Transitional Review Mechanism* ('TRM') in addition to the WTO biannual *Trade Policy Review Mechanism* ('TPRM')[136]. The United States, in particular, had argued for the necessity of this extraordinary, additional review as a precautionary device to control the evolution of the PRC towards market economy. However, as HSIEH convincingly explains, the TRM may well serve instead as a discretionary 'discovery' mechanism to scrutinize trade measures which other WTO Members intend to challenge. Indeed, unlike with the TPRM, China's subjugation to TRM is enforceable under the DSU by virtue of PA 1.2 and DSU 1.1[137].

Under earlier WTO practice, acceding Members commonly undertook some rule-based commitments such as have been described so far, although those were not as extensive[138]. However, a new category of rule-based commitments was created by the Chinese accession. These are addressed below.

'WTO-minus' commitments

A third subset of rules contains obligations which are not provided for by the letter or the spirit of the WTO agreements, and which reduce the rights of China within the multilateral trading system[139]. These commitments concern mostly trade remedies, i.e. means available for trading partners to depart in specific situations from the general rules to counteract intentional or circumstantial damage resulting from their application[140]. The most remarkable of these commitments are addressed below.

The Transitional Product-Specific Safeguard

Under WTO rules, Members retain the possibility of restricting imports (through the use of tariffs or otherwise) from a certain product when an absolute or relative surge of imports cause, or threaten to cause, serious injury to their domestic industry[141]. The imposition of this safeguard is conditioned to the showing of causality (and not of simple conjunction) between the increased imports in question and the alleged injury or threat thereof. Safeguards can be maintained for eight years maximum[142] and should in principle be applied on a MFN basis[143]. Affected exporting Members are entitled to compensation, which can take the form of a

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[136] *See* PA 18.
[137] Hsieh (2009) at 380.
[138] On transition economies accessions, *see*, generally, Polouetkov (2002) at 26. *See also*, Qin (2003) at 488.
[139] Halverson (2004) at 332; Qin (2003) at 490; Lardy (2002) at 80 (although this author refers to these commitments as 'WTO-plus').
[140] *See* Chapter 2 below.
[141] *See*, generally, GATT XIX and the *WTO Agreement on Safeguards* ('SFG').
[142] SFG 7 – which, in particular, provides for a mandatory 'cool-off' period, equal to the duration of the safeguard, during which a new safeguard can not be applied on the same product once the previous measure has elapsed.
[143] SFG 2.2 and 5.2. *See also* Hoekman & Kostecki (2009) at 423.

legitimate suspension of concessions under Article 8 of the *WTO Agreement on Safeguards* ('SFG')[144].

The PRC's Protocol of Accession creates a twelve-year 'transitional product-specific safeguard mechanism' ('TPSS'), under which imposition of a safeguard on Chinese imports is facilitated and China's rights to compensation are reduced[145]. The TPSS can be triggered by a lower injury standard – 'market disruption' – than under SFG and GATT XIX[146]. As the TPSS applies solely to Chinese products, it opens the possibility to restrict only imports from the PRC, thereby departing from the general non-discrimination principle embodied in SFG 2.2[147]. Furthermore, the PRC's right to compensation is curtailed as China cannot suspend equivalent concessions for two, respectively three years after the imposition of the safeguard measure, depending on whether the latter was taken in response to a relative or an absolute increase in imports[148]. Furthermore, a TPSS measure is apparently not limited in time, as long as the measure lies within the 'extent necessary' to remediate the market disruption[149]. A TPSS could therefore theoretically remain in force for twelve years, i.e. the entire transitional period under which the mechanism is allowed[150].

Two aspects of the TPSS are particularly disturbing. Firstly, under PA 16.8, any WTO Member that considers that a TPSS measure taken by another Member causes, or threatens to cause, significant diversions of trade into its market may request consultations with the PRC and, provided its requests are not satisfied, impose a TPSS measure of its own on Chinese imports. This 'anti-diversion TPSS' is not subject to any showing of injury to the domestic industry[151]. Given that trade diversion is almost certain to take place in third countries once a WTO Member has engaged a safeguard on Chinese imports, the implications of this mechanism could be a 'cascade' of safeguard measures on certain Chinese products – a kind of 'global safeguard' – which, for the most, would not only lack any economic rationale[152], but also not rely on any need as regards the protection of threatened domestic industries. At last, such a situation would simply reduce the global volume of PRC exports of the said product.

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[144] Retaliation is immediately available when the safeguard has been taken in response to a relative increase of imports, whereas, in cases where it is based on an absolute increase, retaliation is barred for the first three years. *See* SFG 8.3.
[145] *See* PA 16. The TPSS will expire in December 2013.
[146] According to former USTR Barshefsky, "[the TPSS] *permits us to act based on the lowest showing of injury*". Quoted by Lardy (2002) at 82. *See also*, Halverson (2004) at 331 and fn 51.
[147] Although Jackson (2003) at 26 is of the opinion that such departure from MFN is not necessarily negative.
[148] PA 16.6.
[149] PA 16.3.
[150] In between 2002 and 2009, the United States initiated 9 TPSS investigations resulting in the imposition of 7 safeguards. *See* ITC (2010) at table 16; *See also* Lardy (2002) at 84.
[151] Lardy (2002) at 84.
[152] The rationale behind safeguards such as contained in GATT XIX and SFG is solely of a political nature, as measures taken to impede trade will generally reduce the global efficient allocation of resources. *See*, generally, Hoekman & Kostecki (2009) at 423.

Secondly, the procedure under the TPSS provides specifically that the WTO Member looking to remediate market disruption should first enter into consultations with China, and, provided that Chinese imports are in cause, that "[…] *China shall take such action as to prevent or remedy the market disruption*"[153]. This provision marks a backdoor return for voluntary export restraints ('VERs'), a practice commonly used by the United States in its trade relations with Japan in the 1980's and early 1990's. The US propensity for 'aggressive unilateralism' in the form of VERs was source of much concern during the Uruguay Round, ultimately leading to the express prohibition of the practice[154]. Thus, although VERs had for decades been repeatedly described by economic authorities as extremely inefficient and costly, and carried the symbolic value of the trade wars between the US and Japan in the 1980's, the practice was reinstalled as a legitimate measure against one WTO Member, China, in its Protocol of Accession.

The Transitional Textile Safeguard

A major cause of concern to China's trading partners was the potential for growth in its already powerful textile sector, especially so as the *WTO Agreement on Textile and Clothing* ('ATC') provided for all quantitative restrictions to be phased-out by January 1st, 2005. Although China managed to secure regular treatment as regards the phase-out of quotas by 2005 [155], it also agreed to be subject to a 'transitional textile safeguard mechanism', valid until December 31st, 2008 [156]. A proper analysis of this specific safeguard exceeds the scope of this paper. However, some of its features still deserve to be underlined.

Under the Textile Safeguard, countries could restrain China's exports of textile and apparel beyond the deadline provided for by the ATC. Moreover, the PRC Safeguard permitted immediate action (i.e. without prior consultations)[157] and did not provide for any compensation to China. More surprisingly, WTO Members which had not maintained quotas on imports from the PRC under the ATC could nonetheless restrict them through the use of the Textile Safeguard[158].

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[153] PA 16.3.
[154] *See* SFG 11.1(b); on this subject, Bown & McCulloch (2009) at 9, 10, 21; *see also* Hoekman & Kostecki (2009) at 423.
[155] That was, apparently, an achievement in itself, as the American textile lobby pushed for a longer transitional period. *See* Bhala (2000) at 1514.
[156] WPR §242.
[157] *See* WPR §242(c).
[158] Lardy (2002) at 85. This author suggested nonetheless that the TPSS would be preferred to the Textile Safeguard as measures taken under the latter are limited to late 2008 and impose progressive liberalization of the quotas – two constraints which are inexistent under the TPSS. *See also*, Rumbaugh & Blancher (2004) at 11.

Antidumping and anti-subsidization methodologies

The treatment of remedies to 'unfair' trade practices[159], i.e. dumping and subsidization, is the subject of the following chapter. In sum, it suffices here to say that China agreed to allow other WTO Members to apply methodologies for the calculation of antidumping or anti-subsidy duties and to use definitions which are not provided for within the WTO legal order, or that build extensively on arcane provisions found within the agreements. As will be further explained, these commitments ease the process of imposing extraordinary duties on Chinese imports.

1.4 THE RESULTS OF THE ACCESSION IN PERSPECTIVE: HOW CHINA'S TRADING PARTNERS ENDED IN WONDERLAND

The previous discussion has shown the extent of the PRC's commitments upon accession. Whereas the study of the political and economical dynamics within China may help to explain the PRC's decision to enter WTO – even at such high costs – the results contained in the accession documents can in turn inform of other WTO Members' goals and interests through this accession process.

Two core objectives of WTO Members for the Chinese accession are visible through the concessions that were obtained. The first one, reflected in the market access commitments, is that of mercantilist, direct economic self-interest. At the outset, classic international trade economic theory predicts that gains arise from free trade, and there is no doubt that a major factor favoring a successful outcome throughout the accession process was the prospect of the enhanced overall welfare arising from liberalizing trade with one of the world's largest traders[160]. The original market access sought by industrialized nations purported mainly to open the PRC for processing purposes so as to allow foreign firms to harness the Chinese comparative advantage in labor-intensive production. Services sectors such as telecom, banking or distribution later made their way to the top of industrialized nations' wish list as China was becoming ever more likely to foster the largest market for consumer services in the world. Obtaining meaningful market access implied the need for ancillary trading rights, better protection for foreign investment, but also the effective removal of non-tariff barriers and its monitoring. As has been suggested in the previous section, the transparency

[159] This term, although neither formally part of the WTO vocabulary nor always economically justified, is generally used in literature to refer to these situations. *See* Hoekman & Kostecki (2009) at 413.
[160] At the time of its entry, China was the world's sixth largest trader; *see* Qin (2003) at 431. For a summary of empirical literature on the predicted welfare gains of China's accession, *see* Rumbaugh & Blancher (2004) at 13.

requirements may in turn provide other WTO Members with a decisive advantage when using dispute settlement to effectively 'crack' Chinese markets[161].

Secondly, as China underwent its economic transformation, the perceived need to bring the PRC into a frame where its activity and development could be monitored and, eventually, controlled, became more pressing. For example, effective enforcement of intellectual property rights within what was then perceived as the 'safe harbor' for piracy and counterfeited goods is likely to have been a strong incentive for industrialized nations to support China's accession. But this second guiding idea – obtaining protection from China – can also (and mostly) be seen through the impressive list of rule-based commitments which are part of the accession documents. These create a multilayered system which gives a strategic advantage to WTO Members over the PRC in potential trade conflicts on home or third markets. At the outset are provisions which allow WTO Members to scrutinize domestic policies pertaining to the PRC's trade regime; these do not only provide for highly burdensome requirements on publication and translation of documents (and the inherent costs hitherto), but also for a right to review and question government policies. The number of outstanding legal obligations as regards transparency almost guarantees – when one remembers that China is still a developing country plagued by heavy bureaucracy – that procedural violations could later be found should dispute settlement proceedings occur. A second subset of rules restricts Chinese policies of expansion and development; these are the commitments on market economy (which are discussed more in detail below) and on the reform of State-owned industries; regardless of whether these commitments are supported by any valid rationale, it should be borne in mind that GATT/WTO is in principle not concerned with a Member's sovereign choice of economic system[162]. Finally, a third subset of commitments gives the means to control and regulate Chinese exports through contingent protection, in spite of the principle of non-discrimination underpinning the WTO system. These are the provisions on antidumping and anti-subsidization which are the subject of the following chapter, along with the TPSS and the Textile Safeguard discussed above, which reduce the overall gains China would otherwise derive from joining the WTO. That is, increased market access, transparency and legal security.

Although the two core objectives detailed above – i.e. opening export markets and protecting domestic industries – seem to be irreconcilable, at least within a system that relies as heavily on principles of reciprocity and non-discrimination as WTO does, they were nonetheless simultaneously pursued through the negotiations. Weakening constraints faced by the PRC and its leadership's urgent need for an agreement meant it had to concede extensively

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[161] Indeed, since China's accession, the United States and, to a lesser extent, other Members have been very aggressive in their use of the WTO dispute settlement mechanism to open up markets in the PRC. *See*, e.g., Hufbauer & Woollacott (2010) at 7, 35; Bown & McCulloch (2009) at 16.

[162] Hoekman & Kostecki (2009) at 184, 231; For a positive appreciation of the Chinese accession outcome in that regard, *see* Qin (2003) at 512.

on both ends. Trading partners obtained extremely meaningful opportunities for their exporters while retaining the possibility to shield their domestic industries from Chinese imports. Whereas offensive and defensive interests were catered to in equally generous servings, it is not difficult to see what other WTO Members had to gain from a Chinese accession – regardless of their original position[163]. According to a person close to the US-China bilateral negotiations, "[US Trade Representative Charlene] *Barshefsky was able to have a negotiation in which she demanded a lot and gave up nothing, and what a wonderful success that was*"[164]. Finally, whereas the costs of China's concessions were certainly worsened through multilateralization[165], the Working Party Report expressly cautions against any hopes for a 'spill-over' wave of beneficial liberalization following the PRC accession, stating that:

> *"[…] all commitments taken by China as a result of her accession process were solely those of China and would prejudice neither existing rights and obligations of Members under the WTO Agreement nor on-going or future WTO negotiations […]"*[166].

As a result, the rules under which China acceded certainly tilted the proverbial 'playing field' – with the PRC inherently doomed to fight uphill battles.

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[163] *See*, e.g., Rumbaugh & Blancher (2004) at 14, who find that while advanced economies will benefit from China's accession, developing economies competing for e.g. the textile markets will suffer adjustment issues. However, lesser developed economies with trade patterns complementing China would be likely to benefit. *See also* Qin (2003) at 510

[164] Quoted by Jackson (2003) at 25.

[165] Hoekman & Kostecki (2009) at 570.

[166] WPR §9; *see also* Qin (2003) at 513.

2 TRADE REMEDIES IN CHINA'S WTO: DEALING WITH THE NME FROM WITHIN

The systemic disadvantage of China created by its terms of accession, which POLOUEKTOV aptly describes as belonging more to the *Alice in Wonderland*-context than to a framework of legally binding rights and obligations[167] and the ensuing discomfort as regards what could be called the resurgence of 'second-class membership' are exacerbated by WTO-minus provisions. Against the principled background that is the WTO system, most of these were justified by referring to the PRC as a 'non-market economy' ('NME'), which is the closest to a rationale for the unique treatment of China that is provided by the accession documents [168].

