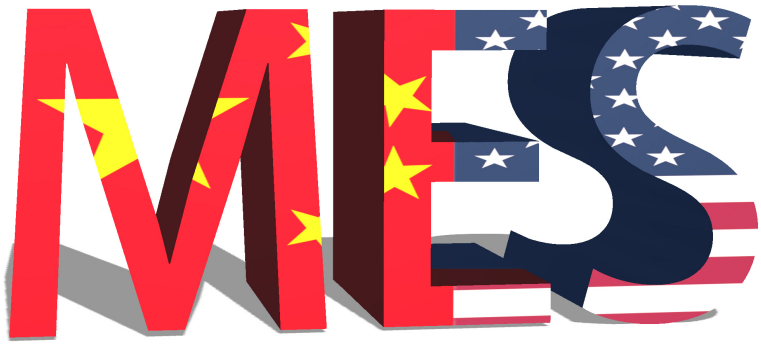
The CIR Master Thesis

The China's Market Economy Status Issue in the US Relations with P.R.C: A Technical Issue or more than that?



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Abstract

The research question regarding whether the decision of the U.S. not granting China MES is just a "technical" issue in the U.S relations with China or more than that was proposed, at the beginning, with my hypothesis that the issue is more than a technical issue. In order to test this intuitive statement, two sub-questions in terms of why the U.S. still refuses to grant China MES were phrased from legal and FPA perspectives. After methodology and theories presenting, I applied perspectives from the two-level game theory to identify rationales behind the U.S. not granting China MES but did it to Russia and the two types of factors, the economic factors and the ideological factor, were found. Until now, the status of "DS515", a consultation requested by China related to "price comparison methodologies" with the Government of the U.S. under the WTO Dispute Settlement Body (DSB), is still on-going. But there is no doubt that the hypothesis can be tested in the thesis.

Key words: MES, WTO, the two-level game theory.

Table of Contents

1. Introduction

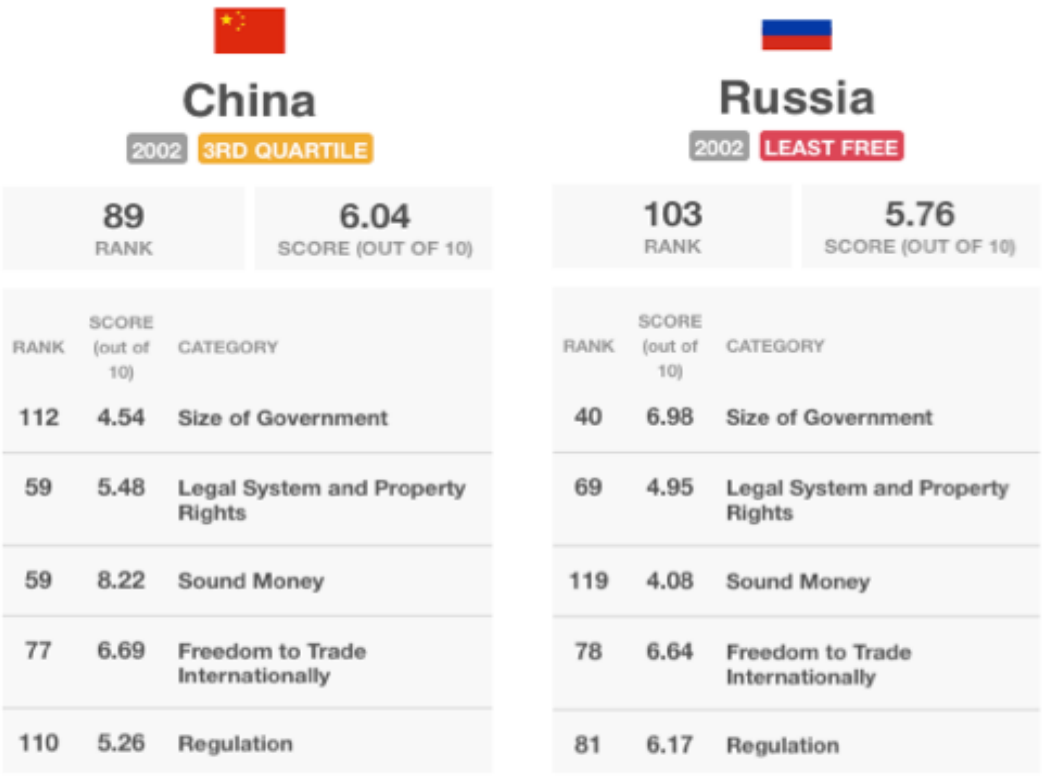
On 11 December 2001, People's Republic of China (P.R.C) became the 143rd World Trade Organization (WTO) member after 15 years efforts to negotiating with WTO members. During the bilateral negotiation with the U.S., China accepted a compromised article, the Article 15 in the Protocol of Accession, which is that China can be treated as a Non-Market Economy (NME) in antidumping (AD) investigations by other WTO members (Yongtu 2011). But this Article contains an expiration date that is 11 December 2016, 15 years after China's accession to the WTO, which brings a fierce debate on whether China would automatically gain its Market Economy Status (MES) within the WTO after the 15th anniversary of that accession. Dr. Douglas Bulloch (2016), as one of the U.S. representatives on China's MES issue, stated that *"China Doesn't Deserve Its 'Market Economy' Status By WTO*." in a published article on Forbes on December 12, 2016. However, at the beginning of 2016, the U.S.-China Business Council (USCBC), an U.S. based American industry lobby association, called on the United States to grant China MES in AD cases at the end of this year upon the expiration of the Article 15 as mentioned (insidetrade.com 2016). More confusingly, the U.S. granted Russia's MES in 2002 when the Economic Freedom of Russia (5.76 out of 10) was lower than China's (6.04 out of 10) (see Figure 1.1), which reflects that Russia's "market economic performance" was worse than China's at that time.[1] Thus, the debate of granting China MES among different

[1] The Economic Freedom is a composite index comprising five factors, "size of government, legal system and property rights, sound money, freedom to trade internationally, and regulation", that can be evaluated a

groups in the U.S. and the paradox of the U.S.' decision on granting Russia MES but not China, both aroused my interest in investigating **whether the decision of not granting China MES is just a "technical" issue in the U.S relations with China or more than that.** By a technical issue, I mean the core dispute of this issue or the way for understanding the issue only involves one aspect, e.g. legal or economic, which is specific and pure rather than complex and compound.

Figure 1.1

Economic Freedom of China and Russia in 2002



Source: The Fraser Institute https://www.fraserinstitute.org/economic-freedom/map?page=map&year=2002&countries=CHN,RUS

Therefore, I propose a hypothesis that **the decision of not granting China MES is more than a pure technical issue in practice, which might involve legal, economic**

state's market performance designed by the Canadian based Fraser Institute, an independent research Institute. See more at https://www.fraserinstitute.org/economic-freedom/map

and political considerations in the U.S. foreign policy toward China. My hypothesis seems intuitive but needs further study. Thus, in order to identify rationales behind not granting China MES in US foreign policy, I formulated following sub-questions:

Why does the U.S. still refuse to grant China MES，

(1) when it is expected that China would automatically gain its MES after 15 years of accession to WTO?

(2) but granted Russia MES in 2002 when the Economic Freedom of Russia was lower than China's?

After the introduction, the thesis will be structured by first presenting a section regarding methodology, which contains my analytical framework, theoretical consideration, selection of data, and the literatures review. Next, I will provide a theory section on the two-level game theory including its background, the basic logic, the development and the critiques to it. Followed by, the core concept and perspectives from the two-level game theory will be applied to analyze and discuss why the U.S. still refuse to grant China MES but did it to Russia. Finally, the conclusion and the reflection of the whole project will be stated.

2. Methodology

In this chapter, I will first present the analytical framework on why the U.S. still refuses to grant China's MES and how to interpret it. Following is the theoretical

consideration. After that, the selection of data will be presented. Finally, the literature review containing details of the concepts MES and NMES, and the debate of China's MES issue under the WTO framework mainly from the legal perspectives will be stated.

2.1 Analytical Framework

As formulated in the introduction, the way I proposed my sub-questions actually implicates my consideration on my analytical framework. The first sub-question was originally angled from the debate under the WTO legal framework. The background of this question includes different interpretations of the condition on China gaining its MES according to the China's Protocol of Accession to WTO. Thus, the way of answering the first sub-question will be mainly based on international legal perspectives. But it can only cover one aspect of my hypothesis; therefore I designed the second sub-question from other perspectives, including foreign policy analysis (FPA) perspectives, for fully understanding my main question. The paradox of my second sub-question reflects my spatially comparative analytical framework (states VS states). In terms of the spatial comparison, I refer to comparing U.S.' different decisions on granting China and Russia MES. The comparative approach can help to distinguish why the U.S. still refuses to grant China's MES. In all, the way in which I formulated sub-questions reveals the approach that I intended to analyze them.

Besides, for trying to test my hypothesis in a more comprehensive framework, I believe that the MES issue in U.S. relations with China needs to be understood at both domestic level as well as international level. Thus, Looking for theories that can

provide analytical tools at both levels is what I did during the project. Inspired by the two-level game theory, I can interpret the MES issue in U.S. relations with China as a temporal failure of a negotiation involving the interaction between the domestic level and the international level. Therefore, my analytical framework can also be seen as "two levels", which are drawn from the two-level game theory.

2.2 Theoretical Consideration

My analytical framework reflects a kind of "level-of-analysis" approach, which has been adopted by many scholars for studying international relations (IR) and the states' behaviors. Kenneth Waltz (1954), who first academically formulated the level-of-analysis approach in his *Man, the State, and War: A Theoretical Analysis,* attributed the causes of war to three "images" at different levels: man (individual level), the state (national level), and the international system (international level). Followed by, J. David Singer first applied the level-of-analysis approach as a systemic approach to IR, who examined the characteristics of "international system" and "national sub-systems". He believed his two-level systems provide a more comprehensive IR image than only one of them (Singer 1961). After that, mainstream IR theories, e.g. neo-realism, neo-liberalism and Wendt's constructivism, developed based on this level analysis approach. Also, this level-of-analysis had a direct influence on the International Political Economy (IPE) that emerged in 1970s, since IPE is studying IR problems at international level or focusing on the interaction between domestic politics and international politics or economics (Katzenstein, Keohane and Krasner 1999).