This chapter addresses the NME problematic from the perspective of trade remedies, namely antidumping duties ('ADs') and countervailing duties ('CVDs'). The reasons for such an approach are twofold: firstly, China is the most frequent target of such proceedings. In the period 1995-2010, ADs were imposed on Chinese products in 590 instances, or 23.6% of all measures worldwide, making it by far the hardest hit country by such duties – the Republic of Korea occupies the second place with 6.7% of all measures[169]. This finding needs to be assessed against the fact that ADs and CVDs have become the most used instruments for trade protection[170]. Over the period 2002-2009, products accounting for 8% of the total value of Chinese exports to the US were subject to extraordinary duties[171]. A look to the annexes of the 2010 European Commission report on the EU's trade defense activities shows a similar picture, with the PRC accounting for 35% of all new investigations in the period 2005-2009. Chinese exports to the EU in 2009 were subject to over 60 measures, with some 20 more pending final determination[172].

Secondly, because these instruments allow for a wide margin of discretion to national authorities and rely more on political consideration than on economics, they can easily be subverted and abused by protectionist interests. This is even more so when the PRC-specific rules on trade remedies are taken into consideration. The purpose of this chapter is to show that trade remedies as modified by China's related WTO-minus concessions have been used to legitimize restrains on China's opportunities to perceive benefits from its accession.

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[167] Polouektov (2002) at 30.
[168] Qin (2003) at 511, 514.
[169] WTO, *Anti Dumping Duties Statistics (1995-2010)*, available at http://www.wto.org (last visited 28.10.2011); *See also*, Hoekman & Kostecki (2009) at 417, 432, using figures from 1995-2007. A comparison of the relative shares of total measures targeting the PRC shows an increase from 21.1% to 23.6% in the last three years.
[170] As of 2008, over 1300 AD measures were reportedly in place, more than the total for the period 1947-1970: Hoekman & Kostecki (2009) at 431 and Bloningen & Prusa (2001) at 1. *See also*, Hoogmartens (2004) at 131.
[171] Hufbauer & Wollacott (2010) table 9 at 53, table 11 at 55.
[172] EC (2010b) at 62, 93, 133.

The first section recalls the concepts of dumping and subsidization and expands on the nature and use of their respective 'remedy', both in general and in the WTO system (2.1). The second section discusses the special NME rules for China and their implications (2.2).

2.1 TRADE REMEDIES: POLITICAL SAFETY-VALVE OR LEGITIMATE PROTECTIONISM?

The presence of remedies to what are often called 'unfair' trade practices – dumping and subsidization – is common to most trade agreements. The underlying rationale often invoked for such provisions is that they are necessary to counteract practices that run counter the principles of free trade and in particular of market-oriented decisions. From this perspective, trade remedies are a device that may help to prevent or circumscribe abuses which could result from the abolition of contingent protection. However, a large volume of economic literature backed by a historical review of the use of trade remedies shows a strong potential for their use as an unjustifiable mean to protect import-competing industries[173]. The following subsections review the issues with dumping and subsidies and how these have been legally apprehended in the international trade context.

2.1.1 DUMPING AND ANTIDUMPING DUTIES

Basic concepts

Simply put, (cross-border) dumping occurs when a firm sells a product cheaper on an export market than on its domestic market or when the export price charged is below its costs of production[174]. Several reasons may explain why dumping occurs. Economic taxonomy defines categories of dumping as follows[175]: *Sporadic dumping* is the result of a pricing error by the firm, caused e.g. by inexperience towards the pricing of a new product or the unavailability of proper data on demand or exchange rate on a foreign market. *International price discrimination* can occur when a firm benefits from some market power on its home market, that demand is relatively more elastic on the export market and that the two markets are separable, i.e. that prices would not be re-equilibrated through arbitrage. Where these conditions are met, price discrimination maximizes the firm's profits. *Cyclical dumping* takes place when the firm is faced with a temporary lower demand. As demand is expected to pick up, it may be more advantageous for a firm to forego some revenue and maintain capacity rather than to immediately downsize its operations. *Defensive dumping* takes place when a firm strategically lowers prices on an export market to deter entry of foreign competitors onto its home market. The possibility for a firm to develop *economies of scale* may also induce it

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[173] *See*, generally, Hoekman & Kostecki (2009) at 419.
[174] *See*, e.g. Detlof & Fridh (2006) at 6; Lantz (1995) at 996.
[175] The following draws on Hoekman & Kostecki (2009) at 436.

to price its products below their production costs. *Head-on dumping* generally occurs at the early stages of product development in hi-tech sectors, where the firm's purpose is to gain rapidly a large market share so as to discourage other competitors from developing similar technology (e.g. VHS and Betamax, DVD and Blu-Ray). All these practices rely on sound economic and business grounds and are driven by market considerations such as business cycle or product characteristics. While they can certainly harm import-competing industries, they do not harm competition itself, but instead increase price-competitiveness and the overall welfare in the importing country[176].

A last category of dumping is generally referred to as *predatory dumping*. Under this practice, a foreign firm first drives all competitors out of the market through very low pricing. The predator then recoups its losses by charging consumers a higher price for its product. While this practice, in contrast with the other forms of dumping, may indeed lower overall welfare, occurrences of predatory dumping are extremely unlikely. As HOEKMAN & KOSTECKI justly note, the ability to recoup prices implies that the predator would either end as a global monopolist or obtain import protection from the government of the importing country[177]. Both situations are unlikely, and especially the latter. Regardless, predatory dumping is nonetheless considered as the underlying assumption justifying the need for antidumping measures[178].

Historical background on antidumping

Interestingly, the first antidumping legislations enacted by WTO Members (Canada in 1904 and the United States in 1916) required evidence of a predatory intention[179]. As use of such statutes was limited due to their predation standard, they were quickly replaced (or supplemented) with looser provisions targeting price discrimination[180]. To a certain extent, the rationale of these acts is more in line with the real concern of import-competing industries, which is underselling by foreign firms that benefit of comparative advantage such as lower labor costs[181]. Nonetheless, protection against predatory dumping remains the invoked rationale for antidumping laws.

Until the late 1970's, antidumping was rarely used. The United States had pushed for the inclusion of antidumping in GATT, but until 1980 only six Members had imposed ADs (US, EC, Australia, Canada, New Zealand and, most significantly, South Africa). Between 1950 and the mid-1970's, less than 5% of investigations resulted in the imposition of duties[182]. Following the Tokyo Round, GATT rules on antidumping were relaxed. The definition of

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[176] Hoogmartens (2004) at 134; Hoekman & Kostecki (2009) at 438.
[177] Hoekman & Kostecki (2009) at 438.
[178] Bloningen & Prusa (2001) at 2; Lantz (1995) at 998.
[179] Lantz (1995) at 999.
[180] USITC (2008) at IV-3
[181] Hoekman & Kostecki (2009) at 439.
[182] Bloningen & Prusa (2001) at 5; *see also*, e.g., USITC (2010) table 10: the United States started 223 investigations in the period 1955-1979 and imposed duties in 103 cases.

'less than fair value' was revised to include sales below costs in addition to price discrimination, whilst the required causal link between dumping and the material injury caused to domestic industries was weakened[183]. At the same time, tariff liberalization meant that other forms of protection were sought by import-competing industries[184]. As a result, antidumping actions picked up in the early 1980's[185]. The EU and the US together accounted for more than 400 ADs imposed from 1980 to 1986, while the overall number of ADs filed in the 1980's totaled 1600 – more than twice the total of the previous decade[186]. Starting in the late 1980's, developing countries have increasingly turned to use antidumping measures, in particular against other developing economies[187]. Except for a dip in the years 2004-2007, the use of ADs has been steadily on the rise since the conclusion of the Tokyo Round[188].

Antidumping in WTO

Dumping is the result of individual firms' behavior. As such, it falls in principle outside the scope of WTO law, which is concerned with State behavior. Dumping is therefore not prohibited under GATT/WTO rules. However, following the theoretical approach that dumping may deny benefits from liberalization, WTO rules permit Members to enact measures designed to counteract this effect and regulate their use.

The basic provision dealing with antidumping is GATT VI, which provides for a definition of dumping as the sale of products in another country at 'less than its normal value' (GATT VI:1) and, provided such practice 'causes or threatens to cause material injury', allows Members to levy duties to 'offset or prevent dumping' (GATT VI:2). Importantly, such antidumping duties may not exceed the margin by which the product was dumped i.e. the difference between the normal value and the export price. Following the Uruguay Round, this provision was complemented by the *WTO Agreement on Implementation of Article VI of the GATT 1994* (commonly referred to as the Antidumping Agreement, 'ADA') which provides for more detailed regulation of the use of antidumping. Petitions for the imposition of ADs are filed by the domestic industry (ADA 5). Essentially, the ADA then provides for a three-pronged approach which an administration needs to follow in order to impose ADs.

Firstly, the importing Member needs to determine that there is dumping (ADA 2). This is done by comparing the 'normal value', i.e. the price in the home market of the exporter, with the export price, i.e. the price at which the good is sold in the importing country. When the product is not sold in the home market of the exporter (e.g. the product is exclusively sold

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[183] Bloningen & Prusa (2001) at 5.
[184] On this rationale, *see* Hoogmartens (2004) at 135; Bloningen & Prusa (2001) at 7.
[185] *See* Hoekman & Kostecki (2009) fig. 9.1 at 416; Bloningen & Prusa (2001) at 6.
[186] Hoekman & Kostecki (2009) at 417; Bloningen & Prusa (2001) at 6.
[187] WTO, *Anti Dumping Duties Statistics (1995-2010)*, available at http://www.wto.org (last visited 28.10.2011); *See also*, Messerlin (2002) at 4; Hoekman & Kostecki (2009) at 417; Bloningen & Prusa (2001) at 6.
[188] Hoekman & Kostecki (2009) fig. 9.1 at 416.

abroad), normal value may be determined by using the price charged for the same product on a third market. When this option is unavailable or if this price is 'not representative', normal value can also be constructed by factoring the exporter's costs of production and adding a 'reasonable amount' for additional costs and for profits. When, on the other hand, there is no export price or that it is unreliable (e.g. if the importer and the exporter are in agreement), the value for determination may be construed using the first resale to an independent buyer or 'on such reasonable basis as the authorities may determine'. In any case, ADA 2.4 provides an overarching obligation of fair comparison between normal value and export price e.g. at the same level of trade (generally ex-factory), and taking into account differences in taxation or internal regulation of sales.

Secondly, the importing country needs to determine that there is a material injury, or threat thereof, to a domestic industry. The framework set by ADA 3 requires Members to base their determinations on 'positive evidence' and by examining objectively the volume of dumped imports, its effect on domestic prices and consequent impact on domestic producers. The increase in volume of dumped imports can be relative or absolute, but needs to be 'significant' (although this term is not defined by ADA). Indicators of the effect of dumping on domestic prices can include significant price undercutting or depression, or prevention of increases. The impact on the domestic industry is to be assessed against 'all relevant' economic indicators, some of which are listed by ADA 3.4 such as decline in sales, profits, market share, productivity, employment, wages and, importantly, magnitude of dumping. Finally, causality needs to be asserted between dumping and injury using all these factors, and in particular, dumping needs to be clearly distinguished from other causes such as contraction in demand, changes in consumption patterns, technological development or competition between foreign and domestic producers (ADA 3.7).

Thirdly, the Member needs to set the amount of the duty. ADA 9.1 reiterates the general ceiling set by GATT VI:2 at the full margin of dumping. While ADA advocates the use of lesser duties limited to the amount necessary to remove the injury, it does so in a non-binding manner. On the contrary, ADA 11 explicitly provides that duties shall only remain in force as long as and to the extent necessary to counteract dumping causing injury, and provides for a limit of five years. Members may however continue their measure provided that a review of the measure demonstrates that the removal of the duty is likely to lead to injury. ADs may thus remain in force indefinitely, provided that a review is conducted at least once every five years.

The rules of ADA are technical and complex, and are unfortunately very vulnerable to interpretation. With many variables left to be defined but little methodological constraints, these rules are ill-designed to prevent the perversion of antidumping statutes into all-out

protectionism[189]. The next subsection looks briefly at the diversity of the modern antidumping landscape.

A matter for domestic authorities

National authorities operate within the wide framework set by GATT VI and ADA. WTO Members are free to choose whether to implement antidumping measures, and, within the limits mentioned above, how to do so. As a result, antidumping legislations in the some forty-six countries that have made use of the possibility are quite diverse. The following points may nonetheless be addressed in a comparative perspective[190].

Antidumping investigations are generally delegated to administrative entities. The two determinations – dumping and injury – are sometimes entrusted to different authorities. This is the case in the US, where the Department of Commerce ('USDOC') investigates dumping and the International Trade Commission ('USITC') determines injury of the domestic industry[191]. Other jurisdictions such as the EU or Australia entrust a single authority to make both determinations. Whereas these choices are devised to create an impression of isolation from the political process, the extent to which they achieve this goal is uncertain at best, as antidumping appears to remain an intrinsically politicized area[192].

Transparency varies considerably across jurisdictions. Methodologies, in particular, are rarely disclosed by so-called 'new users' of antidumping, i.e. developing economies. However, lack of transparency is not only a developing country issue. Thus, e.g., business data which is collected to calculate margins is not made available to investigated firms under EU rules, although they receive a 'summary' of findings. Under US and Canadian laws the parties' legal counsels have access to such data. Some WTO Members open the possibility to refrain from imposing duties provided that exporters enter in price undertakings. This practice, explicitly allowed under ADA 8, is similar to VERs[193] and yields the same damaging results in terms of transparency. While EU legislation explicitly provides for this possibility, HOEKMAN & KOSTECKI point out that in practice such undertakings are also common in the US at the industry-to-industry level[194]. The extent of imposed ADs also differs: the US and Canada typically levy ADs equivalent to the full dumping margin, whereas the EU applies a statutory

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[189] *See*, Hoogmartens (2004) at 133; Hoekman & Kostecki (2009) at 439.
[190] The following draws on Bloningen & Prusa (2001) at 7.
[191] Lantz (1995) at 1001.
[192] *See* the discussion in the next section; *see also*, Bloningen & Prusa (2001) at 19, emphasizing on the impact of political pressure on injury determinations at the USITC. An interesting side note concerns the EU. Although policymaking in the field of external trade is the exclusive prerogative of the Commission, the question of its impartiality and independence when it administers antidumping proceedings does not seem to attract much interest amongst the literature.
[193] Discussed above at p. 23.
[194] Hoekman & Kostecki (2009) at 443.

'lesser duty rule'[195]. The idea of lesser duty is best captured by a numerical example: Assume that a final determination of dumping under ADA 2 has been made against certain products that resulted in a dumping margin of 80%. Assume that the price for these exports is equal to 100€, whereas the price for domestic like products is equal to 140€. Whereas ADA permits the imposition of an AD of up to 80€, the importing Member could remove the injury by levying a duty of only 40€.

Finally, although the overall welfare impact of ADs is rarely taken into consideration, the EU antidumping regulation mandates the Commission to refrain from imposing a specific measure if it can clearly conclude that the measure would negatively affect the 'Community interest' in a disproportionate manner[196]. Admittedly, this exception is very narrow. Nonetheless, it is a step in the direction of economic rationality.

A summary: the issue with antidumping

The subsections above draw a worrying picture of antidumping. Classic arguments in favor of this instrument fall short of economic or otherwise moral support. The theory of protection against predatory practice lacks credibility. Likewise, the idea that antidumping could be used to pressure exporting governments into a change of policy (e.g. more stringent competition rules) relies too much on very indirect effects, at best[197]. The strongest argument for antidumping is maybe that governments require a 'safety-valve' to buffer the political costs of liberalization[198] – even so, a cost-benefit analysis of the damaging effect that antidumping imposes on overall welfare probably negates any benefit that can be derived thereof[199]. Quite to the contrary, an overwhelming majority of the economic literature is adamant in defining current antidumping as a noxious endeavor. As Nobel laureate Joseph E. Stiglitz posits, there is no connection between national welfare and antidumping, "[i]*t is simply a modern form of protection*"[200].

A major concern lies with the latitudes conferred by the ADA as regards methodologies, where values can easily be construed so as to tilt the determination of dumping upwards e.g. by including higher profits or costs in normal value or by comparing a weighted average normal value with individual export transactions, leaving out these which are made above normal value[201]. Similarly, the injury test may easily be corrupted by protection-seeking firms – e.g. through overpricing or laying off more employees than necessary. The degree of

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[195] Article 9.4 of *Council Regulation (EC) No. 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community*, OJ (2009) L 343, p. 51.
[196] Article 21 of Regulation (EC) No. 1225/2009.
[197] Hoekman & Kostecki (2009) at 440.
[198] Hoogmartens (2004) at 135; Hoekman & Kostecki (2009) at 440.
[199] This is even more so once the very likely tit-for-tat retaliation by affected exporting countries is taken into account.
[200] Quoted by Bloningen & Prusa (2001) at 3.
[201] Hoekman & Kostecki (2009) at 442, 446.

discretion generally granted to antidumping authorities in making their determinations (either by domestic law or by practice) certainly makes matters worse, both in terms of transparency as well as in terms of results. The figure according to which the average dumping margin found in US affirmative determinations in the 1990's amounted to 60% seems to support the idea that tinkering with methodologies is frequent[202]. Such argument needs further to be put into perspective with the influence of politics and lobbies on antidumping. Evidence points at the remarkable success rates of ADs investigations on products which are directly competing with influential industries – while more than 50% of all investigations target steel or chemicals products, studies show that US steel cases are 30% more likely than all others to result in the imposition of ADs[203].

Against the potential for 'administered protectionism' which arises from the loose methodological provisions, the legal standard of review provided by ADA 17.6 prohibits overturning the authorities determination so long as the evaluation of facts was unbiased and objective[204]. Furthermore, where multiple interpretations arise from the text of ADA, measures which rely on one of the permissible interpretations are deemed to be in conformity with the Agreement. As the bias lies within vague rules that permit dodgy methodologies to be applied, ADA 17.6 *de facto* immunizes most ADs from judicial review[205].

In sum:

> *"Antidumping constitutes straightforward protectionism packaged to make it look like something different. By calling dumping unfair, the presumption is that* [antidumping] *is fair and thus a good thing. This is good marketing, but bad economics. From an economic perspective, there is nothing wrong with most types of dumping. Antidumping is not about fair play. Its goal is to tilt the rules of the game in favor of import competing industries."*[206]

2.1.2 SUBSIDIES AND COUNTERVAILING DUTIES

Basic concepts

Economically, a subsidy may be defined as a payment by a government which creates a wedge between the price consumers pay and the costs incurred by producers, so that the price lies below marginal costs[207]. This payment may be direct or indirect, and may also consist of

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[202] Bloningen & Prusa (2001) at 23.
[203] Hoekman & Kostecki (2009) at 432 and Bloningen & Prusa (2001) at 20.
[204] On this topic, *see* Lennard (2003) at 398.
[205] Hoekman & Kostecki (2009) at 447, 431, note that this outcome was a key objective for the US industries lobbies in the Uruguay Round negotiations. This immunity is important, whereas WTO Members imposing ADs fare extremely poorly in dispute settlement.
[206] Hoekman & Kostecki (2009) at 439.
[207] Lardy (1995) at 1009, quoting the MIT Dictionary of Modern Economics (1986).

e.g. tax rebates, loans, loan guarantees or equity participation. It may target region-, sector- or size-specific industries, or be generally available.

Governments subsidize for a variety of purposes. At the outset, it should be noted that subsidization can sometimes be beneficial in welfare terms when it succeeds in aligning marginal private and social costs and benefits – i.e. when it remediates externalities[208]. But subsidies are more commonly apprehended from a negative angle due to their potential for market distortion and inefficient resource allocation leading ultimately to lower overall welfare. In international trade, the adverse effects of subsidies are basically held to arise when otherwise competitive products are displaced by subsidized goods, whether the displacement occurs at home, on a third market or on the domestic market of the subsidizing country[209].

As private undertakings will mostly be unable to compete with State resources, measures aimed at offsetting or discouraging subsidization are sometimes said to have a stronger economic rationale than ADs[210]. Nonetheless, the case for imposing CVDs is still a hard one to make as, in the short run at least, this operation is welfare-reducing. Whilst import-competing industries may benefit from a CVD, it raises prices for the consumers and results inevitably in a lower welfare[211].

Background on CVDs

The idea of imposing extraordinary duties to countervail the adverse effects of subsidization on domestic producers was first enacted in an 1890 US Congress Act designed to protect sugar producers from subsidized imports of sugar from Russia[212]. Seven years later, a new statute permitted the use of CVDs against any type of subsidized imports. Elements from the 1897 Act survived successive revisions and legislation changes until the conclusion of the Uruguay Round, and have notably influenced international rule-making in this area[213]. GATT VI, the basic rule providing for CVDs in the GATT/WTO system, was added in 1947 as a 'grandfather' clause for the US CVD laws. A first proper codification in the Tokyo Round was underpinned by the will of target countries to benefit from an injury test (i.e. conditioning the imposition of CVDs to the showing of an injury of the domestic industry), which the United States conceded to in return for tighter disciplines on the use of subsidies. Although the US has remained the predominant user of CVDs, other countries such as Canada, Australia or the EC have progressively made use of this instrument.

Historically, two rationales have been invoked as a basis for using CVDs. According to the first approach – the so-called *neutralization theory* – CVDs purport to place domestic

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[208] Hoekman & Kostecki (2009) at 216.
[209] Qin (2004) at 865.
[210] *See*, e.g., Lee-Makiyama (2011) at 1; Hoekman & Kostecki (2009) at 455.
[211] Hoekman & Kostecki (2009) at 457.
[212] *See* USITC (2008) at IV-5; Lardy (1995) at 1018.
[213] Hoekman & Kostecki (2009) at 458.

firms in the situation they would be in 'but for' the targeted subsidy. Under this theory, the CVD is limited to the extent necessary to neutralize the disadvantage supposedly arising from the subsidy. The issue with this approach is that difficulties in the determination and estimation of the advantage almost guarantee that the CVD will be set at an inappropriate level[214]. The second approach, known as the *deterrence theory*, posits that CVDs will discourage governments from granting subsidies by immediately denying the benefits arising thereof. Although the appropriateness of this theory has sometimes been questioned, in particular because it doesn't take into account potentially positive effects of subsidies[215], it boasts more economic credentials than the neutralization theory. Indeed, provided that the country imposing CVDs is large enough to influence the terms of trade of the subsidizing State, such a threat may lead the latter to refrain from engaging into subsidization policies. However, this will only be the case when the potential costs arising out of the CVD would exceed the benefits from the policy[216]. LANTZ notes that while the neutralization theory is often used to describe the purpose of US CVD law, it is rather the deterrence theory which dominates the enforcement process[217]. The same could be argued of the WTO regime[218].

Anti-subsidization in the WTO

The original GATT provisions on CVDs contained in GATT VI were complemented in 1995 by the *WTO Agreement on Subsidies and Countervailing Measures* ('SCM'). SCM 1.1 defines a subsidy as a financial contribution by a government conferring a benefit to its recipient. According to the WTO Appellate Body, the benefit conferred by a subsidy exists when the financial contribution provided by the government is provided on terms more favorable than those available to the recipient on the market[219]. Eluding the hardship of dealing with subsidies conferred to large swaths of recipients[220], SCM 1.2 and 2 provide that only 'specific' subsidies – i.e. that benefit a specific firm, industry, sector or region – are subject to counteraction by WTO Members. These subsidies are in turn further defined in two groups: prohibited and actionable subsidies. SCM 3 prohibits two kind of subsidies held to be highly trade-distortive, namely those conditional to export performance or local content

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[214] Hoekman & Kostecki (2009) at 457.
[215] Lardy (1995) at 1013.
[216] Hoekman & Kostecki (2009) at 457.
[217] Lantz (1995) at 1015.
[218] *See*, notably, fn 36 to SCM 10 which defines a CVD as "*a special duty levied for the purpose of offsetting any subsidy*[…]" and SCM 19 which sets a ceiling on the CVD to the extent of the subsidy.
[219] WTO Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999, § 157.
[220] Qin (2004) at 893 rightfully recalls that economics can only explain partially why non-specific subsidies are held to be non-actionable. Indeed, whereas broadening the pool of recipients will tend to minimize trade-distorting effects, it may not be sufficient to conclude these are nonexistent. On another hand, certain broad programs certainly need to be taken off the list of countervailable measures for political and administrative purposes.

requirements. All other specific subsidies are to be regarded as subject to countermeasures when they cause 'adverse effects' to another WTO Member (SCM 5)[221].

Such countermeasures can take two distinct forms, or 'tracks'. Under the first, multilateral track, Members can seek a ruling from a WTO dispute settlement Panel and, ultimately, the Appellate Body, declaring the subsidy to be in breach of the SCM provisions. Importantly, when the measure in question falls under the category of prohibited subsidies, SCM 4.7 provides for its immediate withdrawal – an unconventionally strong provision within the realm of international dispute settlement.

Under the second, unilateral track, Members can impose CVDs pursuant to SCM 10 *et seq.* Roughly speaking, the WTO framework on CVD procedures is similar to the AD framework detailed above. Investigations are initiated when the national authorities are petitioned by the domestic industry (as defined under SCM 16 and 11.4). In turn, the authority is to determine that there is a subsidy, an injury or threat thereof on the domestic industry and a causal link between these two elements. Provided that these criteria are fulfilled, CVDs can be imposed to the full amount of the subsidy, although SCM 19.2 advocates a 'lesser-duty rule'. CVDs can remain in force for five years and may be extended subject to a review. Finally, SCM also provides for the possibility of entering undertakings (SCM 18).

Developing countries benefit of special and differential treatment under SCM 27. This provision grants transitional periods for eliminating prohibited subsidies, and also raises *de minimis* thresholds for the use of CVDs against developing countries: the subsidy needs to represent more than 2% of the unit value and the subsidizing country's share of the import market needs to be above 4% (SCM 27.10).

Contemporary use of CVDs

CVDs have often been defined as a typically American remedy. For a long time, the United States were indeed the quasi-exclusive users of that instrument, and used it very moderately. The use of CVDs picked up in the late 1980's. In the period spanning 1985 to 2010, the total number of CVD investigations and measures lies close to 600, respectively 300[222]. Since 1995, 16 WTO Members have imposed 158 measures. The United States leads the pack with 70 measures (or 44.3% of all CVDs), followed by the European Union (28

[221] This article purposefully ignores the category of 'non-actionable' subsidies which were immunized from countermeasures under SCM 8 i.e. research and development, environmental or regional development subsidies. This article, of transitional nature, has expired in 2000 following SCM 31 and its validity was not extended. At the time of writing, the state of play of the Doha Round negotiations does not permit to speculate on the future relevance of a non-actionable exemption for these (or other) subsidies.

[222] *See* Hoekman & Kostecki (2009) table 9.1 at 418, which the author combines with WTO statistics for years 2008-2010.

measures or 17.7%) and Canada (16 measures or 10,1%). Other users include Mexico, Peru, South Africa, Argentina, New Zealand and Australia[223].

The use of CVDs had peaked in the early 1990's, but declined following the inception of WTO. As has been showed above, although there can be some economic rationale justifying the use of CVDs in very specific situations[224], using this instrument makes little sense in most cases – and in any case for relatively small economies. This in turn may help to explain why there has been few users and a limited amount of measures. However, following the outbreak of the economic crisis of 2008, CVDs have now returned on the front stage. In the three fiscal years 2008-2010 alone, the total number of CVDs imposed by WTO Members reached 39, out of which 23 were US measures, and nine more for the two other main CVD users, the EU and Canada[225].

Many reasons may explain this surge in the recent years. One factor may be, quite simply, that governments resort to more subsidization in troubled times. In spite of it being a pleasantly simple explanation, it still lacks credibility, as political economists have long recognized using CVDs may be a very dangerous exercise in the face of potential retaliation[226]. Another reason may perhaps explain the renewed interest for CVDs more accurately. Until 2007, the PRC had been *de facto* immunized from CVDs by virtue of an established USDOC practice on non-market economies. For all its clout in the CVD realm, the 'American Way' here also seems to have influenced other countries which had also adopted similar practices[227]. However, a USDOC decision in 2007 ended the practice as regards China, opening the floodgates to a wave of new petitions for CVDs against imports from the Middle Kingdom. And in the same way other jurisdictions followed the US in its restraint, they appear to have followed suit in intensifying anti-subsidy investigations and measures. Between 2006 and 2010, more than half of all CVD investigations worldwide targeted China. In 2008-2010, the PRC was imposed with CVDs 26 times, two-third of the total amount of CVDs imposed by the WTO Membership[228].

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[223]WTO, *Countervailing Duties Statistics (1995-2010)*, available at http://www.wto.org (last visited 28.10.2011).
[224] *See*, e.g. Lee-Makiyama (2011) at 8, defining the situations in which use of CVDs make sense as when i) a substantial share of the subsidized exports is destined for the country imposing a CVD and ii) showing the targeted subsidies are WTO inconsistent is hard and may entail strong legal challenge.
[225]WTO, *Countervailing Duties Statistics (1995-2010)*, available at http://www.wto.org (last visited 28.10.2011).
[226] As previously mentioned, every government subsidizes to a certain extent. This has frequently led to tit-for-tat trade conflicts. *See* Hoekman & Kostecki (2009) at 227 and 456. *See also*, Lee-Makiyama (2011), builds a crystal-clear case against the use of CVDs in the EU-China relationship by pointing out at the risks of retaliation.
[227] Qin (2004) at 905.
[228]WTO, *Countervailing Duties Statistics (1995-2010)*, available at http://www.wto.org (last visited 28.10.2011).