Even though "level of analysis" has been established in IR theories, there was a period of time when much of IR theory ignored or violated decades of research in foreign policy analysis (FPA) on how domestic political and decision-making factors affect actors' choices and policies, according to Kaarbo (2015). The fact once caused my bias or stereotype that domestic level analysis is meaningless in IR theories due to "unitary-actor" assumption. With the domestic politics turn in IR theory over the last 25 years (Kaarbo 2015) and the development of mainstream FPA theories in US that mainly applied to interpreting US foreign polices (Klaus Brummer 2017), I believe it is reasonable to argue the MES in the U.S. relations with China from FPA perspectives.

As for FPA perspectives, three major analytical and theoretical approaches: "*system-centered, society-centered, and state-centered approaches*" are well-presented in a range of literature in constructing explanations of American foreign economic policy, and no single approach currently dominates the field. (Ikenberry, Lake and Mastanduno 1988) First, system-centered or international-centered approaches interpret the U.S. foreign policy under a particular international system that might provide opportunities or challenges for U.S. dealing with its relations with other nation-states. Typically, Charles Kindleberger (1973), Stephen Krasner (1976), Robert Keohane (1980), David A. Lake (1983), and Duncan Snidal (1985) once explained American policies based on system-centered approaches. Second, society-centered approaches emphasizes how various domestic factors, such as political parties, various interest groups, and the dominant group or class in society,

influence American foreign policy. Like E. E. Schattschneider (1935), Jonathan J. Pincus (1977), Timothy McKeown (1984), and Peter Gourevitch (1986), they adopted society-centered approaches for explaining American foreign policy and most of them chose "tariffs" as their topic. Third, state-centered approaches focus on the domestic institutional structures and the ability of political and administrative officials who are trying to utilize their positions in the political institutions to defend American national interests. As I read, state-centered approaches can be seen from articles written by Peter J. Katzenstein (1978), Stephen Krasner (1986), and G. John Ikenberry (1986).

But Robert D. Putnam (1988) argued that each of these three major approaches mainly is based on some observations that a purely domestic or international analysis, i.e. either *Second Image:* "domestic causes and international effects" (Waltz 1954) or *Second Image Reversed*: "international causes and domestic effects" (Gourevitch 1978). For trying to seek theories that simultaneously account for domestic and international factors in IR affairs, Putnam suggested a conceptual framework, ac two-level games theory, which interprets how domestic politics and diplomacy interact. (Putnam 1988)

Considering the specific context of the U.S. decision on not granting China MES, I will review the two-level game theory more thoroughly and critically in the theory section, which will be adopted for analysis concerning the China's MES issue in the U.S. relations with China.

2.3 Selection of Data

2.3.1 Identify Key Words

After proposing my hypothesis of the research question, I initially identified four key words: "MES" （"市场经济地位" in Chinese）, "China's MES" （"中国的市场经济地位" in Chinese）, "The US Relations with China"（"美国对华关系" in Chinese）, and "WTO", for broadly getting knowledge on my topic. It is noted that I interpreted "WTO" here as an international law framework rather than a general term to be referred to an entity dealing with international trade affairs.

2.3.2 Interview

Reviewed different arguments on China's MES under the WTO framework, I first designed a questionnaire on China's MES from WTO legal perspective for two Chinese legal experts: Professor Yang Guohua (Prof. Yang) and Professor Tan Qiping (Prof. Tan), for collecting first-hand data in order to improve my understanding of the topic based on their professional perspectives.

Prof. Yang was one of legal representatives in the negotiation of China's accession to WTO and was the Deputy-Director of the Treaty and Laws Department of Ministry of Commerce of the People's Republic of China (MOFCOM). He published a series of books or articles related to China in WTO, such as "*China's Cases in WTO: Selected*" (《WTO 中国案例精选》), "*WTO Dispute Settlement Understanding: A Detailed Interpretation*", etc.

Prof. Tan, a law PhD, is the Vice-Chairman of China's Civil Law Research Association. Even though his field is more related to civil and commercial law, he

made his answer based on the views from other international law experts whom he knows, according to his replies in the email correspondence.

In all, their academic backgrounds and working experience make their words valuable for my thesis in terms of legal interpretation. As for the way of collecting their answers, I interviewed Prof. Yang in Chinese via Wechat, an instant communication tool, and recorded our conversation for transcript; while I directly received the answers from Prof. Tan in Chinese via email. Their answers are attached in Appendix 7.1 and 7.2.

2.3.3 Search Online

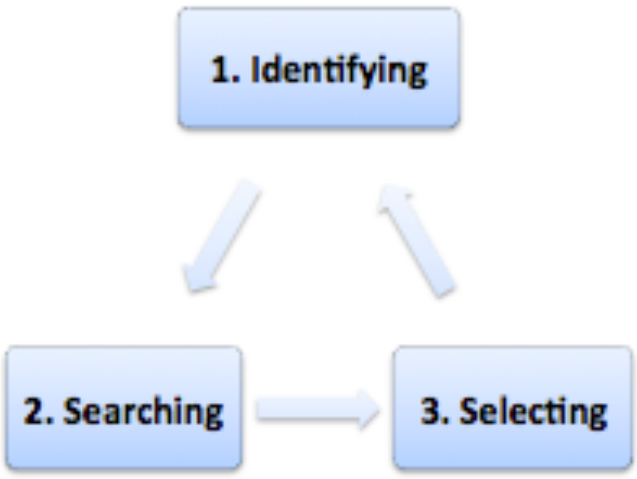
Besides collecting data from interview and email correspondence, I was also looking for relevant literatures and data in many different online search engines. These are as follows:

1. ***Google Scholar*** provides relevant literature across the world of scholarly research. I used both English and Chinese key words mentioned above to search for relevant literature.
2. ***China Knowledge Resource Integrated Database*** (CNKI) is used with the same searching strategy as I did with the "Google Scholar" to look for relevant literature.
3. ***The Aalborg University online library*** (AUB) and ***The Library of University of International Relations*** including **JSTOR** and **EBSCO** databases were used to find books and articles concerning "MES".

4. ***World Trade Organization*** (WTO), the official website, encompasses all WTO-relevant documents, data and resources online for free.

My strategy of collecting data was first searching key words in these search engines to get relevant documents. After scanning through the abstract of these relevant documents, I selected the most relevant documents for intensive reading. Further, I could be more targeted to look for relevant data, both quantitative and qualitative, based on the reference in my selected documents. This "Identifying—Searching—Selecting" circle (See Figure 2.3.3.1) for collecting data was dynamic but time-consuming. However, it did was necessary for providing a solid foundation during my data collection period.

Figure 2.3.3.1: The Author's Strategy for Collecting Data



Source: Made by the author

2.4 The Literatures Review

In this section, I will first present an overview of the concept of MES and its implications in WTO framework. They are summarized from answers of the two legal

experts introduced before and the search results of those databases or websites. Next, the debate on granting China MES from the legal perspectives will be reviewed.

2.4.1 (Non-) Market Economy and (Non-) Market Economy Status

Market economy (ME) or nonmarket economy (NME) can be defined from historical, legal, economic, political perspectives, which makes it a interdisciplinary term that must be understood in a specific context or field.

(1) Market Economy VS Planned Economy

Eric Berglof (2006), the Chief Economist of European Bank for Reconstruction and Development (EBRD) wrote in "*Life in Transition Survey I* " that *"transition from a planned economy and authoritarianism to a market economy and democracy is one of the most ambitious and important socioeconomic and political journeys in the last century* (EBRD and World Bank 2006)." He didn't give a specific definition of "market economy" but the sentence implicates two points that: (1) A "market economy" is a different, or even opposite, economic system to a "planned economy". (2) A "market economy" is empirically combined with a "democratic" political system while a "planned economy" is linked with "authoritarianism" from the euro-centric perspective. Thus, an ideological consideration is embedded in the "market or planned" dichotomy, i.e., capitalism or communism. Since the "transition" indicates a historical background that are the fall of the Soviet Union and the opening of transition economies to international trade. That is why prof. Tan replied in his questionnaire that "Market Economy Status" was originally an economic term rather

than a concept in international law.[2] In the context of "transition" mentioned above, a distinction between NME and ME has been established in international trade law, especially in the framework of anti-dumping (AD) investigations (Puccio 2015). Francis Snyder (2001) also considered NME as a legal concept in European Commission (EC) AD law, which has been socially constructed by means of relations among "*a plurality of institutional and normative sites*". That means the concept of 'nonmarket economy' in EC anti-dumping law can be argued as part of a dynamic configuration of legal ideas "*in specific historical circumstances, and in contexts of political, economic, social, and symbolic power* (Snyder 2001)." These indirect definitions identified that the ME or NME roots in a "cold war" background and each of them is intimately linked with AD laws in different cases, but still are vague for distinguishing what ME or MES is or not.

(2) The Universal Standard or not?

So the question is whether there is an international standard approved by all states to define a state is a ME or NME. According to Prof. Yang and Prof. Tan, the answer is "no", at least in the WTO legal framework. Prof. Tan explained that there is no universal standard, general definition, or relevant interpretation in WTO, but the standard of "MES" or "NMES" can be discovered in and traced back to national laws of some WTO members, such as the U.S. and the EC. Prof. Yang also confirmed that there is no WTO's criterion of MES but only each national standard. He explained this argument by taking the legal texts in Article 15 (d) of China's Protocol of

[2] Here I think he treated MES as ME.

Accession as an example.