2.2 TRADE REMEDIES IN CHINA'S WTO: SPECIAL RULES, AND THEIR CONSEQUENCES

The Protocol of Accession modifies importantly the procedure leading to a determination of dumping or subsidization of Chinese exports. Two provisions mark a strong departure from the WTO system. PA 15 concerns the so-called non-market economy methodologies for measuring dumping margins and subsidy benefits in China, and PA 10.2 provides for a particular 'specificity' test of PRC subsidies. The following subsections address first antidumping (2.2.1) and anti-subsidization issues (2.2.2) as well as their impact on Chinese trade, before examining the PRC's response to the system (2.2.3).

2.2.1 ANTIDUMPING ISSUES

NMEs in GATT

Although the GATT/WTO system does not prescribe any particular economic system for its Members, GATT has historically been defined as a system built by market economies for market economies[229]. Nonetheless, the Membership has been regularly confronted with the issue of dealing with non-market economies[230]. State-controlled or centrally-planned non-market economies are generally economies in which "*all production, distribution and external trade are controlled by the government instead of by supply and demand in the marketplace*"[231], and where most if not all enterprises are State-owned. The fundamental implication for the GATT/WTO system is that the pillars that are non-discrimination and reciprocity can not be implemented as such by these countries[232], prompting the need for various adaptations to enable their participation[233].

There is no mention, let alone a definition, of the concept of NME in WTO. The only provision dealing with NMEs resulted from the GATT review session of 1954-55, where Czechoslovakia tabled a proposal to amend GATT VI:1(b). The issue raised was that the methodologies for calculating normal value were inappropriate when dealing with a State monopoly on trade, as market benchmarks are inexistent both as regards pricing and costs[234].

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[229] Qin (2003) at 504; Polouektov (2002) at 7.
[230] A number of State-controlled economies were members of GATT, such as Czechoslovakia, Cuba, Yugoslavia, Hungary, Poland and Romania. *See* Hoogmartens (2004) at 1, 13; Polouetkov (2002) at 7.
[231] Qin (2004) at 870.
[232] Hoogmartens (2004) at 14.
[233] Halverson (2004) at 339.
[234] Polouektov (2002) at 8.

The membership refused to amend GATT, but added an interpretative note which reads as follows:

> *"2. 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* [GATT VI: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."*

Admittedly, this interpretative note contains very vague language. According to some commentators, this could be due to the absence of AD activity against NMEs at the time[235]. However, in the 1960's trade between Western nations and eastern European States of the COMECON picked up and, as cheap eastern imports were flowing in the United States, the American industries' demands for protection were growing[236]. In that context, '*the possibility that a strict comparison may not be appropriate*' was sufficient language for GATT Members to develop a peculiar methodology for NME antidumping calculations.

An important side note should be made here: the claim that 'pure' NMEs are serial dumpers should not necessarily be considered as outright protectionism from the AD-imposing countries' side. Indeed, several reasons such as nonconvertible currency, balance-of-payment difficulties or import-substitution programmes may have given these countries a primary incentive to dump exports[237]. Nonetheless, the potential for discrimination remains strong within the methods used to determine normal value.

NME methodologies for antidumping

The wording of the interpretative note *Ad* GATT VI, § 2 does not prescribe any appropriate methodology for dealing with determination of normal value in NMEs. In 1960, the United States launched the first-recorded AD investigation against a NME in the *Bicycles from Czechoslovakia* case[238]. In that investigation, the US Department of the Treasury (in charge of dumping margin determinations until 1980) faced for the first time the issue of how to calculate normal value in a NME, where prices fail to reflect market forces. It developed a practice for calculating normal value by using the prices of the targeted product in an appropriate 'surrogate' country, i.e. a market economy at a comparable level of economic development[239]. This practice was codified in the Trade Act of 1974 [240].

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[235] Polouektov (2002) at 8.
[236] Horlick & Shuman (1985) at 14-2.
[237] *See* Hoogmaartens (2004) at 144; Polouektov (2002) at 9; Horlick & Shuman (1985) at 14-7.
[238] 25 Fed. Reg. 5657 (Dep't Treas. 1960)
[239] Horlick & Shuman (1985) at 14-8; Lantz (1995) at 1003.
[240] Horlick & Shuman (1985) at 14-3.

It wasn't long however until problems started to arise from the surrogate country method. A first logical issue is that the criteria taken into consideration by US authorities to select the surrogate – namely GNP per capita and 'overall economic structure' – may simply be irrelevant in assessing the real prices of products; if the rationale for dismissing NME prices is that they do not reflect market forces, then the same logic should apply at aggregate level when looking at GNP per capita[241]. Moreover, using prices from a third country ignores any comparative advantage which the NME may have had in respect of that particular product: even in a State-controlled economy, the government will often privilege and develop industries which inherently benefit from a certain such advantage[242]. Another issue is procedural. While targeted industries have an incentive to provide an investigating authority with all relevant data in an effort to dismiss claims of dumping, this is not the case of industries in a surrogate country. Not only is there no benefit for the producers in the surrogate country to make this information available, it may as well turn against them as it could provide evidence and trigger a antidumping investigation on imports from the surrogate country[243].

These issues became salient in a 1975 dumping investigation on *Electric Golf Cars From Poland* [244], where the US authority was unable to find an appropriate surrogate. The US Department of Treasury decided instead to construct the normal value by using the prices of inputs from a surrogate country. However, whereas this so-called 'factors of production' approach did have the benefit of providing the authority with figures necessary for its determination, this methodology is just as flawed as the pure surrogate country method and its results are as uncertain.

The main criticism of using surrogates is that it yields significantly higher dumping margins than under regular methods, as costs are higher in a country deprived of similar comparative advantage[245]. This effect is worsened by the open-ended criteria set for selecting the surrogate, which provide all necessary latitudes for the process to be captured by protectionist interests, i.e. selecting as surrogate a country with a heavily inefficient target sector so as to inflate the normal value and, hence, the dumping margin. Despite the critics, and in the absence of any better method[246], the 'factors of production' approach was recognized in US legislation and, following the Trade Act of 1988, became the statutory 'preferred' method to deal with NME dumping margin calculations[247]. In the EU, the basic

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[241] Horlick & Shuman (1985) at 14-9.
[242] Lantz (1995) at 1007; Rushford, G., *America Dumps on Free Trade*, 16.12.2005, available at http://www.rushfordreport.com (last visited 28.10.2011). *See also*, Horlick & Shuman (1985) at 14-9.
[243] Horlick & Shuman (1985) at 14-10.
[244] 40 Fed. Reg. 25497 (Dep't Treas. 1975).
[245] Lantz (1995) at 1006, 1008.
[246] Horlick & Shuman (1985) at 14-8 call the calculation of normal value in NMEs a 'nearly impossible' problem.
[247] Lantz (1995) at 1006.

antidumping regulation deems both surrogate-based methodologies acceptable[248]. As regards the surrogate selection, the EU basic regulation simply provides that a market economy should be selected 'in a not unreasonable manner', without any further guidance as to the criteria to be used. In EU antidumping proceedings, the EU itself can be chosen as a surrogate country[249].

The NME issue in a contemporary perspective

The vague interpretative note *Ad* GATT VI, §2 remains the only provision dealing with non-market economies in the WTO system. In spite of the antidumping reforms which led to ADA, the real issue of how to determine normal value in NMEs was left unaddressed, with ADA 2.7 expressly recalling the validity of the interpretative note *Ad* GATT VI, §2 [250]. Therefore, determination of NME status, along with the methodology to be used, remains within the WTO Members' scope of regulatory discretion[251]. The core issue with this outcome is, as many authors point out, that 'pure' NMEs as overseen by the interpretative note have almost disappeared nowadays. With the exception of maybe Cuba and North Korea, most former centrally-planned economies are now in transition to market-based kind of systems[252]. However, attempts to address economies in transition such as the 'market-oriented industry' approach developed by USDOC or 'market-economy treatment' under EU regulations, whereby individual producers could avoid surrogate methodologies by demonstrating that they operate under market-economy conditions within an NME, have proved too restrictive to yield truly encouraging results[253]. In the absence of a more specific definition to be used, economies in transition are often qualified as NMEs, which entails the application of differential treatment as legitimized by the interpretative note, although these countries do not fit within the latter's definition.

In the United States, the determination of NME status is made by USDOC and can be made "*with respect to any foreign country at any time*". This finding is not judicially reviewable[254]. The US antidumping law provides for six guiding criteria in making the

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[248] *See* Art. 2(7) of Reg. 1225/2009. *See also* Detlof & Fridh (2006) at 11, finding that, although theoretically the EU Regulation also permits
[249] This is explicitly recognized by Art. 2(7) of Reg. (EC) No. 1225/2009.
[250] Polouetkov (2002) at 14.
[251] According to Polouektov (2002), table 1 at 16, many of the WTO Members which have enacted Antidumping legislation include some specific NME provisions, including most of the heavy users of ADs such as the US, the EC, India or Korea.
[252] *See*, e.g., Qin (2004) at 871; Detlof & Fridh (2006) at 7; Polouektov (2002) at 14; Lantz (1995) at 1008.
[253] Lantz (1995) at 1036, 1041, 1044, 1047 shows that claims of operating in a 'market-oriented industry' are almost inherently bound to fail, in particular as they imply proving a negative, namely that no government control exists. Detlof & Fridh (2006) at 24, Table 7, find that out of 200 applications for 'market-economy treatment' between 2001 and 2005, only 38% were successful. The success rate for Chinese manufacturers was even lower, at 35% , whilst the authors note that significant cases took place at the time of writing which would force these figures downwards.
[254] 19 U.S.C. §1677(18)(C).

determination as regards market orientation of a given country: i) the extent to which currency is convertible, ii) the extent to which wages are determined by free bargaining between labor and management, iii) the extent to which foreign direct investment is permitted, iv) the extent of government ownership or control of the means of production, v) the extent of government control over the allocation of resources, the price and output decisions of enterprises and vi) such other factors as USDOC considers appropriate[255].

In the EU, countries qualified as NMEs are listed by Regulation (EC) No. 1225/2009. The EU legislation does not express any rationale for the inclusion of a given country in the list of NMEs. It does not either provide for formal graduation into market-economy status[256]. However, under EU practice, the following criteria have been established as the basis of bilateral discussions between the European Commission and NMEs on country-wide market economy status[257]: i) a low degree of government influence over the allocation of resources and decisions of enterprises, ii) an absence of State-induced distortions in the operation of enterprises linked to privatization and the use of non-market trading or compensation system, iii) an effective and transparent company law ensuring adequate corporate governance (e.g. accounting by international standards), iv) effective and transparent property rights and bankruptcy law, and v) the existence of a genuine financial sector independent from the State and adequately supervised[258].

These criteria are a far cry from the interpretative note *Ad* GATT VI, §2, and extend its scope in an impermissible manner. Instead of a narrow definition of non-market economy, both sets of conditions have very broad macroeconomic implications and require an extensive commitment to the fundamentals of western capitalism. That such a practice is applied without challenge stands in contrast to the Organization's supposedly neutral standpoint on economic systems.

The position of China upon accession

China has long been considered a NME for trade remedy purposes, a status that it has repeatedly denied or sought to have repealed[259]. A specific feature of the PRC's Protocol of Accession which sets it apart in the WTO system is the market economy obligations it prescribes[260]. China has thus notably committed to let market forces determine nearly all prices on its domestic market, with very limited exceptions for price control or guidance

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[255] 19 U.S.C. §1677(18)(B).
[256] Detlof & Fridh (2006) at 19.
[257] These rely on the criteria which condition 'market-economy treatment' for individual producers under Reg. (EC) No. 1225/2009. *See* Detlof & Fridh (2006) at 13.
[258] EC (2010b) at 17.
[259] *See*, e.g., Lantz (1995) at 1038, 1046. *See also* Qin (2004) fn 179 at 905.
[260] Qin (2003) at 512.

pricing (PA 9)[261], but also to refrain from influencing any State-owned or State-invested enterprise (WPR §46). As QIN noted:

> "[…] *thanks to the Protocol, whether China develops and maintains a market economy is no longer a mere matter of domestic policy; instead, it has become a matter of China's international treaty obligations. The Protocol provisions on market economy represent a constitutional commitment of China to a market-based economic system. The implication of these obligations are profound for China.*"[262]

As regards antidumping, however, such extensive commitments seem not to have curbed China's trading partners' inclination to use NME methodologies against the Middle Kingdom. Worst even, the Protocol of Accession contains the following section, which is literally transposed from the 1999 US-China bilateral agreement[263]:

> "*15. Price Comparability in Determining Subsidies and Dumping*
>
> [GATT VI], [ADA] *and* [SCM] *shall apply in proceedings involving imports of Chinese origin into a WTO Member* ***consistent with the following****:*
>
> *(a) In determining price comparability under* [GATT VI] *and* [ADA], *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 strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry*** *producing the like product with regard to manufacture, production and sale of that product.*
>
> […]
>
> *(d) Once China has established, under the national law of the importing WTO Member that it is a market economy, the provisions of subparagraph (a) shall be terminated provided that*

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[261] Under PA 9 and WPR §50-64, China may maintain price controls over four categories of goods (tobacco, edible salt, natural gas and pharmaceuticals) and four categories of services (public utilities, postal and telecom, entrance fees to touristic sites and education). China may further subject six categories of goods and six categories of services to government guidance pricing. *See* Qin (2003) at 505.
[262] Qin (2003) fn 127 at 512.
[263] Lennard (2003) at 393.

> *the importing Member's national law contains market economy criteria […]*. ***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.*"
>
> (emphasis added)

In sum, investigated Chinese producers shoulder the burden of demonstrating that they operate in market-economy 'industries or sectors' if they desire to obtain non-differential treatment in antidumping proceedings.

This situation is not a temporary one, in spite of the sunset clause under PA 15(d), as it provides solely for the expiry of subparagraph (a)(ii), namely that NME methodologies can be automatically applied where producers have not demonstrated they operate within a market-economy. However, the general rule under subparagraph (a) would remain into force beyond December 11th, 2016, effectively voiding the sunset clause of any real effect. The only option left is thus to obtain recognition that market-economy conditions prevail either in individual sectors or industries, or across the whole Chinese economy.

China's position as a 'systemic NME' in antidumping proceedings – an institutional failure

As has been showed, the WTO system's failure to properly regulate the treatment of economies in transition in antidumping proceedings opens the possibility to subject them to differential treatment. However, as transition economies progressively abandon State-control and move towards more 'acceptable' levels of State intervention, the fault line dividing them from full-fledged market economies appears increasingly arbitrary, drawn more on political grounds than on any economic rationale.

Some comparative studies of macroeconomic indicators between recognized market-economies and NMEs seem to confirm such bias. Thus, France's government expenditures in 2000 amounted to a staggering 49% of GDP, as compared with China's 18%. China's weighted average tariff rate lies at around 10%, higher than OECD countries but much lower than many developing nations[264]. Government consumption to GDP ratios in 2000 showed that recognized market economies such as Russia, India or France boasted levels way higher than China's, in spite of the latter's much-discussed 'SOE-problem'[265]. LARDY finds that, as early as 1999, 95% of the prices for imported goods on the Chinese domestic market reflected

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[264] Bown & McCulloch (2009), Table 6 at 36.
[265] *See* Detlof & Fridh (2006) at 7.

international prices[266]. According to the 2011 World Ranking for Ease of Doing Business, China stands at the 79th place, well ahead of Russia (123rd), Brazil (127th) or India (134th), all recognized as market-economies for antidumping proceedings by major users[267]. The 2010 Enabling Trade Index places China at the 48th overall rank, again ahead of India (84th), Brazil (87th) and Russia (114th)[268]. HOOGMARTENS considers that the Chinese economic approach can be compared to modern market economy in France[269]. Finally, the recent involvement of virtually every OECD country's government into various 'bail-out' schemes for ailing industries in the aftermath of the global economic crisis has also raised questions as regards State interference in modern market economies. Such findings have led some critics to deny that the concept of NME is grounded in any economic rationale. Instead, they prefer to see it as a legal instrument which, in fact, amounts to a non-tariff barrier permitting contingent protection against imports from low-cost economies[270].

Whether or not this position can be agreed to, the loophole which results from the interpretative note implies that antidumping proceedings against economies in transition are extremely vulnerable to protectionist interests. Here again, empirics can be found that appear to confirm that such hijacking is, in fact, taking place. MESSERLIN finds, i.e. that in the period 1995 to 1998, pure price comparison resulted in average dumping margins of 3% in the US and 22% in the EU, while NME methodologies yielded dumping margins of 40% in the US, respectively 46% in the EU[271]. The high ratio of investigations leading to ADs on Chinese imports worldwide in the last fifteen years may indicate that using NME methodologies easily results in findings of dumping[272].

RUSHFORD's account of the imposition of US ADs on Chinese tissue papers is particularly telling. Under the 'factors-of-production' approach, USDOC chose India as a surrogate for the prices of two of the most important inputs in production of tissue paper, dyes and ink. Whilst public records indicate that average Indian prices of dye ranged from US$ 5 to 6, USDOC chose to use notoriously-overpriced Mumbai prices and valued dye at US$ 14. Similarly, the ink prices taken into account were not the countrywide average of US$ 2-4, but a soaring US$ 20[273]. The situation in the EU is not better – where the most-frequently used surrogate for China are the United States of America[274].

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[266] Lardy (2002) at 24
[267] Sally (2011), Table 2 at 29.
[268] Sally (2011), Table 3 at 29. *See also,* Hoekman & Kostecki (2009), box 9.2. at 433. *See also* Dreyer & Erixon (2008) at 3.
[269] Hoogmartens (2004) at 19.
[270] Detlof & Fridh (2006) at 8 and fn 3.
[271] Messerlin (2002) at 20.
[272] *See* Polouetkov (2002) at 31.
[273] Rushford (2005), above fn 242.
[274] Detlof & Fridh (2006) at 27.

Section 15 of the Chinese Protocol of Accession turns the interpretative note loophole into a systemic failure. As NME methodologies result from Members' regulatory discretion, the potential discrimination resulting from GATT and ADA could have been corrected by the WTO Membership by defining economies in transition out from the interpretative note concept of centrally-planned systems. Instead, by deferring to the domestic assessment of market-economy status, the Protocol of Accession effectively introduces an institutional recognition of differential treatment. This outcome has prompted criticism as regards the emergence of a two-tiered membership within WTO[275], even more so since identical provisions have hereafter been included as part of the following accessions of e.g. Vietnam or Laos.

The situation of China appears further to be inextricable, as this status is made part of 'its' WTO Agreement. As mentioned above, obtaining market-economy recognition, whether countrywide or for individual sectors or industries, is complicated by several factors. The criteria for such recognition, provided they exist, vary considerably across countries[276]. Moreover, some WTO Members do not provide for formal graduation, such as the EU, or may revert such determination at any time, as is the case, at least theoretically, in the US. In sum, non-differential treatment in antidumping proceedings for Chinese producers seems unlikely in the absence of a political consensus on the issue[277]. In the meantime, China's status as an economy in transition and its export-led growth policies make it particularly vulnerable to antidumping proceedings[278]. Since it joined WTO, an average of 6.5% of the value of Chinese exports to the US were subject to ADs, whilst in 2008 alone, approximately US$ 60 billion worth of Chinese exports were under investigation worldwide[279].

2.2.2 ANTI-SUBSIDIZATION ISSUES

The issue with imposing CVDs on NMEs

The regulation of countervailable subsidies under WTO rules relies on market-economy norms and assumptions, not least that a specific benefit can be analytically isolated for the purpose of determining whether it creates a trade-distortion favorable to certain actors on the market. However, the question arises as to whether such an analysis can be meaningfully applied to a centrally-planned economy in which the government controls substantially all actors and transactions[280]. In other words, it is unclear that a NME can produce

[275] *See* Polouetkov (2002) at 30; Qin (2003) at 513.
[276] Polouetkov (2002) at 18
[277] *See* subsection 2.2.3 below.
[278] Hoogmartens (2004) at 133.
[279] Hufbauer & Woollacott (2010) at 21; Hsieh (2009) at 378, citing total exports under AD and CVD review.
[280] Qin (2004) at 870.

countervailable subsidies. As both GATT VI and SCM fail to offer any guidance on this matter, the answer is left to the discretion of WTO Members' national authorities.

This issue has been the subject of a fierce debate in the United States in the 1970's and early 1980's, and saw two schools of thought oppose their conflicting conception of subsidies[281]. One school argued that subsidization is to be assessed on the basis of the preferential treatment given to a category of producers, regardless of the absolute level of government intervention i.e. the 'general state' of the economy[282]. For partisans of this theory, subsidization is therefore a relative concept which is to be assessed against a 'business-as-usual' benchmark. While such theory would theoretically permit to impose CVDs on imports from NMEs, it has been criticized as not capturing benefits which are generally available to NME producers as an inherent consequence of government influence[283]. In a WTO perspective, though, this theory seems to be in line with the requirement for a subsidy to be deemed specific (i.e. not generally available) before it can be countervailed.

A second school however considered that NMEs can not grant countervailable subsidies. This opinion relies on the premise that, as the entire economy is guided by government intervention, any attempt to isolate one specific benefit is pointless. Moreover, procedural issues may be impossible to overcome, as the calculation of a subsidy needs to be assessed against marketplace benchmarks which are inexistent as there is no difference between public and private sectors[284].

Historically, the second position denying the application of CVDs to NMEs has had the upper hand. In the United States, the theoretical controversy was resolved in a 1985 US Court of Appeals for the Federal Circuit decision, *Georgetown Steel Corp.*[285]. In this case, the Court of Appeals reversed a prior decision by the US Court of International Trade and upheld a USDOC determination that, in the absence of a meaningful marketplace, a NME government cannot distort resource allocation through subsidization[286]. In turn, the US practice seems to have influenced considerably other major trade remedy users such as the EU and Canada, which also refrained from imposing CVDs on NME countries[287]. A similar consensus seemed to exist on the multilateral level, whereby 'pure' NMEs were considered not to grant countervailable subsidies. This is still the case of Cuba, which notifies the WTO that it does not maintain any subsidies as per SCM 1.1 and 2 [288]. As a result there was, until recently, few to no instances of CVDs imposed on countries considered as NMEs[289].

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[281] Horlick & Shuman (1985) at 14-17.
[282] Horlick & Shuman (1985) at 14-18.
[283] Lantz (1995) at 1022.
[284] Horlick & Shuman (1985) at 14-18.
[285] Georgetown Steel Corp. v. United States, 801 F.2d 1308 (Fed. Cir. 1986).
[286] Lantz (1995) at 1028.
[287] Qin (2004) at 905.
[288] Qin (2004) fn 27 at 870.
[289] *See* Bown & McCulloch (2009) at 12; Qin (2004) at 905.

NME treatment in CVD proceedings in a contemporary perspective

The issue with the stance that imports from NMEs cannot be countervailed is that it results in the counterintuitive situation whereby the more subsidization programmes a country maintains, the less likely its exports are to be slapped with CVDs[290]. Adding to this absurd situation is the invoked rationale that the absence of marketplace benchmarks makes it impossible to calculate the amount of the subsidy for the purpose of imposing CVDs. This proposition does have real economic merits, but those are not any different than as regards dumping margin calculations; however, as seen above, the same countries that refrain from imposing CVDs to NMEs do not seem to have any second thoughts about using third countries figures as surrogate benchmarks in antidumping proceedings[291].

As QIN notes, in 'pure' NMEs – where there is no distinction between the private and public sector – it may not matter much whether trade remedies are imposed in the form of ADs or CVDs, as the practices of dumping and subsidization have identical effects on export trade[292]. However, there are not many 'pure' NMEs nowadays, rather many former centrally-planned economies in transition. In order to successfully complete their transition, these countries need to enact substantial reforms of virtually every facet of their economic and legal systems[293] - and to withstand the social strains and political pressures which may arise thereof. A key aspect of these reforms, of particular importance to the Chinese case, is the restructuring and privatization of State-owned enterprises, which can involve an array of subsidy-type measures such as soft loans or debt forgiveness[294]. Hence, as soon as some sufficient level of competition is established on their market, economies in transition would be caught between a rock and a hard place, as they have no choice but to heavily subsidize but have theoretically foregone their NME-immunity to CVDs.

This situation can hardly be described as a desirable policy outcome. Indeed, there seems to have been a prevailing view amongst industrialized countries that market-economy reforms should be encouraged[295]. On the multilateral level, this view is reflected in SCM 29, which, under the heading '*Transformation into a Market Economy*', provided economies in transition with a seven-year transitional period to phase out prohibited subsidies and during which these countries '*may apply programmes and measures necessary for such a*

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[290] Lantz (1995) at 1028. This would is the case even if all these subsidies can be held to be 'specific'. This situation is to be distinguished from the provision of non-specific, generally available subsidies which are by definition immune from counteraction. *See also* fn 220 above.
[291] Qin (2004) at 870, 903. The argument that the absence of a corresponding provision to the interpretative note *Ad* GATT VI, § 2 for determining subsidies prevents the application of surrogate-type methodologies should be dismissed in light of the Appellate Body findings in *US – Lumber CVD Final*. WTO Appellate Body Report, *United States – Final Countervailing Duty Determination with respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004, § 167.
[292] Qin (2004) at 871.
[293] Lantz (1995) at 1032.
[294] Qin (2004) at 868, 875.
[295] Lantz (1995) at 1035 and fn 192, 1041; Qin (2004) at 907.

transformation'. Under SCM 29, all subsidies notified to WTO are immune from multilateral action during the transitional period, but remain subject to CVDs.

The impact of high(er) politics and the recognition of the difficult position of economies in transition may have been important factors explaining their qualification as NMEs for the purpose of CVD proceedings. In that manner, this 'protection' afforded to economies in transition could be characterized as a victory for some administrations against protectionist lobbies. Such a picture, however comforting, may nonetheless attribute too generous intentions to national authorities. It is much more likely that the past reticence of industrialized nations to enforce CVDs is largely due to the threat of tit-for-tat retaliation based on their own levels of subsidization[296]. This position would also best explain the incoherence between the very limited – if any at all – use of CVDs and the extremely intensive use of ADs against NMEs. From a logical and systemic perspective, inconsistencies thus remain, not least since subsidization is an oft-invoked (and oft-confused) ground for justifying the imposition of ADs[297].

The position of China upon accession

China did not benefit from an additional transitional period, either as a developing country (SCM 27) or as an economy in transition (SCM 29)[298]. It was therefore bound to apply the WTO disciplines on subsidies to their fullest extent from the day of its entry, and was subject to counteractions pertaining to SCM[299]. As regards the determination of subsidies, the Protocol of Accession provides as follows:

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

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[296] Lee-Makiyama (2011) at 4, builds a solid case in that sense against the use of CVDs by the EU against China. *See also* Hoekman & Kostecki (2009) at 456; Horlick & Shuman (1985) at 14-18.
[297] *See*, e.g., Detlof & Fridh (2006) at 5.
[298] *See* Qin (2004) at 907.
[299] Qin (2004) at 887.

This provision is the first recognition within the WTO system that surrogate country benchmarks may be used in CVD proceedings. Abstracting from all economic considerations, PA 15(b) appears at first hand to have a systemic benefit, which is to permit that – in the case of China – counteraction on subsidies be operated through a more appropriate instrument than ADs. However, this somewhat positive result cannot conceal two worrying issues with this provision.

Firstly, the use of a third country surrogate is conditioned to the investigating authority encountering 'special difficulties' in using prevailing conditions in China. The Protocol and Working Party Report nonetheless do not provide for any further guidance as to what these 'special difficulties' may be[300]. Given the general deference to national authorities' determinations in AD and CVD investigations, it is unlikely that a WTO Panel or the Appellate Body would rule against any substantive determination that establishes such 'special difficulties'[301]. In that regard, it is important to note that in 2004, the Appellate Body ruled in favor of the United States' use of a surrogate country benchmark in a CVD case against Canada[302]. The Appellate Body found that alternative benchmarks could be used where private prices of the targeted goods were distorted due to '*the dominant role of the government in the market as the provider of the same or similar goods*' and that the alternative benchmark used '*relates or refers to, or is connected with, prevailing market conditions in the country of provision*'[303]. How this interpretation relates to PA 15(b) is unclear[304]. However, the 'special difficulties' standard would appear to have precedence over the *US – Softwood Lumber IV* interpretation, as the latter dealt with SCM 14 which PA 15(b) expressly supersedes in investigations relating to Chinese products.

A second issue is that PA 15(b) is not limited in time, and does not provide for the possibility of obtaining recognition that Chinese conditions should prevail before national investigating authorities. As a matter of fact, there is no mention in PA 15(b) of non-market or market economy status, meaning that, theoretically, China could be recognized as a market economy for antidumping purposes, yet still be subject to the alternative benchmark provision of the Protocol in CVD investigations.

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[300] Qin (2004) at 903.
[301] Lardy (2002) at 90; Qin (2004) at 904.
[302] *US – Softwood Lumber IV*, above fn 291.
[303] *US – Softwood Lumber IV*, § 167.
[304] *See* WTO Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, §§ 447, 490. Qin (2004) at 903 erroneously holds that the Protocol of Accession departs from the standard as interpreted in *US – Softwood Lumber IV*, although this ruling occurred two years after the entry into force of the Protocol.

A second provision of the Protocol of Accession substantially modifies the situation of China in anti-subsidization proceedings. According to PA 10:

> "*10. Subsidies*
>
> […]
>
> *2. For purposes of applying Articles 1.2 and 2 of* [SCM], ***subsidies provided to state-owned enterprises will be viewed as specific if, inter alia, state-owned enterprises are the predominant recipients*** *of such subsidies or state-owned enterprises receive disproportionately large amounts of such subsidies*."
>
> (emphasis added)

This particular 'specificity' test departs from the SCM standards, namely that subsidies made broadly available in the investigated country are not susceptible of being counteracted by WTO Members. On the contrary, PA 10.2 permits to initiate remedies against such broad subsidies based on the ownership of its recipients, an unusual – and hardly explainable – position in the WTO system. As noted by HOEKMAN & KOSTECKI, "*what matters* [to WTO] *is not ownership, but exclusivity or special privilege*"[305].