> *"(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。"*

The text, "under the national law of importing WTO Member", clearly shows the discretion power of MES is held by each WTO Member itself, according to Prof. Yang. Thus, I collected the MES standard not only in the U.S., the EU, but also the criteria of EBRD, World Bank, and the Fraser Institute as follows:

(a) The U.S. Criteria

Generally, the term "nonmarket economy country" means "*any foreign country that the administering authority determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise*", which was stated by P. Stewart, et al in "Any Change to China's Non-Market Economy Status, Must Be Based on the Criteria Specified," a position paper submitted to the US-China Economic and Security Review Commission on August 18, 2005. Here, the "Criteria" refers to Section 771 (18) of the Tariff Act of 1930 (of the U.S.), as amended; 19 U.S.C. § 1677 (18):

> *(i) the extent to which the currency of the foreign country is convertible into the currency of other countries;*
> *(ii) the extent to which wage rates in the foreign country are determined by free bargaining between labor and management,*
> *(iii) the extent to which joint ventures or other investments by firms of other foreign countries are permitted in the foreign country,*
> *(iv) the extent of government ownership or control of the means of production,*
> *(v) the extent of government control over the allocation of resources and over the price and output decisions of enterprises, and*
> *(vi) such other factors as the administering authority considers appropriate.*

In a 1986 antidumping case involving candles from China, the U.S. Commerce Department provided another standard but shared the same logic as the six criteria listed above to determine "NMES" that included the extent of: "*government ownership of the means of production, centralized control over resource allocation and inputs, government control over output, and currency convertibility and government control over trade* (Barshefsky 1990) (Xiaoxi 2003)."

(b) The EC Criteria

The European Commission issued the Regulation No. 905.98 in 1998, which provided five criteria for any respondent producer who is accused of dumping, no matter operating in a NME or ME, to present evidence that it is actually in line with ME principles or under ME conditions:

> *(i) Decisions of firms regarding prices, costs and inputs, including for instance raw materials, cost of technology and labor, output, sales and investment, are made in response to market signals reflecting supply and demand, and without significant State interference in this regard, and costs of major inputs substantially reflect market values,*
> *(ii) Firms have one clear set of basic accounting records that are independently audited in line with international accounting standards and are applied for all purpose,*
> *(iii) the production costs and financial situation of firms are not subject to significant distortions carried over from the former non-market economy system, in particular in relation to depreciation of assets, other write-offs, barter trade and payment via compensation of debts,*
> *(iv) the firms concerned are subject to bankruptcy and property laws which guarantee legal certainty and stability for the operation of firms, and*
> *(v) Exchange rate conversions are carried out at the market rate.*

Unlike the U.S. Criteria is for determining a state status, the EC standard is more flexible for a producer to argue its own operating conditions. But it clearly enunciated

its direction of defining ME for a state concern the five dimensions: 1) pricing mechanism, 2) accounting standards, 3) financial situation; 4) law system concerning bankruptcy and property, and 5) exchange rate.

(c) The EBRD Criteria

There is an Index of Reform Progress (IRP) designed by EBRD for evaluating the extent of transition to market economy that includes five parts: 1) the ratio of private enterprises' domestic output in the state's Gross Domestic Products (GDP), 2) the privatization and restructuring of state-owned enterprises, 3) the liberalization of trade and market, 4) the reform of financial institute, the market-oriented reform of interest rates, and the establishing of capital market 5) the market legalization.

(d) The World Bank (WB) Criteria

In the"World Development Report 1996: From Plan to Market" published by the WB, the market economy was defined as the goal of transition from a central planning economic system with rapid price and trade liberalization and privatization of state-owned enterprises (SOE). The way to look at a market economy also includes the property rights and social policy. The WB report distinguishes some characteristics of ME that are different to planned economy, but it doesn't illuminate the specific line between them, since the report is mainly for understanding transition economies.

(e) Economic Freedom of the World (EFW) by the Fraser Institute

EFW is an index for measuring the degree of a state's economic freedom, rather than an index particular for identifying its MES. But since the cornerstones of

economic freedom are "*(1) personal choice, (2) voluntary exchange coordinated by markets, (3) freedom to enter and compete in markets, and (4) protection of persons and their property from aggression by others*." It is reasonable to interpret it as an index to reflect a state's market performance. Technically, the five factors presented in EFW, as introduced in figure 1, have 24 components. Further, some of these components are themselves made up of several sub-components. Thus, EFW comprises 42 distinct variables (Appendix 7.3). The condensed index provides a simple but comprehensive approach to compare states' market performance.

(f) Chinese Perspectives

Based on these criteria above, some Chinese scholars and institutes also designed quantitative measures like EFW to identify the core characteristics in ME and to prove China's MES. The "*Report on the Development of China's Market Economy 2003*", which was released by the Economic and Resources Management Research Institute under Beijing Normal University, summarized ME's features in five aspects: the government role in economy, the rights of enterprises (access to production), pricing mechanism, fair trade, and financial parameters, which were claimed internationally accepted standard (Xiaoxi 2003). Because the working team had used the criteria of anti-dumping laws in the U.S., the EU and Canada for reference. Furthermore, they designed 11 sub-parameters and 33 economic indicators to show the objectivity of the results, inspired by the Heritage Foundation of the United States and Fraser Institute of Canada. Therefore, this report laid a foundation for China arguing its MES, because China was about 69% a market economy measured in 2003,

exceeding 60 % as the threshold of a market economy country (China.org.cn 2003). Besides that, Fan Gang (2003) proposed a National Economic Research Institute (NERI) index for measuring the process of marketization of China in each region. This NERI index also includes five facets: the relations between government and market, the development of non-state-owned economy, the commodity market development degree, the production elements market development degree, and the legal system (Gang 2011). It shares similar idea with the index designed by EBRD. Both of them are focusing on quantifying the marketization degree of an economy, especially for a transition economy.

From above, I reviewed the origin of ME and NME, also their criteria for a state or a producer in different context. But what does MES implicate in WTO framework even though there is no unified standard to define it and why is there a debate on whether China would automatically gain its MES after 15 years of accession to WTO?

2.4.2 The Debate on China's MES: A Legal Interpretation

The debate over China's MES heated up in 2016, but the China's MES issue has been concerned since China joined in WTO with a "compromised clause" in its Protocol of Accession. By "compromise", I mean China accepted that other members in WTO could legally treat it as a NME in trade remedy cases in 15 years since China officially joined in WTO, even though China's negotiation representatives had expressed their concern that it was unfair to many Chinese export companies, especially considering past measures taken advantage by certain WTO Members that had treated China as a NME *and* "*imposed anti-dumping duties on Chinese*

companies without identifying or publishing the criteria used, without giving Chinese companies sufficient opportunity to present evidence and defend their interests in a fair manner, and without explaining the rationale underlying their determinations, including with respect to the method of price comparison in the determinations (Working Party on the Accession of China 2001)." In response to these concerns, members of the Working Party confirmed a set of obligations in its report paragraph 151 (a)(b)(c)(d)(e)(f) for WTO members, when any importing WTO Member intends to treat China as NME in trade remedy cases (Working Party on the Accession of China 2001).

As for the debate on China's MES issue in 2016, the blasting fuse just hinds in the Article 15 'Price Comparability in Determining Subsidies and Dumping' (a) and (d) in China's Protocol of Accession to WTO, citing[3]:

> *(a) In determining price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement, the importing WTO Member shall use either Chinese prices or costs for the industry under investigation or a methodology that is not based on a strict comparison with domestic prices or costs in China based on the following rules:*
> *(i) If the producers under investigation can clearly show that* ***market economy conditions*** *prevail in the industry producing the like product with regard to the manufacture, production and sale of that product, the importing WTO Member shall use Chinese prices or costs for the industry under investigation in determining price comparability;*
> *(ii) The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that* ***market economy conditions*** *prevail in the industry producing the like product with regard to manufacture, production and sale of that product.*
> ……

[3] Key words are in **bold**.

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

Prof. Yang said, legally speaking, the text that "*In any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession"* can only deduce that the methodology for calculation of "normal values"[4] of products in AD investigations against producers located in NMEs (the NME methodology) as enshrined in (a)(ii) will not be applied by any WTO Members after 11 of November, 2016. All the lawyers can reach consensus over this deduction from the perspective of Prof. Yang. But why did the deduction that should be a "consensus" arise debate on China's MES? Or what does the expiration of NME methodology mean for China and other WTO Members?

Let us take a closer look at Article 15 (a) and (d). In line with the existed agreements in WTO, China's Protocol of Accession Article 15 (a) presents methodologies in determining price comparability of China's exporting goods under investigation in two different scenarios: one is using Chinese prices or costs as long as the producers under investigation can clearly show that ME conditions prevail in their industries;

[4] The "normal value" of products in the WTO/GATT Article VI Anti-dumping and Countervailing Duties refers to the price or costs of goods for exporting in a state are determined by "relatively free markets" rather than manipulated by non-market factors, such as the subsidy from government and so on.

the other is not using Chinese prices or costs when the producers under investigation cannot prove that ME conditions prevail in their industries. From the two methodologies, we can find that which methodologies WTO Members can use for investigating normal value in AD cases depends on whether the Chinese exporting producers under investigation can prove their industries' ME conditions. Let us move on to the Article 15 (d) that illustrates three scenarios: First, at national level, if China the state was granted MES legally by other importing WTO Members, then methodologies under Article 15 (a) shall not be used to China. Second, at industrial or sectoral level, if any Chinese industry or sector can prove its ME conditions pursuant to the national law of other WTO Member, then the NME methodology under Article 15 (a) shall be terminated to that industry or sector. Third, the source of "blasting fuse" over debate, is that the NME methodology shall not be applied to no matter China the state or any Chinese industry post 11 of December 2016. After reviewing these scenarios in the Article 15 (a) and (d), people may consider that it all about "the methodology" for calculating normal value of Chinese exporting goods and it should not be any debate over China's MES. However, we can also clearly notice the methodology is intertwined with ME condition of a Chinese sector or industry and MES of China. Thus, a legal methodology issue became a MES issue, i.e. whether the expiration of NME methodology can be interpreted as China getting MES automatically after the date of expiry?

There are opposite attitudes on this derived question. Legally speaking, some lawyers who hold the "No" answer, like Bernard O'Connor, a European lawyer and Prof.