Scores of issues plague the SOE-specific test contained in PA 10.2. There is, for instance, no definition of what constitutes a State-owned enterprise, or of what threshold is intended by the use of the words 'predominant' or 'disproportionately large'. The central problem, though, may be that there appears to be no economic rationale for singling out SOE subsidization, as it does not appear to be more trade-distortive than the subsidization of private entities[306]. On the contrary, this provision could well have been devised to facilitate the use of anti-subsidization instruments against China. Indeed, SOE reforms in China rely heavily on providing loans at fixed interest rates through State-owned banks and on restructuring the massive debt incurred in some sectors[307]. Although such programmes are broadly available, in the absence of a 'proper' specificity-test, they could wind up in a CVD investigation.

The picture that results from the Protocol of Accession as regards anti-subsidization is therefore a very unfavorable one for China. As an economy in transition, the PRC needs to use subsidies in order to progress with the reform of its large State-owned sector. However, none of the transitional periods afforded by SCM as regards privatization (SCM 27.13), developing country status (SCM 27) or transformation into a market economy (SCM 29) have been extended for the PRC. Instead, China conceded that many of its privatization programmes can be considered as countervailable (although it is unclear how trade-distortive they are) and that the margins determined in CVD proceedings can be assessed against

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[305] Hoekman & Kostecki (2009) at 231.
[306] *See* the detailed analysis of this provision by Qin (2004) at 895.
[307] Lardy (2002) at 89.

conditions prevailing in third countries, so long as 'special difficulties', as defined by imposing authorities, are deemed to exist when looking at Chinese benchmarks. Worst even, China has committed to this treatment without any limitation in time.

As has been previously noted, there may have been a real need for specific rules designed to deal with an economy in transition as large as China and its subsidization and privatization programmes. However, being as one-sided as they are, the provisions of the Protocol set the scenery for yet another protectionist showdown[308].

CVD practice against NMEs after 2004: A change in the weather

In 2004, the Appellate Body upheld a decision by USDOC to use US market figures as an alternative benchmark for assessing alleged Canadian subsidies on certain lumber products[309]. Interestingly, Canada was, shortly after the Appellate Body decision, the first country to break the standoff on imposing CVDs to China, though it considers it to be a NME. On August 27th, 2004, Canada imposed a provisional duty on outdoor barbecues from China[310]. The following year, Canada imposed two final CVDs (including the final CVD on outdoor barbecues). The real outbreak, however, started with a March 2007 preliminary determination by USDOC to impose CVDs on coated free sheet paper from China[311]. In its press release, this authority stated:

> *"China has developed to the point that we can add another trade remedy tool, such as the countervailing duty law. The China of today is not the China of years ago."*

Although the USITC later denied injury to the US industry, the reversal by USDOC of its earlier policy opened the floodgates for investigations against Chinese products. In 2007 alone, 14 US CVD investigations were initiated against imports from the PRC[312]. Between 2005 and 2010, Chinese goods were imposed a total of 29 CVD measures by three countries, the US (20), Canada (8) and Australia (1) – out of a total 48 CVDs imposed by WTO Membership as a whole[313]. On May 14th, 2011, the EU announced it would impose CVDs on Chinese coated fine paper[314].

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[308] Qin (2004) at 905, 912.
[309] *US – Softwood Lumber IV*, above fn 291.
[310] Canada Border Services Agency, *Canada Border Service Agency Imposes Provisional Duty on Outdoor Barbeques*, News Release, 27.08.2004, available at http://www.cbsa-asfc.gc.ca (last visited 28.10.2011).
[311] U.S. Department of Commerce, *Commerce Applies Anti-Subsidy Law to China*, Press Release, 30.03.2007, available at http://2001-2009.commerce.gov (last visited 28.10.2011).
[312] Hoekman & Kostecki (2009) at 459.
[313] WTO, *Countervailing Duties Statistics (1995-2010)*, available at http://www.wto.org (last visited 28.10.2011).
[314] European Commission, *EU Imposes First Ever Anti-subsidy Tariffs Against Imports from China*, Press Release, 14.05.2011, available at http://trade.ec.europa.eu (last visited 28.10.2011). Interestingly, both the European Commission's and USDOC's reversals occurred in investigations on the paper industry. Shedding some light on the topic, *see* Lee-Makiyama (2011).

The idea that favorable methodologies may encourage the use of CVDs is plausible when looking at the high 'success' rate of CVD petitions against China. HUFBAUER & WOOLLACOTT cite figures showing a success rate of 84% in US investigations of Chinese products from 2002 to 2009, compared to 56% for all other investigated countries[315]. Similarly, duties imposed frequently exceed 100% *ad valorem*, with e.g. a 2007 US CVD imposed on Chinese laminated woven sacks set at 226% *ad valorem*[316].

Several other reasons may explain the revived interest for CVDs in the recent years. Firstly, the slowdown of western economies in the wake of the financial crisis has prompted increased demand for protection, especially since China fared remarkably well in the global downturn[317]. In the present context of international suspicion and hostile rhetoric, fueled notably by growing bilateral trade deficits between industrialized powers and China, CVDs come as a readily available marketing tool whereby governments can be seen to act against unfair competition policies from abroad[318].

Secondly, the use of CVDs may be linked to the approaching expiry of the AD methodology sunset clause contained in the Protocol of Accession. As has been shown above, the expiry of PA 15(a)(ii) does not imply automatic recognition of market economy status to the PRC. However, the issue has become so publicly contentious that denying formally-equal treatment after 2017 might simply be politically untenable. Using much-similar CVDs may instead prove easier, in particular since the Protocol does not link the surrogate methodology to NME status nor provides for an expiry date. WTO Members could therefore 'repackage' their protection from NME-based ADs into 'special difficulties'-based CVDs. In that regard, it should however be noted that the threat of retaliation may deter WTO Members that notoriously subsidize important exporting sectors, such as the EU, from employing CVDs[319]. On another hand, countries such as the US that have traditionally adopted a more restrained approach towards industrial policy may be more inclined to increase protection through CVDs in the future[320]. Should the US follow that path, it could possibly do so by fully decoupling the special CVD methodology from market economy status and grant China its long awaited

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[315] Hufbauer & Wollacott (2010), Table 10 at 54.
[316] Bown & McCulloch (2009), Table 3 at 32.
[317] *See* e.g. Sally (2011) at 3.
[318] On the hardening discourse between the EU, the US and China, *see* e.g. Dreyer & Erixon (2008); Cohen, M. A., *Panda Mugging – Can the 2012 Candidates China-bash their Way to Victory?*, Foreign Policy online edition, 14.10.2011, available at http://www.foreignpolicy.com (last visited 28.10.2011). *See also*, Hufbauer & Woollacott (2010), Figure 3 at 48, illustrating the surge in news' coverage of the US bilateral trade deficit with China.
[319] Lee-Makiyama (2011) at 4, 5. Referring to the EC defence of the preferential loans granted to Airbus, this author notes that "*it is inconsistent to argue that it is justified for a public body like the ECB to have such developmental aspirations while it is not for a commercial State-owned Chinese bank*[…] *It is not far-fetched to say that the EU is using double standards*".
[320] Hoekman & Kostecki (2009) at 456. This assumption may however need to be revised following the unusually deep involvement of the United States government in its economy during the recent years. An overview of recent US interventions that could be questioned from a subsidization perspective is given by Hufbauer & Woollacott (2010) at 25.

graduation in antidumping proceedings. Whilst the political effect of such a maneuver would certainly be important, it would nonetheless do little to advance the causes of non-discrimination and legal certainty in the multilateral framework.

2.2.3 THE CHINESE REACTION

Political efforts to gain market economy status

Facing the systemic disadvantage enshrined in PA 15, and with few hopes of being granted its graduation on economic grounds, China launched an extensive campaign to obtain political recognition of its market economy status as soon as it entered WTO. As discussed hereafter, the PRC engaged its trading partners in various forums.

China made market economy status part of its free trade agreement ('FTA') packages. This strategy was successful with a score of small to midsized countries, and most specifically in the Asia-Pacific region. Hence New Zealand was, in 2004, the first country to grant market economy status to China, as part of the China-New Zealand FTA[321]. According to *China Daily*, some 80 nations and regions have since followed suit; these include Australia, Hong Kong, Singapore and the ASEAN[322]. Future developments to watch in this regard are the forthcoming negotiations on the Asian 'super-FTA' with South Korea and Japan, or with the European Free Trade Association States, Switzerland, Norway and Iceland[323].

This strategy may work well for countries that have a strong incentive to join China's growing network of preferential trade agreements[324], but does little to achieve recognition by key players (and major trade remedy users) that are the US and the EU. China has been addressing the NME issue with the United States since the early 1990's[325]. Since 2006, the question of graduation is discussed amongst other topics at 'the highest official level', within the framework of the US-China Strategic & Economic Dialogue ('S&ED')[326]. The 'economic track' of these yearly meetings generally involves the US Secretary of the Treasury and the Chinese Vice Premier, and aims at discussing strategic issues in a medium-to-long-term

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[321] China Daily online edition, *US Won't Grant MES Before 2016*, 12.05.2010, available at http://www.chinadaily.com.cn (last visited 29.10.2011).
[322] Gao (2007) at 383.
[323] *See* Wall Street Journal online edition, *Japan, China, South Korea Eye Trade Pact*, 22.05.2011, available at http://online.wsj.com (last visited 29.10.2011); Switzerland State Secretariat for Economic Affairs, *Free Trade Negotiations between Switzerland and China Officially Launched*, Press Release, 28.01.2011, available at http://www.seco.admin.ch (last visited 29.10.2011). *See also* MOFCOM's webpage for FTAs, available at http://fta.mofcom.gov.cn.
[324] Sally (2011) at 15.
[325] *See* above fn 259.
[326] The S&ED was formerly known as 'Strategic Economic Dialogue'. The denomination was revamped by the Obama administration, along with the addition of a 'strategic track' for discussing e.g. security or environmental policies. *See* the US Department of Treasury's webpage for the S&ED, available at http://www.treasury.gov/initiatives.

perspective[327]. On the subject of China's market economy status, however, Chinese and US views of the S&ED outcomes often seem at odds. At the joint press conference following the 2011 meeting, Chinese Vice Premier Wang noted the US commitment to consult and "*work towards China's market economy status in an expeditious and a comprehensive manner*". The American side did not mention the possibility of graduation[328].

China has not been much more successful in its European endeavors. In 2003, the PRC lodged an official request with the European Commission purporting to be granted countrywide market economy status. In a preliminary assessment in June 2004, the Commission held that shortcomings in terms of State interference, enforcement of corporate governance, property and bankruptcy laws and openness of the financial sector did not permit to grant market economy status to China[329]. The Commission has since established a 'MES Working Group' which gathers regularly to assess Chinese progress against EU criteria[330]. Since 2008, European and Chinese top officials also discuss the question of NME status in the EU-China High-Level Economic and Trade Dialogue, a forum inspired by the S&ED[331]. It is however unclear how much the EU is willing to achieve through this forum, when the Commission considers that "[market economy status] *is not a political statement. It is a technical analysis exclusively linked to trade defence investigations*"[332]. Interestingly, the European position is not always clear as regards the nature of NME status, hesitating at times back and forth between political and technical hurdles. Hence, when asked about progress on the matter at a recent conference, European Commissioner for Trade De Gucht replied that the decision of granting market economy treatment to China relied ultimately with a decision of the European Parliament and of the WTO Membership[333]. The latter assertion is wrong, and this example illustrates the use of a 'hands-tied' discourse to justify the absence of tangible progress on this important question.

Institutional efforts: Influencing trade remedies rulemaking in the Doha Round

China accession to WTO took place at the same Ministerial Conference where the launch of the Doha Round of negotiations was decided. Against the very ambitious agenda

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[327] Hsieh (2009) at 382; Dreyer and Erixon (2008) at 4.
[328] *Joint Closing Remarks for the Strategic and Economic Dialogue*, 10.05.2011, available at http://www.state.gov (last visited 29.10.2011). The situation appeared even more confusing in 2010, with Chinese media hailing a statement by US officials that China would be granted a 'prompt recognition' of its market economy status – although analysts agreed that this probably did not mean until 2016. *See* China Daily online edition, *US to Recognize China's Market Economy Status*, 27.05.2010, available at http://www.chinadaily.com.ch (last visited 29.10.2011); above fn 321.
[329] European Commission, *China – Market Economy Status in Trade Defence Investigations*, 28.06.2004, available at http://trade.ec.europa.eu (last visited 29.10.2011).
[330] *See* EC (2010) at 17; EC (2008).
[331] *See*, generally, Dreyer & Erixon (2008).
[332] European Commission, above fn 329.
[333] These comments were gathered by the author at the European Policy Centre's Policy Dialogue "Rising to the China challenge – the future of EU-China economic relations", held in Brussels on October 14th, 2011.

which was proposed for the Round, China took the helm of a group of recently acceded Members ('RAMs') by positioning itself against major new commitments. The RAMs essentially argue that the concessions made in order to gain accession exceed substantially the obligations of other WTO Members, not least because of their numerous WTO-plus and WTO-minus commitments[334]. The PRC has therefore adopted what could be described as an overall 'passive-defensive' position in the Round, resisting new concessions but avoiding to antagonize other WTO Members in the pursuit of offensive interests. This position may have slightly shifted towards more assertiveness in the recent years, especially since China was granted a seat at the table of influent parties negotiating the hard core of a tentative agreement in 2008 [335].

China has however sought much more actively to influence the outcome of the negotiations on antidumping rules. The Doha mandate in antidumping and subsidies aims at 'clarifying and improving disciplines', and to take into account the situation of developing and least-developed countries[336]. Along with a coalition of WTO Members frequently targeted by ADs – the so-called 'Friends of Antidumping' – China has argued for tightening rules which are deemed too permissive and easily abused[337]. It has thus called e.g. for a ban on 'zeroing', a USDOC practice whereby negative dumping margins (i.e. exports priced above normal value) found in some export sub-groups are factored in as zero in the average calculation. Under zeroing, an investigation is likely to result in a finding of dumping even when a minority of the actual exports under review is being dumped. The Appellate Body has ruled against this practice on several occasions in the recent years. Nonetheless, USDOC continues to apply it[338]. Other points of contention for China have been to argue for a mandatory 'lesser-duty rule'[339] or the mandatory expiry of ADs[340].

Interestingly, the PRC's primary goal in rules negotiations seems to have been to reign in on certain practices that heavily contribute to the poor situation of Chinese manufacturers in trade remedies matters, but that are not NME-specific. This could be due to the concern that antidumping and anti-subsidization rules as they stand may result in discriminatory treatment of Chinese exports, whether or not China is considered as a NME.

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[334] Sally (2011) at 9.
[335] Along with the US, the EU, Brazil, India, Australia and Japan. *See* Bridges Daily Update, *WTO Mini-Ministerial Ends in Collapse*, 30.07.2008, available at http://ictsd.org (last visited 29.10.2011).
[336] *See* the Doha Ministerial Declaration, WT/MIN(01)/DEC/1, at § 28.
[337] Hoekman & Kostecki (2009) at 451.
[338] *See*, e.g., Hoekman & Kostecki (2009) at 452.
[339] *See* above p. 33-34.
[340] Hoekman & Kostecki (2009) at 454.

Judicial activity

An overview of China's approach to dispute settlement in WTO

Since its entry into the WTO, China has been extensively involved in dispute settlement proceedings. As of writing[341], it has faced a total of 23 cases lodged against it, and has participated as a third party in 79 cases. As a complainant, China has filed eight cases against other WTO Members.

China's judicial activity was limited during its first five years in the Organization. The US and other major trading partners seemed to be exercising restraint and preferred to use litigation as a threat[342]. This strategy was successful for two reasons: firstly, the Chinese leadership appeared to perceive international disputes from a very political perspective and feared the public display of a 'defeat', or of a partnership gone sour[343]. Secondly, as a new Member, China had little – if any – domestic capacity to handle WTO disputes, and may therefore have been hesitant about pursuing hardcore Panel and Appellate Body litigation[344]. As a result, until 2007, China settled a number of cases when faced with the prospect of litigation[345], and did not face its first Panel until late 2006 [346]. In the meantime, China lodged only one complaint against a US steel safeguard, and did so alongside seven co-complainants including the EC, Japan, Korea or Brazil[347]. The PRC did nonetheless invest considerable resources in third-country participation, plausibly with a view to develop a homegrown, experienced legal capacity[348].

Along with a hardening discourse on China[349], the US and EU litigation strategy appeared to shift from 2007 on. In the following years, the US and the EU requested consultations in ten, respectively four instances. Various reasons have been invoked to explain this change of policy, such as growing trade imbalances[350] or the 2006 incoming Democrat majority in the US Congress[351]. A key factor is however that the transitional periods provided for the phase-in of China's commitments under its Protocol of Accession had expired by 2006. At that point, the US announced its intention to begin using litigation more

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[341] The cut-off date was October 29th, 2011.
[342] Hsieh (2009) at 383.
[343] Gao (2007) at 376, 389; Hsieh (2009) at 383.
[344] Gao (2007) at 390; Hsieh (2009) at 389.
[345] *See* Gao (2007) at 374, 380, 384.
[346] DS 339 (EC), DS 340 (US), DS 342 (Canada), *China – Measures Affecting Imports of Automobile Parts*. *See* WTO Appellate Body Report, *China – Measures Affecting Imports of Automobile Parts*, WT/DS…/AB/R, adopted 12 January 2009.
[347] WTO Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS252/AB/R, adopted 10 December 2003. *See* Hsieh (2009) at 390.
[348] Hsieh (2009) at 389.
[349] *See* above fn 318.
[350] Bown & McCulloch (2009) at 17; Dreyer & Erixon (2008) at 2.
[351] Hsieh (2009) at 384

aggressively to enforce China's core WTO obligations[352]. The European Commission made similar statements[353]. This approach would seem to be corroborated by the subject-matter of WTO disputes brought against China since then, which are mostly concerned with 'behind-the-border' measures[354].

At the same time, China also seems to have revised its stance towards WTO litigation. It is possible that the leadership felt confident that the experience accumulated through years of observing the WTO judicial process would allow it to sustain more active involvement. It is also likely that the threat of increased litigation and the intensive use of trade remedies by the US and the EU prompted the Chinese authorities to adopt a more aggressive response[355]. From 2007 on, China filed seven cases in the WTO, five against the US and two against the EC. Five of these cases are relevant here: the first two target the concurrent use of ADs and CVDs by the US; the following two address some aspects of the EU regulation on NME treatment in antidumping investigations. The last case has been brought against the abovementioned US zeroing practice[356]. As the Panel was only recently established (October 26th, 2011), this dispute will not be further discussed.

AD/CVD cases

The first two cases China filed with the WTO (following the 2002 *US – Steel Safeguard* case already mentioned) were concerned with concurrent AD/CVD measures imposed by the US. In September 2007, China requested consultations as regards US preliminary AD/CVDs imposed on imports of coated free sheet paper from the PRC[357]. This was the first time USDOC applied CVDs to a NME in more than twenty years. No further action was taken in the WTO, presumably because final duties were never imposed following USITC's negative injury determination[358]. Although the precise legal arguments underlying the Chinese claims are unclear, the Request for Consultations identifies methodological issues with the determination of specificity, of the benefit conferred and of the dumping margin on the investigated products[359].

One year later, China filed its second case on US final AD/CVDs imposed on steel pipes, tires and woven sacks. Essentially, China argued first against the US determination that every SOE should be considered as a 'public body', which in turn permitted to hold all SOE

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[352] Sally (2011) at 7; Hsieh (2009) at 376. Hufbauer & Woollacott (2009) at 7, Table 5 at 50, discuss 'complaint intensity' of China's various trading partners
[353] Dreyer & Erixon (2008) at 1.
[354] *See* Hufbauer & Woollacott (2010) at 35.
[355] Gao (2007) at 389.
[356] DS 422, *United States – Anti-Dumping Measures on Shrimp and Diamond Sawblades from China*.
[357] DS 368, *United States – Preliminary Anti-Dumping and Countervailing Duty Determinations on Coated Free Sheet Paper from China.*
[358] *See* above p. 54.
[359] Request for Consultations by China, *United States – Preliminary Anti-Dumping and Countervailing Duty Determinations on Coated Free Sheet Paper from China*, WT/DS368/1, received on 14 September 2007.

inputs of investigated producers as subsidization. Secondly, China contested the use of alternative benchmarks in determining the amount of the claimed subsidies. These two claims were rejected by the Panel, but partly reversed by the Appellate Body. The latter held that, although SOEs and State-owned commercial banks could be deemed public bodies for the purpose of SCM 1.1, the control of an entity by the government is in itself not sufficient to establish that such entity is a public body[360]. The Appellate Body also refined its *US – Softwood Lumber IV* analysis by stating that the use of alternative benchmarks instead of in-country prices was warranted only in 'very limited' circumstances. It emphasized that the determining factor should be price distortion on the investigated producer's market and not the government's position as a predominant supplier, even though the latter may provide strong evidence of the former[361].

Of more importance to the present analysis was the claim made by China that the use of NME methodologies in calculating ADs imposed concurrently to CVDs resulted in the double counting of some subsidization, which was then offset twice, in contravention to SCM and GATT VI. This is known as the issue of 'double remedies'. In the case at hand, the Panel had ruled that there was no breach of the WTO agreements by relying heavily on the wording of GATT VI:5, which provides that "[n]*o product* […] *shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or* ***export*** *subsidization*" (emphasis added). The Panel held therefore that there was no limitation on imposing concurrent duties in the case of domestic subsidies[362]. This view reflects the economic assumption that domestic and export subsidies affect prices differently. When a subsidy is contingent on export, it is believed to affect the price of the product on foreign markets but to leave domestic prices unchanged. Comparing these prices in a dumping investigation therefore results in a margin which encompasses not only producer-induced price discrimination but also some effect of the export subsidy. When the importing member imposes a concurrent CVD, that effect is therefore accounted for twice. In contrast, a domestic subsidy affects the producer's prices across the board, at home and abroad. Price comparison in that case thus only reflects price discrimination.

The Appellate Body reversed the Panel's finding, noting that, in its opinion, the key element in GATT VI:5 was the prohibition of double remedies targeting the 'same situation'. It confirmed this interpretation through a systematic review of provisions in SCM, and finally noted that:

> "[i]*t is counterintuitive to suggest that, while each agreement* [i.e. SCM and ADA] *sets forth rules on the amounts of anti-dumping duties and countervailing duties that can be levied, there is no obstacle to the levying of a total amount of anti-dumping*

[360] WTO Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, above fn 304, § 320.
[361] WTO Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, §§ 438-447.
[362] WTO Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, §§ 565-566.

> *and countervailing duties which, if added together, would not be appropriate and exceed the combined amounts of dumping and subsidization found.*"[363]

The Appellate Body opined with the assumption that double counting is, in principle, precluded in the case of domestic subsidies[364]. However, it noted that a particular problem arises in respect of NME methodology. Given that surrogate country prices are used to construct normal value, these do not include any effect of a domestic subsidy that would have been granted to the NME producer under investigation. However, in calculating the dumping margin, this value is compared with the actual export prices, which are affected by the subsidy. The dumping margin therefore encompasses some of the effects of the subsidy on the producer's costs. According to the Appellate Body, the concurrent application of CVD in that situation is 'likely' to result in the imposition of double remedies, but it is not 'necessarily' so[365]. Because USDOC had not assessed whether double remedies would arise in the present case, the Appellate Body found the US in breach of SCM 19.3, a provision which commands importing members to impose CVDs in the 'appropriate amounts in each case'[366].

Whether – and how – the results of this case can be applied in practice remains to be seen; regardless of the sound logic underpinning the ruling on double remedies, the problem remains of how to assess the exact effect of a domestic subsidy on costs so as to avoid double counting. Seen the complexity of such calculations, it may well be that this ruling will not be fully implemented.

EU 'Individual Treatment' of NME producers in the imposition of ADs

In July 2009, China initiated its first WTO case against the EU in a dispute over ADs on Chinese iron and steel fasteners[367]. The substance of this case, *EC – Fasteners*, revolves around 'individual treatment' granted to NME producers under Article 9(5) of the EU antidumping law, Regulation (EC) No. 1225/2009 [368].

According to ADA 6.10 and 9.2, producers subject to ADs are entitled to an individual assessment of their dumping margin and to be assigned an individual duty accordingly. Under EU law however, dumping margins for NME producers are determined on a countrywide basis i.e. using a weighted average export price instead of the producer's own export data to compare it with the normal value[369]. According to Art. 9(5) of the EU Regulation, ADs for NME producers, when imposed, are also set at a countrywide rate. A producer may nonetheless be granted individual treatment if it fulfills five cumulative criteria. These are i)

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[363] WTO Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, § 572.
[364] WTO Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, § 568.
[365] WTO Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, § 599.
[366] WTO Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, § 606.
[367] DS 397, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*.
[368] *See* above fn 195.
[369] *See* Detlof & Fridh (2006) at 18.

the freedom to repatriate capital in the case of fully or partly foreign-owned firms, ii) independent price- and condition-setting for exports, iii) absence of State or State officials ownership or influence, iv) exchange rates set by market conditions and v) the absence of State interference such as would permit circumvention of measures (applied to other producers). In that case, the producer's export data will be assessed against the surrogate-based normal value to determine an individual duty rate. The difference in duty levels between a countrywide and an individual rate is not marginal; DETLOF & FRIDH find that, within identical EU investigations, duties for NME producers granted individual treatment hover mostly between a third and a half of the duties imposed on other NME producers[370].

China claimed that Art. 9(5) of the EU Regulation was inconsistent with ADA 6.10 and 9.2, and that it also was in breach of GATT I:1, the MFN treatment principle. Upholding the Panel's finding (although on different grounds), the Appellate Body dismissed most of the EU's defensive arguments.

Firstly, the EU claimed that the differential treatment of NME producers was justified in the particular case of China, on the basis of PA 15. The EU argued that this provision reflected a general 'understanding' that China is not a market economy yet and that "*it does not narrow the universe of situations where the* [ADA] *permits a flexible application of the rules*"[371]. The Appellate Body rejected this claim by emphasizing on the very narrow scope of PA 15, which only permits different treatment of China as regards price comparability in the calculation of normal value. It noted in that respect that

> "[…] *while* [PA 15] *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* […] *such as the determination of export prices or individual versus country-wide margins and duties*."[372]

Secondly, the EU argued that, as a provision concerned with the imposition of duties, Art. 9(5) should not be reviewed under ADA 6.10, which concerns the calculation of margins. The Appellate Body held that there was a 'close and necessary' link between the calculation of the dumping margin and the AD rate as the former is a prerequisite to establish the latter[373].

Thirdly, the Appellate Body noted that Art. 9(5) contains the rebuttable presumption that, in a NME, all exporters and producers in all sectors are sufficiently related to be considered as a single entity. It held this presumption to be inconsistent with ADA 6.10 and 9.2[374]. Whilst the Appellate Body recognized that a theoretical situation could arise whereby State control or influence would be important enough to consider several exporters as a single

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[370] Detlof & Fridh (2006), Table 9 at 28.
[371] WTO Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, adopted 28 July 2011, §§ 283, 284.
[372] WTO Appellate Body Report, *EC – Fasteners*, § 290.
[373] WTO Appellate Body Report, *EC – Fasteners*, § 300.
[374] WTO Appellate Body Report, *EC – Fasteners*, § 370.

entity, it however denied that such a situation could be assessed through Art. 9(5). Only one of the criteria is directly concerned with structural relations between the State and the investigated exporter, and a second one relates to State interference on prices and output. All other criteria, the Appellate Body remarked, relate to State intervention in general. As a result, the test proposed under Art. 9(5) is likely to capture broader market distortions than the distortions relating to the product under to review – especially since the conditions of this test are cumulative[375]. The Appellate Body concluded:

> "*Therefore, even if, as the European Union argues, the purpose of the IT* [i.e. individual treatment] *test was to identify the actual source of price discrimination, we cannot see why the failure to comply with one of the criteria of the IT test provides conclusive evidence that the price discrimination by individual suppliers can be attributed to the State, when some of the criteria do not touch on the question of whether an exporter is free to determine its own prices. We thus consider that the IT test is not capable of establishing whether* […] *the State and one or more exporters can be deemed a single entity for purposes of* [ADA] *6.10 and 9.2*"[376]

The Appellate Body ruled that Art. 9(5) is inconsistent with ADA 6.10 and 9.2. As regards MFN inconsistency, the Appellate Body held that such a claim would require a finding that Art. 9(5) is in breach of GATT VI, as the latter provides explicitly for a departure of MFN under certain conditions. However, as China had not raised this provision, the Appellate Body refrained from deciding on the validity of Art. 9(5) under GATT I:1[377].

The Appellate Body Report in *EC – Fasteners* was adopted on July 28th, 2011. It may be too early at the time of writing to properly assess the consequences of this ruling on future EU practice. Nevertheless, the outcome seems extremely positive for China. As mentioned above, obtaining individual duties results in much lower AD rates. Moreover, the increased administrative costs which will arise from the supplementary calculations of individual rates may temper – to a certain extent – the use of ADs. More fundamentally, this decision is a prestigious victory for China in that the Appellate Body sharply recalled its right to non-discriminatory treatment and seemed to caution other WTO Members that the Protocol clause is not a 'white card' for antidumping abuses, but a narrow and temporary exception at best.