Yang, believe that the myth that "China's MES would be automatically granted by other WTO Members post 2016" cannot be interpreted from the Article 15. Their main idea is that the deadline of NME methodology is irrelevant to granting MES based on the texts. But Prof. Yang disagrees over the core arguments of Bernard O'Connor that can be summarized as that the provision just state that the Article 15 (a)(ii) would cease to apply but the rest of the clause has left. In the view of Prof. Yang, the Article 15 (a)(ii) clearly stipulates a "negative obligation" for other WTO Members, which means others "cannot" do something after the due. But that doesn't mean others "must" do something, which is a "positive obligation" legally. The only problem for other WTO Members would appear if they don't change their national laws on antidumping proceedings for fulfilling their "negative obligation" under WTO, just Like the U.S. and the EU. Along with not granting China's MES, they have not taken some real actions on their national laws with respect to determining normal value in AD proceedings, which shows a probability that they would continuously use the NME methodologies based on their national laws but same as the Article 15 (a)(ii) to Chinese exporting producers. Thus it would be in violation to their WTO Member's obligations. That is why China requested consultation related to "price comparison methodologies" with the Government of the U.S. (WTO 2016) and the EU (WTO 2016) under the WTO Dispute Settlement Body (DSB) on 15 of December 2016. According to Prof Yang, the core of the Article 15 issue is this practical problem that how to determine merchandise price in an AD case investigation rather than a "political gesture" that whether China should be granted

MES. However, other scholars who conclude a "Yes" answer argued that the expiration of NME methodology "sunset provision" means there is no legal basis for treating China as a NME in WTO after the expiry date. Specifically, the Article 15 (a) states that other importing WTO Members can use either Chinese price or NME price "based on the following rules", which are elaborated respectively in (a)(i) and (a)(ii). Considering (a)(ii), the "legal basis", clearly corresponds to the NME, some people argue its expiration also mean the expiration of NME. Then China should be treated as a ME post 2016 and China's MES should be granted after the due date. In addition, Henry Gao (2011) stated "whether other WTO Members grants China's MES or not post 2016, they are obliged to treat China as a ME, otherwise it will be in violation of its WTO obligation." Here, I doubt that Henry Gao mixed up the "negative obligation" of other WTO members deduced from the legal texts with the MES "positive obligation" legally. Actually, these "Yes or No" arguments are only based on the Article 15 legal texts. But Prof. Tan provided a new perspective about the background of the Article 15. He replied that not only the Protocol of Accession contains the MES contents, but also *the Report of the Working Party on the Accession of China* (2001) does. Particularly, the paragraph 150 and 151 of the Report (Appendix 7.4) claimed that China is in the transition to a ME, which is the background of setting the Article 15 in the Protocol. Even though these two paragraphs were not incorporated into the Protocol, this background information still has legal sense according to interpretation rules of treaties in the field of international law. Thus, it offers a probability that China's MES should be granted under WTO. The action of USCBC urging granting

China MES at the beginning of 2016 for building "confidence in the bilateral relationship" with China and solidifying the foundation for "mutually beneficial commercial relations (insidetrade.com 2016)" indicate the China MES issue debate actually provide a legal wiggle room for the U.S. to make the decision of granting China MES a political one at the end.

From above, the legal texts in the China's Protocol of Accession that aroused debate on whether China would automatically gain its MES after 15 years accession to WTO actually brought about a matter of the methodology in price comparability in AD cases. As for granting China MES, even though the consequence of the decision is intertwined with the methodology issue, the U.S. still has its discretion in granting or not without violating its obligatory as a WTO member, due to the WTO legal text, "under the national law of importing WTO Member", in Article 15 (d) of China's Protocol of Accession. Thus, the U.S. can take advantage of its discretion to postpone granting China MES based on other reasons.

In all, the debate from legal perspectives reflects that the China's MES issue in the U.S. relations with China includes legally and economically technical issues, e.g. the NME methodology on calculating the subsidy and dumping. But the debate still provides space for politicians to determine what the China's MES issue really means for the U.S. based on its national interests. Considering the decision of granting China MES is also closely linked with foreign trade policy by the U.S. as mentioned, I will continue to identify the political and economic factors in my hypothesis by comparing the U.S. different attitudes on granting MES toward China and Russia from the

perspectives in the two-level game theory.

3. The Two-Level Game Theory

Many IR Scholars have attempted to interpret the interaction between domestic politics and international politics, especially in the field of trade. They also have tried to construct a theory in terms of domestic-international interaction by "level-of-analysis" approach, as stated in the theoretical consideration. Kenneth Waltz (1959) was conceived as the first one to formally put forward a three-layers of IR theory consisting of individual, domestic, and international level approaches. But there was a period of time when mainstream scholars in IR believed it is trivial to analyze domestic factors in international arena and they stuck to adopt a macro and systemic perspective to study. It was not until the publication of Robert Putnam's (1988) seminal article "Diplomacy and Domestic Politics: the Logic of Two-Level Games" in *International Organization* that the interaction between domestic "trivial factors" including domestic politics, the chief negotiator, etc., and international reactions were taken seriously in IR research.

In the theory section, I am going to illustrate the two-level game theory by presenting its background first. Then, the logic of Putnam on this theory will be stated. Followed by, the core concept, "win-sets", along with its determinants and characteristics will be defined and discussed based on Putnam's idea. Finally, the development of the two-level games theory and the critiques to it will be reviewed respectively.

3.1 The Background

The two-level games theory can be traced back to Robert D. Putnam' s "the logic of two-level games" that he abstracted from the Bonn Summit of 1978 where G7 members approved a comprehensive package deal in order to tackle with the international economic crisis at that time under both international and domestic pressure. Putnam didn't dig into the economic wisdom of that agreement but concerned how the package deal became possible politically, especially among the "locomotive" economies of the U.S., Germany, and Japan. Thus, he put forward a "metaphor", two-level games, for understanding how diplomacy and domestic politics interact, by incorporating ideas from both comparative politics and IR subjects. The academic contribution of Putnam's two-level games metaphor is conceived as trying to construct a theory that can explain the interaction between national level and international level comprehensively rather than focusing on a single factor, like international institution or interest conflicts among domestic bureaucracies, etc., and a single way (from domestic to international or from international to domestic) in domestic-international Linkage Politics. Besides that, the two-level games "metaphor" of Putnam was based on critiques to the assumption of structural realism (neorealism) that the state is a unitary-actor at international stage. Scholars[5] who hold these critiques observed that an international negotiation is not merely a negotiation at international level but inevitably influenced by domestic voters who would have different views on it at national level. Thus, the unitary-actor assumption cannot be

[5] For example, Richard E. Walton and Robert B. McKersie who formed a "behavioral theory" of social negotiations to analyze international conflict and cooperation. See *A Behavioral Theory of Labor Negotiations: An Analysis of a Social Interaction System* (1965).

taken for granted, when we analyze international negotiations or other interactions.

3.2 The Logic of Putnam

The two-level games refer to the politics of international negotiations at national and international level that would be reflected in the bargaining process of adopting any policies by each states or claiming attitudes by top decision-makers in the government. At the national level, when an international negotiation is about to start, domestic groups persuade negotiators to pursue their goals or defend their interests as much as he or she can by making potential troubles; while negotiators, usually politicians or senior officials of states, can take advantage of those groups' intentions to construct coalitions for seeking power politically. At the international level, these negotiators representing their national governments to try to maximize their bargaining capacity strategically to satisfy the needs of certain domestic groups who would cause the heaviest cost and also avoid adverse consequences as much as they can. Thus, the logic of two-level games can be simply summarized as the government negotiators, the key players appearing at both levels simultaneously, have to coordinate and balance between foreign counterparts and main domestic stakeholders including executive institution, legislation institution, also relevant interest groups, as long as the sovereignty of each state remains integrity.

Even though negotiations at international level and national level are simultaneous in most cases, Putnam decomposed the negotiating process into two stages for analytical convenience: "a negotiation phase" that is phrased as **Level I (L1)**, while "a ratification phase" called as **Level II (L2).** He defined L1 as "bargaining between the

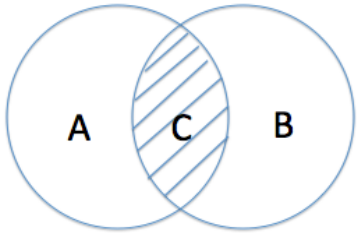
(international) negotiators and leading to a tentative agreement" and L2 as "separate discussions within each group of constituents about whether to ratify the agreement." "Ratification" here was defined as "any decision-process at L2 that is required to endorse or implement a L1 agreement, whether formally or informally". Formal ratification is generally be understood as the voting procedure in parliament; while actors of informal ratification, referring to "bureaucratic agencies, interest groups, social classes, or even 'public opinion'", can be functioned as veto-players and probably make their decisions become de facto ratification. But, ratification is not necessarily "democratic" in any normal sense. As for the constraint of formal ratification, a tentative agreement at L1 cannot be modified at L2 unless that this amendment will be approved by all other negotiators at L1. In other words, the final agreement among negotiators has to be "ratified" at both levels. Thus, failures at any level will lead to the international cooperation stagnant or even collapsed.

3.3 The Core Concept: Win-Sets

After distinguishing formal and informal ratification at domestic level, Putnam further proposed a core concept: **"win-sets"** for analyzing the possibility of domestic actors at L2 ratifying and implementing the agreement at L1. The win-sets, literally, is defined as the "set" of all possible L1 agreements that would "win" at L2 according to Putnam. Win-sets at L2 are crucial for understanding the bargain process and strategy at L1 for two reasons: First, "*larger win-sets make Level I agreement more likely, ceteris paribus*"; Second, "*the relative size of the respective Level II win-sets will affect the distribution of the joint gains from the international bargain.*" I'd like to

illustrate this concept in Figure 3.3.1.