The positive outcomes may not all have unfolded yet. Shortly after *EC – Fasteners*, China initiated a second similar case against EU ADs imposed on Chinese footwear[378]. The Panel Report was circulated to the WTO Membership on October 28th, 2011. Although its contents were not available as of writing, findings indicate that the Panel held Art. 9(5) of Regulation (EC) No. 1225/2009 to be inconsistent with MFN treatment under GATT I:1.

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[375] WTO Appellate Body Report, *EC – Fasteners*, §§ 378, 379.
[376] WTO Appellate Body Report, *EC – Fasteners*, § 380.
[377] WTO Appellate Body Report, *EC – Fasteners*, §§ 392-397.
[378] DS 405, *European Union – Anti-Dumping Measures on Certain Footwear from China*, Panel Report circulated on 28 October 2011.

Retaliation strategies: playing the AD/CVD game

This brief section needs to begin with a warning. As an eminently strategic decision, retaliation generally entails a carefully weighed – if not disguised – political discourse. As a result, although elements such as temporal or subject-matter coincidence may at times confirm or infirm suspicions of retaliatory intent, such assertions need to be treated as conjectural.

As it was preparing for entering WTO, the PRC introduced, in 1997, its first antidumping and anti-subsidy regulation, which was split upon accession to reflect the WTO dichotomy[379]. With a total of 186 investigations and 145 ADs imposed between 1998 and 2010, China now accounts as the Organization's fifth largest antidumping user in a historical perspective[380]. The main targets have been Korea with 26 measures, Japan (25), the US (23), and the EU (aggregated, 22). In itself, China's target pattern in ADs rather seems to reflect the structure of its imports than to deliberately target a given Member. From a temporal perspective, China's AD use has been relatively constant since its entry in WTO, imposing typically 10-15 measures per year. Its use peaked in 2003, with 33 measures imposed. It is possible that this punctual high intensity was a response to the global surge in ADs on imports from China which took place in close connection to its accession (2000-2002).

Of much interest is also the provision contained in Article 56 of the *Regulations of 26 November 2001 of the People's Republic of China on Anti-Dumping*[381], which states that

> "*Where a country (region) discriminatorily imposes anti-dumping measures on the exports from the People's Republic of China, China may, on the basis of the actual situations, take corresponding measures against that country (region)*".

It is unclear how much meaning is contained in this provision, and to which extent it has been used. It could be that Article 56 is just a poorly worded reciprocity clause, implying that China does *not* intend to impose discriminatory duty to countries which refrain from doing so themselves. It is also unlikely that this provision would withstand a WTO challenge.

Still, some evidence could indicate that China does respond to ADs by giving other WTO Members 'a taste of their own medicine'. Hence, whilst it successfully pursued dispute settlement against the EU in the *EC – Fasteners* case, China had also slapped imports of iron and steel fasteners from the EU with a provisional AD in 2009, probably in an attempt to bulge the EU position in the pre-litigation phase[382]. As China increasingly turns into a large importer, the strategic use of ADs becomes more meaningful. Such a strategic use would

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[379] Hufbauer & Woollacott (2010) at 24.
[380] WTO, *Anti Dumping Duties Statistics (1995-2010)*, available at http://www.wto.org (last visited 28.10.2011).
[381] The translated version of which was notified to the WTO on 11 September 2002, G/ADP/N/1/CHN/2.
[382] Interestingly, the EU filed a WTO dispute against this AD, but it has remained at the consultations stage. Request for Consultations by the European Communities, *China – Provisional Anti-Dumping Duties on Certain Iron and Steel Fasteners from the European Union*, WT/DS407/1, received 7 May 2010.

seem to be confirmed by two recent WTO disputes initiated in 2011 by the EC against ADs on X-ray equipment[383] and by the US against AD/CVDs on broiler products[384].

A tit-for-tat pattern is more obvious in the PRC's use of CVDs. Whereas it had not made use of this instrument until then, China launched three investigations against alleged US subsidies in 2009. These concerned steel products, broiler products and certain cars. The first two investigations resulted in the imposition of CVDs in 2010, and have both been challenged by the US before the WTO[385]. The cars investigation also led to provisional CVDs being imposed in 2011. Interestingly, these investigations were launched shortly after the establishment of a Panel in the *US – Anti-Dumping and Countervailing Duties (China)* case. In the case of the EU, China initiated investigations on imports of potato starch from Germany and the Netherlands which resulted in the imposition of a provisional CVD on May 19th, 2011 – exactly five days after the European Commission announced the first concurrent imposition of CVDs to ADs on coated fine paper from China[386].

Summary: a multilayered approach to the NME issue

China has deployed a variety of efforts to rebalance its NME position on the global trade field. Firstly, China has sought for a political solution to its NME issue. This approach has been relatively successful with minor trade players and may owe a lot to the Chinese growing regional influence. This approach may also be symptomatic of the diplomatic way Chinese leaderships have dealt with international relations in the era of the 'Peaceful Rise'.

Secondly, through the Doha Round negotiations China has sought to alter and tighten the WTO framework on trade remedies, in an effort to systemically foreclose the possibilities to use special NME rules against it. Although the overall 'backseat' position of China in the Round can somehow be understood, its passivity has certainly prevented the PRC from becoming a true 'price-setter' in WTO negotiations. As there seem to be few hopes left that Doha will conclude in a meaningful outcome, the question will arise of whether the Chinese position was the wisest strategy to adopt. However, a new round of negotiations would be a good opportunity for the PRC to get involved from the start (i.e. setting the agenda) and finally assume a leading position most WTO Member expect from it.

Thirdly, China has actively challenged the application of its specific rules in dispute settlement. After an initial running-in phase, the Middle Kingdom has showed increasing confidence in its abilities to lead cases and has challenged the two most experienced litigators

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[383] DS 425, *China – Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union*.
[384] DS 427, *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*.
[385] DS 414, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-rolled Electrical Steel from the United States* (the Panel was composed in May 2011); *see also*, above fn 384.
[386] Lee-Makiyama (2011) at 5; *See also* above fn 314.

in GATT/WTO, the US and the EU. China appears to have picked its battles quite judiciously, as it presents a very positive track record of its cases as complainant. It has often chosen to challenge complex methodological issues and revealed serious theoretical and legal inconsistencies. Interestingly, there is uncertainty as regards the practicalities of implementing the outcomes of both the US AD/CVD and the EU Regulation Art. 9(5) cases. In that respect, the strategic value of both series of cases could be very important, as the US and the EU may have to chose between a standstill in the imposition of new measures – until the technicalities are solved, if they can be – or proceeding with the certainty that such measures would be declared illegitimate by a WTO ruling.

Finally, China has also showed that it can play hardball as it now has the necessary market leverage to do so. Although major traders may have been appeased by China's diplomatic efforts, its passive-defensive attitude in negotiations or its use of the dispute settlement mechanism, the Middle Kingdom remains an extraordinarily powerful economy with a historical weakness for retaliation[387]. This should not be ignored, as the world's three largest economies have, in the recent years, been particularly inclined to indulge into reciprocal bashing.

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[387] Gao (2007) at 373.

CONCLUSION: CROUCHING TIGER, HIDDEN DRAGON

The question of its market orientation has been a major concern with the accession of China. Undeniably, the structure of the Chinese 'socialist market economy' has been difficult to integrate within the multilateral trading system, and, in many regards, it still is. But the underlying thesis that this paper aims to have demonstrated is that the real issue may not be as much the style as it is the size of the Chinese economy.

Like GATT, the World Trade Organization is not meant to impose an economic system to its Members. Instead, it purports to serve as an 'interface' between different economies, and has been used to that purpose in the past. Hence, although issues in dealing with very different types of economic structures had arisen under GATT, solutions were often adopted in a pragmatic manner, such as in the case of Cuba or eastern European economies. With the extensive market economy commitments it entailed, the accession of China has broken new ground and signalled a departure from the Organization's earlier neutrality in respect of economic systems. While the Members' underlying reasons for taking such a stance may be diverse and unclear, the understanding of how this principle happened to be reversed in all legitimacy has considerable systemic importance.

The formulation of binding rules is one of the great achievements of WTO. In contrast to GATT, which was ruled by diplomacy and pragmatism, the WTO system relies heavily on a legalistic approach. The question of finding an appropriate balance between legal security and individual flexibility is a classical debate in most legal systems: while privileging the former enhances predictability and reduces discrimination, the latter prevents mechanical decisions that generate arbitrariness. Like many other elementary legal systems, WTO law is more inclined towards legal security than flexibility, but, as a consequence, it relies on the illusion that countries with different realities can be easily identified and grouped into few categories – developing countries, NMEs – within which similar treatment can be applied. This absence of pragmatism is the loophole through which protectionism can hijack the system.

This sets the stage for what happened during the Chinese accession process, where the countries that had (often valid) concerns about competition with the PRC were also the masters of its destiny. Faced with strong demand for protection and a permissive legal framework, the major traders' perceived opportunity to 'have their cake and eat it too' was probably too strong to be resisted. Labeling China a NME permits to safeguard the image of a non-discriminatory WTO, while it *de facto* denies the PRC full benefits of MFN and reinstalls contingent protection. Inserting NME-specific clauses in the Protocol, in turn, permits to secure the legitimate application of such differential – not to say discriminatory – treatment in the future.

But the cost-benefit analysis that was made by major traders at the turn of the century may well have been fundamentally flawed. From a systemic perspective, the multilateral trading system should have enjoyed increased legitimacy by closing in on the goal of universal membership. Another positive outcome was to reign in on the world's biggest growth engine by ensuring it operates within the frame of a rule-based system. These benefits have however been largely outweighed by the negative perception that accession to the WTO could be used by trading powers as a coercive instrument to promote mercantilist self-interest. The latitudes afforded in the use of ADs and CVDs have cemented the already strong relation these instruments bore to outright protectionism. Worst even, the overly burdensome requirements imposed to newly-acceded members has created a category of countries within the WTO Membership that have a strong incentive to reject additional commitments as part of the current round of negotiations. This factor may have seriously impaired the conclusion of the Doha Round, as it was designed to result in a single undertaking.

From an individual, mercantilist perspective, the strategy aimed at curbing Chinese growth by restricting its exports and opening its markets was equally inefficient. Indeed, trading partners seem to have ignored the fact that China had managed to become one of the world's largest traders before its accession and although contingent protection on its exports was not regulated at all. In the years since its accession, China kept growing, and is now the world's second largest trader, the third if the EU is counted as one. As a matter of fact, that China did not benefit from transitional periods probably enabled it to unlock more gains from its accession, as economists seem to opine that special and differential treatment provisions decrease welfare in countries that invoke them to justify lesser liberalization. Such findings fuel the argument that however biased against China, the Protocol of Accession could not rebalance global trade by itself, the way major WTO economies may have wished for. Instead, it merely delayed the ineluctable – and logical – advent of China, a behemoth nation accounting for roughly a sixth of the world's population, as a (if not the one) global leading economy.

In that sense, it could be said that some of the provisions examined in this paper granted a transitional period for other economies to adapt to this situation. Unfortunately, this perspective does not seem to have had much weight for large traders worldwide, especially since they have recently been dealing with a sluggish economy and intense domestic political pressure to secure employment. Hence, the latitudes afforded by the Protocol of Accession have been extensively used as means to protect sunset industries and impose discriminatory measures on Chinese trade. As these industries are, for macroeconomic reasons, not viable any longer, the question may legitimately be asked of whether protecting these operations is not just an exercise in throwing good money after bad. Moreover, this approach can be criticized on strategic grounds, as it also neglects to take into account the increased assertiveness of China on the international stage. In the recent years, China has indeed demonstrated more willingness to use retaliatory trade measures than before. Given the

current importance of the Chinese markets and their future potential, such threats are not to be taken lightly any longer.

This paper hopes to have demonstrated that the costs of protection largely exceed its benefits. This is true as regards the multilateral system and the damage done to one of the key accomplishments of its rule-based framework, the principle of non-discrimination. It is also true as regards the situation of individual countries, where protection benefiting very limited groups with extensive political leverage is made at the expense of the rest of the economy and of the consumers – and is in any case unlikely to substantially reverse the outcome. Finally, when facing an increasingly powerful competitor, both in political and economical terms, adopting a confrontational and zero-sum perspective on the relationship is likely to help it degenerate into retaliatory war.

In all regards, protection can be afforded as a temporary safety-valve, but it is illusory to believe it can replace the necessary reform of inefficient sectors of the economy on the long run. While the costs of reform are real, and should not be minimized, they cannot be avoided. Government-sponsored lifelines for inefficient economic activities may postpone their fate, but these policies only inflate the final bill societies will eventually have to pay. Unfortunately, the political toll of giving up on protection is one that few leaders are willing to take – even more so when facing an economic crisis. As one Chinese commentator aptly put it (admittedly, in another context), '*to not reform is to wait for death, to reform is to look for death*'[388]. Looking at the globalized future of our economies, maybe leaders of trading powers worldwide could use some Chinese wisdom, too.

[388] Zhang Shantong, 77 *Guanli Xiandaihua* 4, February 1995.

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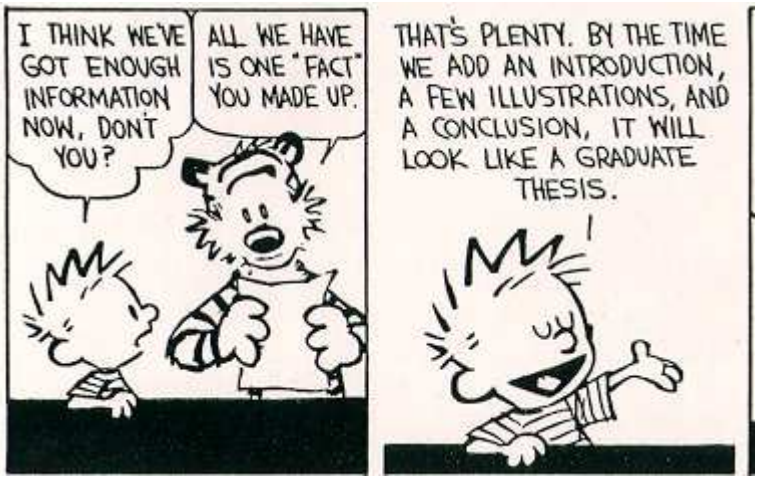
I THINK WE'VE GOT ENOUGH INFORMATION NOW, DON'T YOU?
ALL WE HAVE IS ONE "FACT" YOU MADE UP.
THAT'S PLENTY. BY THE TIME WE ADD AN INTRODUCTION, A FEW ILLUSTRATIONS, AND A CONCLUSION, IT WILL LOOK LIKE A GRADUATE THESIS.