Figure 3.3.1
The Illustration of "Win-Sets"



Source: Made by the Author

Suppose there is a negotiation between state A and State B. Circle A and Circle B respectively represent their win-sets at domestic level. When these two circles overlap, that means theoretically the negotiation can get the outcomes within the overlapping area C. Otherwise, the negotiation would go for nothing. The figure just shows one scenario that two states can find their common ground in negotiation when the size of two states' win-sets is set to be same. But we still need to further consider the square of a circle, i.e. the range of a state's win-set in real IR world, when the distance between the center of each circle is fixed. That brings to three "determinants of the win-set" by Putnam:

> *1. The size of the win-set depends on the distribution of power, preferences, and possible coalitions among Level II constituents.*
> *2. The size of the win-set depends on the Level II political institutions.*
> *3. The size of the win-set depends on the strategies of the Level I negotiators.*

First, Putnam argued that "*any testable two-level theory of international negotiation must be rooted in a theory about the power and preferences of the major actors at Level II.*" From this perspective, certain principles and characteristics related to the size of win-sets and the behavior of constituents at L2 can be summarized: (1) As for constituents at L2, the lower the cost from no-agreement, the smaller the size of the

win-set. For some constituents, no-agreement might means nothing, since no-agreement usually means remaining the status quo; while others probably face high costs. Under such a circumstance, the former probably deliver their attitude, no matter vote up or down, based on their generic feeling on this agreement; while the latter are concerned about the specific context of this agreement. Then, the more constituents whose interests affected by a L1 agreement, the larger win-set might get, ceteris paribus. That reflects the variation of participation rates at L2 across groups and across issues has implications for the size of the win-set. (2) Among constituents at L2, their different preferences of a L1 agreement will form different coalitions that might cause "homogeneous or boundary" conflicts or "heterogeneous or factional" conflicts at L1 in some cases. When the preference of constituents is basically homogeneous, the more the negotiator can win at L1, the better his or her chances of winning ratification at L2. But the situation that preferences of constituents are heterogeneous is more complicated for the negotiator. In this situation, transnational alignments at L2 that support the same policy might form to pressure their governments to reach an agreement at L1. (3) Not like "heterogeneous" preference toward "one" issue in a negotiation as mentioned at last point, various groups at L2 almost have different preferences toward each issue among a multi-issue negotiation, which is a more complex but real situation for negotiators dealing with sometimes. Under such a circumstance, if the expected benefits of an issue in a negotiation can be transferred to win L2 constituents or the costs of an issue can be compensated by the benefits of other issues from foreign states, thus there is a "synergistic issue linkage"

that can create more policy options at L1 for the central decision-makers to balance across several issues without changing the preferences of any constituents at L2.

Second, Putnam believed that "political institutions" also have influence on the size of the win-set by stipulating ratification procedures. Scholars often use the concept of political or domestic institutions in different context but without a clear definition. As Keohane observed, in IR literature, "'institution' is a fuzzy concept, often discussed without being defined at all." Here, the "political institutions" of Putnam refers to the formal rules of ratification process, e.g. the simple majority or the two-thirds majority, etc. Since the more congressmen need to approve, the less probability of an agreement be ratified, it can be inferred that the win-set of a two-thirds vote almost certainly be smaller than the win-set determined by a simple majority. It is sometimes convenient to only think of formal ratification procedures in the parliament, but that is not a whole story. The impact of other domestic political practices, e.g. the discipline of the governing party, the "state strength" or the autonomy of central decision-makers at L2, etc., should not be ignored. Weak discipline within the governing party, corruption or manipulating by individuals in the party for example, decreases the win-set by shrinking the range of agreements for the L1 negotiator who thought he could receive more options and support at L2. As for the autonomy of central decision-makers at L2, it is expected that the more independence of the top leaders domestically (the stronger the state), the larger the win-set which increase the likelihood of reaching an agreement at L1. But based on the logic of two-level games, when other conditions are fixed, if a state is stronger in terms of "autonomy from domestic pressures", the

negotiators of this state will have a relatively weaker bargaining position at L1. Putnam also indicated that, for simplicity of illustration, these principles and characteristics of win-sets above are based on the "two"-level analytical framework, even though in practice, many institutional arrangements include more than two level ratification procedures domestically toward some issues.

Third, different strategies of negotiators can be adopted, which are trying to enlarge others' win-sets or seeking to misrepresent a voluntary defection as involuntary (Putnam 1988). At international level, all negotiators have a motive to persuade others to expand their win-sets domestically for achieving the agreement more likely without compromising their existing win-set foundations. But for their own win-sets, there a tactical dilemma they are facing. Suppose each negotiator is willing to reach an agreement at L1. If the larger domestic win-sets he or she can gain, the higher odds the international agreement will be concluded. But at the same time, that means the relatively weaker bargaining position he or she has to handle with. When a negotiator decides to expand the win-set of his or her state domestically, the strategies that "side-payments" and generic "good will" can be exploited. It is noted that these strategies mainly for attracting "marginal supporters" whose positions on the issue are shifting or not clear. For example, in an international trade negotiation, neither liberalists nor protectionists in a state are targets of the strategy of "side-payments" or a "good will", but the neutral ones. As for the role of the chief negotiator in a state, the higher the status and the better the reputation he or she has, the larger the win-set at L2 might form, which means the more likely a L1 agreement be ratified at L2 in

this state. Thus, the size of the win-set of each state will also be determined by the will or the strategy of each negotiation representative and even his or her role at L2.

Up to now, I reviewed and discussed determinants of win-sets at L1 and L2 under the two-level game logic by Putnam. Besides those characteristics of win-sets determined in different context, Putnam further discussed both positive and negative impact of "uncertainty", "bargaining tactic", "restructuring and reverberation", and "the role of chief negotiator" on the win-sets.

In all, the two-level game theory of Putnam provides a more integrated and comprehensive approach than either the state-centered or the society-centered approach in IR to interpret the interaction between domestic level and international level. But this very broad approach, which made a good start, still needs deeper and farther studies.

3.4 The Development and Extension

Instead of "theory", "metaphor" literally as Putnam suggested, seems more subjective. But it is actually a neutral word to illustrate Putnam's academic contribution in the IR field, just as Max Black stated in *Models and Metaphors (1962)* that "*perhaps every science must start with metaphor and end with algebra; and without the metaphor there would never have been any algebra*." Many followers of the "two-level games", like Helen Milner, Keisuke Iida, David Mitchell, Jongryn Mo, etc., have attempted to further conceptualize and construct the metaphor theoretically. Based on Putnam's outcome, scholars including Putnam himself made their efforts mainly on three aspects for completing the two-level games theory: First, the domestic political

institution (the characteristics of "win-sets"); Second, the context of international negotiation (the determinants of international negotiation outcomes); Third, the preference of negotiators (Peter B. Evans, Harold K. Jacobson and Robert D. Putnam 1993). Besides, many scholars applied the logic of two-level games and its extension to explain many international negotiations in different context.

Helen Miler (1997) developed the two-level theory with the rational choice perspective in the theory chapters of *Interests, Institutions and Information: Domestic Politics and International Relations*. Basically speaking, the rational choice perspective, which is laid as a theoretical foundation in her analysis, abstractly assumes the choice made by actors involved in a decision-making process is for maximizing their profits or preferences but has to be made under certain budgets or constraints. By definition, it allows not only the actors involved in a certain decision-making process and their preferences, but also institutions and other contextual characteristics that determine actors' options are explicitly identified. Thus, hypotheses grounded on the rational choice perspective can be deduced with causal and falsifiable features. That is why Milner chose the rational choice theory for "advancing the theoretical conceptualization of such games and developing testable hypotheses about their impact" in this book. As for domestic politics, she constructed an analytical model with "bureaucratic institution, public opinion, and social economic structure, etc." as identified independent variables. Milner considered domestic politics (in the U.S.) as polyarchy that determined by the preference of domestic actors (interests), the power-separating mechanism (institutions), and the

asymmetric distribution of information (information). Further, she researched how these domestic factors impact on international cooperation. It is noted that her contribution for completing Putnam's two-level game theory also includes first attempting to incorporate "perceptions" and "beliefs" into the analysis of negotiation process. As Alexander (2007) commented, Milner made a good start of combining rational choice theory (the analysis of objective context) and perceptions (the analysis of subjective cognition) for explaining international relations and domestic politics.

As William Zartman (1976) observed that "all negotiation involves the controlled exchange of partial information", Putnam (1988) relaxed the assumption of perfect information to discuss what "uncertainty" might mean in the two-level games. He illustrated a few implications on "uncertainty about the size of a win-set or the lines of the each 'political indifference curves'''. Keisuke lida (1993) also focused on the problem of "uncertainty" in international negotiations, especially the field of international economic policy coordination. Since Iida believed that existing studies mainly applied so-called "strategic uncertainty" to international security issues, but ignored other types of uncertainty and other kinds of international issues, e.g. economic, which a left blank space to be filled. Thus, he distinguished the concept of "analytic uncertainty" and "strategic uncertainty". I summarized the main differences of them in the Table 3.4.1.

Table 3.4.1

Strategic Uncertainty VS Analytic Uncertainty

Differences	Under Strategic Uncertainty	Under Analytic Uncertainty
True Attributes	Each "player" only knows his or her own but not others.	Each "player" knows both but not "the true nature of the economic system they are working with".
Payoff	Each "player" is uncertain about others but only knows his or her own payoff function.	Each "player" is uncertain about both, even if the strategies of all the players are known. Because the actual outcome produced by the economic system is uncertain. (At least at the initial stage of the game).
Prior Assumption	"The common prior assumption" in most literatures.	The prior beliefs are different.
Signaling	Each actor : (1) tries to show his or her true attributes; (2) pretends that he or she has attributes other than his or her own.	Each actor : (1) tries to convince the other actors that her own view of the world is a correct one; (2) tries to take advantage of the "wrong" view of the world held by other actors.
Learning	By observing other's actions.	By observing other's actions and the payoff of policies.

Source: The Author summarized from Keisuke lida, "Analytic Uncertainty and International Cooperation; Theory and Application to International Economic Policy Coordination", *International Studies Quarterly*, 1993. P434-436.

After distinguishing between strategic and analytic uncertainty, Iida suggested that (1) analytic uncertainty is more likely to hinder rather than facilitate international cooperation due to a "downward bias" in IR, particularly in economic issues; and (2) signaling and learning could counter the adverse effects of analytic uncertainty, if one player has superior information. In another Iida's work, "When and How Do Domestic Constraints Matter? Two-level Games With Uncertainty", Iida further formalized Putnam's theory of two-level games by identifying different outcomes under complete information or incomplete information in international negotiations.

As for David Mitchell (2001), he studied the strategies towards Iraqi government in the days after Kuwait being invaded by Iraq, which are adopted by leaders of the U.S., Britain, France, and Germany for testing his hypotheses under a two-level game analytical model. Mitchell put more efforts on illustrating the bargaining game in a more complex but real interstate relationships at L1, since he conceived Putnam just treated international negotiation as a simple bilateral type, which lacks specificity. Based on his improved conception of the international level, he suggested initial strategies for states by taking advantage of their own domestic strength, even though they are constrained by international institutions. Overall, his study achieved to explain how and why executives at L2 react to international constraints at L1 by developing international level of the game.

The third aspect of scholars' contribution to the two-level game theory, as mentioned earlier, is "the preference of negotiators". Unlike Putnam assumed the central decision makers fully represent the majority of their constituents, Jongryn Mo (1994) believed

that the negotiators at L2 have their direct interests in the bargaining outcome that might be inconsistent with those of other domestic groups. Thus, he further divided the domestic game into *"proposal-making process"* and *"ratification process"* to illustrate how negotiators choose their bargaining strategies when they are constrained by domestic participants who have three sources of political power: *"(1) preference-based power, the ability to wait for a better offer; (2) agenda-setting power, the authority to make a proposal; and (3) veto power, the authority to veto a proposal."* In a sentence, Mo formalized the two-level game theory by developing a more realistic model of negotiator behavior, considering that the distribution of political power between the negotiator and domestic constituents endogenously impact on the formation of domestic coalitions in the proposal-making process.

Still, there are many other scholars inspired by Putnam's work and its extension to research on the interaction between international level and domestic level in many IR issues. However, Putnam's work lead to a tendency that more studied have been the ways in which domestic factors determine international negotiation but less work about the impact of international institutions on domestic politics. This brings to my final part of the theory section: the critiques of the two-level game theory.

3.5 The Critiques

Up to May 7, 2017, the number of times that Putnam's "Diplomacy and Domestic Politics: The Logic of Two-Level Games" has been cited by others is 8496 on Google Scholar, which is more than 8444, the number of citation times of Wendt's *Social Theory of International Politics,* the classics of Constructivism in IR. Even the

two-level game theory has gained its popularity among the field of FPA or IR, many critiques to it also come along.

Gregory Raymond (1994) found that the two-level game approach has its strong explanatory power on the international economic issues, like in the field of trade or investment; but not so useful, when it is applied to interpret international security issues. The reason behind it might be attributed to that the Putnam's work didn't take military alliances among states into consideration, as Jeffrey Knopf commented (1993). Besides that, some scholars, e.g. Muhuttin Ataman (2002) and Jeffrey W. Knopf (1993), etc., critiqued that the two-level game theory only focused on "domestic factors" and "international factors" but ignored "transnational factors" in the IR issues. In fact, Knopf believed that there are three different interactions between the two-level: "trans-government", "transnational", and "cross-level". David Mitchell (2001) also pointed out that the two-level game theory only take bilateral interactions at L2 into account. However, international negotiations always involve the third party who has an indirect impact on the outcomes of negotiations by providing options of alliance, check and balance, etc. Moreover, international organizations will definitely impose their rules on members when they negotiate with each other on the relevant issues. So the constraint of international organizations (the third party) cannot be neglected.

Jeffrey S. Lantis (1997) noticed that Putnam and his followers left two important issues that still need wide-range studying. First, they did not systemically discuss how the international agreement be ratified. Second, they did not realize the importance of

some domestic conditions, e.g." *major party unity or disunity, ruling coalition consensus or dissensus, symmetry or asymmetry of effects on various domestic interests, election gains or losses, and public approval or disapproval*", that have a direct link with decision makers at L2. Thus, he proposed a concept of "post-commitment politics" for further discussing this aspect that deserves fuller treatment as he suggested.

Alexander G. Nikolaev (2007) considered that the two-level game theory needs more dynamic reflections on the negotiation process; otherwise, it is just an analytical tool for analyzing static situations. Alexander also doubt that the two-level game theory take "determinants" of international agreements as "blank boxes" or unitary actors, which ignored the fact that cleavages sometimes occur during the negotiation process. Finally, he was not in favor of the separation in Putnam's idea that artificially divides the negotiation process into two independent levels.

According to my limited readings, one of Chinese scholars, Sha Zhiping (沙治平 2014), also held a view that there are two defects of Helen Miler's Model. First, it is hard to identify a logically clear explanation on the two-level game from her model, since her original article building on the Putnam's work mainly focused on how bargaining at L1 influence on the behavior of actors at L2; but did not go deeper into the impact of domestic interactions on negotiation games at international level. Second, the analysis of strategies of actors depended too much on "guessing". He argued that Miler, in fact, could only infer the strategies of decision makers by knowing the negotiation process first.

After reviewing and discussing the two-level game theory by Putnam and its development as well as some critiques to it, I will apply the core concept, "win-sets", and other perspectives based on the logic of the two-level game to analyze why the U.S. still refuses to grant China MES.

4. Analyses and Discussion:

Why the U.S. Granted Russia MES but not China?

President Bush told President Vladimir V. Putin by telephone on June 7, 2002 that the United States would formally recognize Russia as a market economy (Tavernise 2002). But in the year of 2002, as introduced before, the Economic Freedom of Russia (5.76 out of 10) was lower than China's (6.04 out of 10) in 2002, which reflects that Russia's "market economic performance" was worse than China's. Besides, China has made efforts to call on its MES among WTO members since 2004, three years after China officially accessing into WTO, and made significant reforms to its economic and trade regime in line with its accession obligations and commitments under the WTO framework. But the U.S. still refuses to grant China MES. Thus, it is interesting to seek what makes Russia special than China when the U.S. decides to grant MES, and why the U.S. still refuses to grant it to China.

Inspired by the two-level game theory, first I can interpret the decision of granting MES to other states as an outcome of bilateral negotiation on this issue. The outcome would turn out to be a success, i.e. achieving a new transnational agreement that is abided by each state, or a failure, maybe temporary, that the negotiator at one state

has not been able to change the adverse policy from the other state. Thus, the thing that Russia was granted MES by the U.S. in 2002 can be seen as a success for Russia while the MES issue in the U.S. relations with China is still at a "failure" stage from Chinese perspectives.

Actually, the U.S. has delivered its will on granting China MES in different occasions at the Bush and Obama administration. In June 2004, China and the U.S. agreed on establishing a joint panel to decide whether China should be granted MES by the U.S. in a meeting of USCBC. But two months later, the first hearing in the U.S. decided not to grant China MES. Because they found "*China's economic system is still characterized by many distortions which produce false market signals and trade flows that are not reflective of a market-based system* (Terence P. Stewart, et al. 2005)." After that, under the China's continuous efforts to gain the MES, the Obama administration replied that the U.S. would take the decision of granting China MES seriously and hope to grant it as soon as possible through the cooperation in the USCBC at the first round of the U.S.- China Strategic and Economic Dialogue in 2009. Then, the U.S. still held an ostensibly positive attitude on granting China MES at the second and the third round of the U.S.- China Strategic and Economic Dialogue, respectively in May 2010 and May 2011, but did not implement any de facto actions (李思奇, 姚远 and 屠新泉 2016).

If we take a closer look at the long-lasting negotiation on granting China MES by the U.S., it actually involves two distinct issues: For China, the issue is more about requesting that the U.S. should terminate to use the NME methodologies related to

price comparison in AD cases; but for the U.S., the issue can be taken advantage as a leverage to urge China to deepen its economic reform or to make concessions on other areas. Therefore, if the agreement that the U.S. officially grants China MES could be reached at L1, that theoretically be attributed to either that domestic actors in the U.S., such as the Senate and relevant trade groups, etc., ratify and implement it, or that the further economic reform in China has ratified and implemented by the government. Based on this logic, I am going to interpret the "win-set" of China and the U.S. respectively. As defined in the theory section, "win-sets" in the two-level game means "the possibility of domestic actors at L2 ratifying and implementing the agreement at L1." Thus, the win-set of China at L2 can be interpreted as the possibility of ratifying and implementing a whole set of economic reform in the area requested by the U.S., such as "*currency convertibility, free bargaining for wages, foreign investment, government ownership or control of production, government control over prices and the allocation of resources*", which are based on the U.S.' national MES criteria. As for the win-set of the U.S. at L2, that can be conceived as the possibility of ratifying and implementing the China's request of amending the surrogate methods against imported products from China in the U.S. antidumping law and treating China equally as other ME states. These interpretations based on Putnam's idea lay a foundation for further seeking the determinants of the size of their win-sets. Next, I will try to figure out which factors might increase the possibility of granting China MES or hinder it become a reality. Also, I will take Russia's characteristics into account as the reference.

4.1 The Economic Factors

Since the goal of China in the negotiation with the U.S. is mainly being not treated with the NME methodology in AD investigations, I will first compare the situation that the U.S. uses AD against China and Russia.

The U.S. stated that "a country's status as an NME is relevant only to U.S. antidumping proceedings and in no way affects other aspects of that country's bilateral trade relationship with the United States," according to "*COMPREHENSIVE ANALYSIS OF CHINA'S STATUS AS A NON-MARKET ECONOMY UNDER THE U.S. ANTIDUMPING LAWS: FACT SHEET*" (See it in Appendix 7.5). It can be argued that this statement technically implicates a kind of American wishful thinking that trying to "convince" others to believe that the effects of NME status for a trade partner are just within the field of AD proceedings. But no matter it is completely true or not, I can still focus on comparing the characteristics of AD cases of the U.S. against Russia with that of the U.S. against China to seek to distinguish the reason why the U.S. granted Russia MES but still refuses to grant China's. I collected the data from the global antidumping database, a cross-country data collection project that covers almost 90% of antidumping measures undertaken by all WTO members over 1979 to 2015, which is funded by the World Bank and Brandeis University (Bown 2007). As the Table 4.1 shows, I divided the period into two phases: before 2002 (23 years) and after 2002 (14 years), since Russia gained its MES in 2002.

From the Table 4.1.1, we can see the number of the U.S. adopting AD against China over 1979 to 2015 is ten times than that against Russia during the same period. It can

infer at least two points: First, the trade volume between China and the U.S. during that time is much more than that between Russia and the U.S., Since many economists have figured out there is a positive correlation between the times of adopting AD against trade partners and the trade volume. Second, the punitive duties on China in total are much more than that on Russia in total, because China suffered more frequently than Russia in the AD cases investigated by the U.S.. In other words, that means the U.S. can gain more "compensations" from AD cases against China in total. Also, that shows China had more influence on American domestic producers in terms of the range of AD cases, given that 181 different cases out of 190 were involved (See Table 4.1.2).

Table 4.1.1
The Number of AD Cases

AD cases	1979-2015	1979-2001	2002-2015
US against China	190	89	101
US against Russia	19	13	6

Source: The author summarized from the data in the global antidumping database.

Table 4.1.2
The Number of Products Repeated Twice in AD Cases

AD cases (1979-2015)	Repeated
US against China	9
US against Russia	2

Source: The author summarized from the data in the global antidumping database.
Note: In the AD cases that the U.S. against Russia from 1979 to 2015, there are only two products repeated twice in total. They are "Ferrosilicon" and "Pure Magnesium. While in the AD cases that the U.S. against China from 1979 to 2015, nine products repeated twice in total. Respectively, they are "Barium Carbonate", "Steel Wire Rope", "Ball Bearings", "Saccharin", "Pure Magnesium", "Honey", "Oil", "Country Tubular Goods", "Electrolytic Manganese Dioxide", "Carbon and Certain Alloy Steel Wire Rod".

Table 4.1 also clearly illustrates that Russia suffered less AD cases (from 13 to 6) by the U.S. after being granted MES by the U.S.. Besides, Molly Roberts (2008) also confirmed that "China's status as a non-market economy explains the number of U.S. antidumping cases filed against China" in her study. Thus, it is reasonable to argue that the China's NME status can be taken advantage for the U.S. to adopt more AD measures against China. Then, relevant industries and producers at domestic level can gain more punitive duties due to treating China as NME. So, if the U.S. granted China MES at L1, it would directly lead to an amendment in American AD law that the NME methodology toward China should be terminated at L2. Then, some punitive duties from adopting the NME methodology toward China would be no longer imposed on Chinese export products than before. Under such a circumstance, those Chinese products would be more competitive at the U.S.' domestic market while the profits of relevant producers in the U.S., no matter from their own products or from compensations that from Chinese export producers, would be hurt. From the perspectives in the two-level game theory, even if there is a tentative agreement on granting China MES at L1, these American domestic companies whose interests will be potentially impaired at L2 will have motivation to form an alliance to break the agreement. For example, the note of Table 4.1.2 explains what nine repeated products are. We can easily distinguish that four of them are chemicals, i.e. Barium Carbonate, Saccharin, Pure Magnesium, and Electrolytic Manganese Dioxide. Thus, those chemical companies who can treat China as NME in AD cases will probably protest about granting China MES through the Society of Chemical Manufacturers and

Affiliates (SOCMA), a U.S. based trade association that represented a diverse membership of chemical companies since 1921, when they notice the agreement at L1 might be achieved as China wished. Considering this, the central decision makers of the U.S. will not grant China MES, unless it can gain "side-payments" from China.

As for the "side-payments", the real support from Russia on anti-terrorist after September 11, 2001, can be conceived as one of side payments that might stimulate the U.S. to grant Russia MES. But it is hard to find similar "side-payments" from China to the U.S. beyond the field of trade after China accessing to WTO.

In a sentence, with the comparison of the U.S.' AD cases against Russia and the Russia's "side-payments" to the U.S., some economic factors that might hinder the U.S. from granting China MES can be identified based on the logic of the two-level game theory.

4.2 The Ideological Factor

Inspired by a speech "China's stakes in the WTO and the role it could play" presented by Dr. Lin Guijun (Dr. Lin), Vice-President, UIBE, in the WTO Public Forum 2012 Session 30, I designed a question regarding whether China has been discriminated by other WTO members due to its NME status in my questionnaire (Appendix 7.1). In Dr. Lin's speech, he mentioned that China resents being discriminated in the WTO for the following reasons: "*(i) the creation, for the first time, of special safeguard mechanism for manufactured goods; (ii) the invention of non-market economy status for China; (iii) the large number of anti-dumping and countervailing duties against China; and (iv) the review mechanism after eight years of accession*." So I asked Prof.

Tan that "To what extent, do you agree with him on (ii) above? To be clear, do you think that "non-market economy status for China" was "invented" by WTO senior members, which represents a certain discrimination?" Prof. Tan replied that "personally speaking, the term 'MES' itself proposed by capitalism countries is not only a certain discrimination against China, but also against other socialism countries." The reasons behind his argument can also be structured at national as well as international levels as my analytical framework. At national level, Prof. Tan believed that "the concept of 'NME status' was proposed by capitalism countries under the background of 'the cold war'. The dichotomy between capitalism and socialism countries has a direct influence on the implication of ME and NME, which represents a discrimination of capitalism countries against socialism countries. Unfortunately, China was in the worst situation." He further elaborated that, "historically speaking, the U.S. first put forward the NME term in the U.S. antidumping investigation of bicycle cases against Czechoslovakia in 1960s when Czechoslovakia had not disintegrated yet, which means it belonged to a socialism country at that time. Later, the U.S. amended its national trade laws. The amendment was a symbol that the surrogate method against imported products from NME countries was first written in the U.S. antidumping laws. Followed by the amendment of the U.S., European countries was inspired to set up similar "NME status" provisions in their national antidumping laws and countervailing laws. At the beginning, the purpose of establishing "NME status" in the antidumping laws of the European Community (EC) was against central and eastern European countries (CEEC) and the Soviet Union

during the period between 1940s and 1980s. After the collapse of the Soviet Union in 1990s, the antidumping laws and countervailing laws of the U.S. and the EU (the successor of the EC) have changed and been mainly against China." As for international level, the evolution process of the "MES" provision in GATT/WTO also reflects that the term is against socialism countries. By the evolution process of the "MES" provision in GATT/WTO, Prof. Tan explained in his professional but simple way that "GATT incorporated some 'NME' countries or 'transition countries from NME to ME' as new contracting parties in order to strengthen the inclusiveness of multilateral system. These NME countries were mainly socialism countries, e.g., Poland, Hungary, and Romania, which belonged to CEEC at that time. Based on their Accession Protocols, other GATT contracting parties can treat them in a discriminatory way that adopting 'special safeguard measures' to their goods due to their NME status, rather than stick to the Most Favored Nation (MFN) principal to all contracting party in theory when apply GATT Article 19 in terms of 'safeguard measures'. Not until the GATT Article VI the first paragraph 'Note 2' in Annex I[6] appeared, which was driven by western contracting parties, especially the U.S. and the EU, was the so called 'NME provision' finally illustrated in some countries' accession protocol as a latent rule in WTO against socialism countries. That represents the NME treatment became a rule in international laws not only exists in

[6]Annex I: Notes and Supplementary Provisions, Ad Article VI, Paragraph 1, 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 paragraph 1, and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate.
https://www.wto.org/english/docs_e/legal_e/gatt47_03_e.htm

national laws. In all, the evolution process can be attributed to the political consideration and ideological factors in the cold war background that result in the bias from western-capitalism countries against socialism countries and the changes in the international market competition." For example, the section of the Vietnam's Protocol of Accession regarding the "MES" provision was basically "copied" the China's. Because, both the Vietnam and P.R.C are socialism countries. In all, the term 'MES' or 'NMES' proposed by capitalism countries is not only a certain discrimination against China, but also against other socialism countries and China might be the biggest victims, according to Prof. Tan.

From above, the ideological factor with regard to socialism or capitalism state can be identified to explain why the U.S. still refuses to grant China MES but did it to Russia. Considering that Russia is a capitalism state after the collapse of the Soviet Union while China is still a socialism state under the leadership of the CCP, the simple answer might be that the U.S. preferred to grant MES to a capitalism state, but still hold a "Cold War mentality" to socialism states, like China. If it is true, the U.S. can use this ideological factor as a bargaining tactic to expand the size of China's win-set at L2, i.e. to make China increase the possibility of ratifying and implementing a whole set of economic reform and even changing from a claimed socialism state to a real capitalism state as the U.S. preferred, suppose that China accepts to be granted MES at a certain cost.

Even though Prof. Yang believed that the core of the Article 15 issue is a practical problem that how to determine merchandise price in an AD case investigation rather

than a "political gesture" that whether China should be granted MES, other lawyers in the U.S., the largest importing economies from China, conceded that granting China's MES will be a political decision by the U.S. at the end of the expiration day of Article 15, according to a USCBC report (insidetrade.com 2016). From the perspectives of two-level game theory, the economic factors and the ideological factor that have influence on the final decision of granting China MES can be identified as analyzed above. In all, the intuitive hypothesis that the China's MES issue in the U.S. relations with China is more than a technical issue has been tested.

5. Conclusion and Reflections

5.1 Conclusion

In this section, I will conclude upon my research question regarding whether the decision of the U.S. not granting China MES is just a "technical" issue in the U.S relations with China or more than that. As defined before, the "technical" issue refers to an issue is relevant only to one aspect, such as legal or economic, and in no way includes more than two factors. Thus, I proposed a hypothesis, at the beginning, that the decision of not granting China MES is more than a pure technical issue in practice, which might involve legal, economic and political considerations in the U.S. foreign policy toward China. In order to test this intuitive statement, two sub-questions in terms of why the U.S. still refuses to grant China MES were phrased from different perspectives. The first one focused on the legal perspective that is directly linked with the origin of this issue according to my observation; while the second one was

formulated with a paradox of the U.S.' inconsistent decisions on granting MES to Russia and China, which could be used to test the part of "more than a technical issue". After reviewing various literatures, interviewing relevant experts, and being supervised by my two professors, I applied perspectives from the two-level game theory to identify rationales behind the U.S. not granting China MES but did it to Russia. In the section of analysis and discussion, there were two types of factors, the economic factors and the ideological factor, being found by comparing different features of China and Russia on this MES issue from the U.S. perspective. Specifically, one of economic factors that China matters more than Russia in AD cases for the U.S. could be drawn from relevant quantitative data. The "side-payments" factor was inspired by Putnam's two-level game metaphor, considering the context of Russia-U.S. bilateral relations in history. As for the ideological factor, it was actually pointed out by Prof. Tan, one of my interviewees, in a broader context. But I only took it in the Sino-U.S. and Russia-U.S. relations into account for explaining why the U.S. still refuses to grant China MES but granted Russia MES in 2002 when the Economic Freedom of Russia was lower than China's. In terms of the first sub-question concerning the dispute of whether China would be automatically granted MES after the expiration of the Article 15 subparagraph (a)(ii), the answer turned out to be simple that the U.S. has its discretion on granting China MES or not without violating its obligation as a WTO member from the legal perspective. Here, it needs to distinguish "granting MES" carefully, since the decision can be either only a political gesture or a decision containing a real meaning in AD cases. (This distinction

can also reflect that the issue is more than a technical issue.) For China, the latter seems more important, especially in the trade relations with the U.S.. That is why China requested consultation (DS515) related to "price comparison methodologies" that involves so-called "the NME methodology" with the Government of the U.S. under the WTO Dispute Settlement Body (DSB) on December 15, 2016. Until now, the status of "DS515" in WTO is still ongoing, which means the methodology issue (a technical issue) of China's MES with the U.S. has not been decided yet. But there is no doubt that the issue is not only a technical issue and also more than that.

The Last but not least, the point that China has been discriminated in the field of trade due to the NME status can be summarized, but not clearly stated before. The NME methodology on AD cases in China's Protocol of Accession can be interpreted as a discrimination against China. Not only the origin of this NME methodology, as Prof. Tan explained, reflects a certain bias, but also some empirical data, as Molly Roberts (2008) researched, demonstrate that China has suffered from higher duties or more antidumping cases because the China's NME status is taken advantage by other WTO members in antidumping investigation. In all, I will keep track of the China MES issue not only with the U.S. but also with other trading partners, like the EU, etc.

5.2 Reflection

Finally, my reflections on each section of the thesis will be stated respectively. In the introduction section, I proposed my main research question with the formulation of other two sub-questions, which were revised many times. It is interesting that different problem formulation on the same topic usually leads to different approaches

on research. That brings the Problem-Based Learning (PBL) method as one of the most attractive approaches in my study. As for the methodology section, one of my supervisors commented that "it could be an issue that your newest reference here is almost 40 years old" on my "2.2 Theoretical Consideration" one week before the due time. Because of the limited time, I haven't updated the citation he referred to the recent, but I will try to find something new during I prepare the oral exam. The theory section is mainly for providing an analytical tool in my analysis. I noticed that even though the two-level game theory could help me to identify and analyze different factors at each level behind the decision of not granting China MES, it could not illustrate what portions of each factor account for. Besides, unlike reviewing and studying an existed international agreement as many other scholars did when they applied two-level game theory, it is more difficult for me to examine the ongoing MES issue from the perspectives in the theory, because the limited data can be collected. For example, even if I knew the Putnam's argument that "the size of the win-set depends on the strategies of the Level I negotiators", I still could not find the complete data of strategies adopted by negotiators, since the issue is on-going. With regard to the analysis section, more data, and literatures could be gathered to test my hypothesis. Moreover, the language still needs to be polished and the arguments can be sharpen. The final reflection on my thesis is that it would be also interesting to make a comparative study on why different states hold different opinions on granting China MES. In all, I did enjoyed the process of learning based on my formulated problems, even though I clearly realize the written work still needs to be refined.

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7.Appendixes

Appendix 7.1

The Questionnaire for Professor Tan Qiping

Interviewer: Li Dan (LD, the author);
Interviewee: Professor Tan Qiping
Time: 2017/03/10

Questionnaire on China's MES from WTO Legal Perspective
世贸组织法律视角下的"中国市场经济地位问题"学术调查问卷

Could you please introduce yourself? (Name, title, address, academic background, etc.)
请您简要自我介绍。(姓名、职位、工作地址、学术背景等）[7]
谭启平，西南政法大学民商法学院教授。
Tan Qiping, Professor in the Civil and Economic Law College, Southwest University of Political Science and Law.

[It would be perfect if you can provide your CV.]
[如您能提供一份个人简历，我将十分感谢。]

1. To your knowledge, do you know if there are any official documents or legal texts under WTO legal framework that has the general standard or at least implication of a country's MES or Non-MES? If yes, please give some examples.
   据您所知，WTO 的法律框架下是否由对于一国市场经济地位判定的一般标准或默认规定？如有，请举例说明。

   个人认为，"市场经济地位"原本是一个经济学名词，并非国际法概念，WTO 法律框架下并不存在对于一国市场经济地位判定的一般标准或默认规定，也无相关的定义和解释。现有关于"市场经济地位"以及"非市场经济地位"的规定，仅仅是一些 WTO 成员方的国内法规定。

[7] If youareconcernedabout the confidentiality of yourpersonal information and answer, Li Dan can sign the Confidentiality Agreement by Aalborg University for protectingthem.
若您担心您的个人信息和回答被用于超出李丹完成 CIR 毕业论文的用途，李丹愿意与您签订由丹麦奥尔堡大学提供的并受到丹麦法律保护的保密协议。

2. To your knowledge, do you know if there are any official documents or legal texts under WTO legal framework, except China's Protocol of Accession, that can be linked with China's MES? If yes, please give some examples.
据您所知，除了在《中国入世议定书》中存在涉及有关"中国市场经济地位"问题的表述，WTO 的法律框架下是否还有别处涉及与"中国市场经济地位"判定相关的？如有，请举例说明。

个人认为，《加入工作组报告》中包含有关中国"市场经济地位"的内容。其中第 150 段和第 151 段认定，中国正处于向完全市场经济地位转型的过程中，因此 WTO 成员要对中国适用反倾销、反补贴特殊程序规则。这两段是对《加入议定书》第 15 条制定背景的说明。虽然这两段未被列入该报告中所指的中国政府承诺，从而成为《加入议定书》的正式组成部分，但根据条约解释的国际法规则，可将其视为条约解释的背景资料，具有一定的法律意义，即默认中国未来获得市场经济地位的可能性。

3. The debate on China's MES issue mainly originates from the Article 15 'Price Comparability in Determining Subsidies and Dumping' in China's Protocol of Accession to WTO, citing:

> (a) In determining price comparability under Article VI of the GATT 1994 and theAnti-Dumping Agreement, the importing WTO Member shall use either Chineseprices or costs for the industry under investigation or a methodology that is not basedon a strict comparison with domestic prices or costs in China based on the followingrules:
> (i) If the producers under investigation can clearly show that market economyconditions prevail in the industry producing the like product with regard tothe manufacture, production and sale of that product, the importing WTOMember 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 astrict comparison with domestic prices or costs in China if the producersunder investigation cannot clearly show that market economy conditionsprevail in the industry producing the like product with regard to manufacture, production and sale of that product.
> ……
> (d) Once China has established, under the national law of the

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

在《中国入世议定书》第 15 条"确定补贴和倾销价格可比性"中明确规定了中国受到反倾销和反补贴调查的产品的成本或价格认定与生产该产品企业所处的行业的市场经济条件的关系。其中引发"中国市场经济地位"问题争论的是(a)款和(d)款：

(a) 在根据《1994年关税与贸易总协定》第六条和《反倾销协定》确定价格可比性时，该进口成员应依据下列规则，使用接受调查产业的中国价格或成本，或者使用不依据与中国国内价格或成本进行比较的方法:

(i)如接受调查的生产者能够明确证明，生产该同类产品的产业在制造、生产和销售该产品方面具备市场经济条件，则该进口成员在确定价格可比性时，应使用受调查产业的中国价格或成本。

(ii) 如受调查的生产者不能明确证明生产该同类产品的产业在制造、生产和销售该产品方面具备市场经济条件，则该进口成员可使用不依据与中国国内价格或成本进行严格比较的方法。

……

(d) 一旦中国根据该进口成员的国内法证实其是一个市场经济体，则a款的规定即应终止，但截至加入之日，该进口成员的国内法中须包含有关市场经济的标准。无论如何，(a)款第二条规定应在加入之日后15年终止。此外，如中国根据该进口成员国的国内法证实某一特定产业或部门具备市场经济条件，则 a款中的非市场经济条款不得再对该产业或部门适用。

Followings are two sub-questions based on this context. By this context, I mean the contents of part (a)(ii) and (d) of Article 15 in China's WTO accession protocol.

下面两个问题是根据上述《中国入世议定书》中第 15 条(a)款和(d)款的具体内容所提问题：

3.1 How can you interpret the relations between "market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product" and "market economy status" under the WTO framework? Are they referred to the same meaning? If not, in which condition, the "market economy conditions…" can be proved without the

MES of a state? Could you give any cases?
从 WTO 法律的角度来说，中国“企业所处的行业的市场经济条件”和中国“市场经济地位“本身的关系是什么？是否当后者成立时，前者必然成立？若后者不成立，前者有可能成立吗？可否举出相关案例？

根据《中国入世议定书》第 15 条的规定 ,从 WTO 法律的角度来说，中国企业所处的行业具备市场经济条件，并不能说明中国具有市场经济地位；同时，中国具有市场经济地位也并不必然得出中国某企业所处的行业具备市场经济条件的结论。

首先，应当明确中国《加入议定书》的市场经济地位条款仅适用于反倾销、反补贴领域。换句话说，所谓的市场经济地位的条款，在 WTO 语境下只是一些针对中国制定的特殊反倾销、反补贴规则，不涉及其他领域。

其次，文字解释是维也纳条约法公约解释通则的核心，即条约解释者必须从要解释的某条款的文字开始研究。根据文字解释规则，第 15 的解读应有这几项理解：

（1）2016 年后，15 条 a 款第 2 项效力终止，这意味着，WTO 其他成员方无权援引改条对中国反倾销使用替代国方法。

（2）2016 年后，包括 15 条 a 款第 1 项在内的第 15 条其他条款依然有效。尽管 15 条 a 款的 1.2 项是相对应的方面，但根据条约解释的有效性原则，第 2 项的失效不意味着第 1 项必然失效。

（3）2016 年后，15 条 a 款第 1 项仍然有效，但存在的意义仅为中方的举证责任。由于 15 条 a 款第 1 项仍然有效，因此，即便在 2016 年后，中方企业在接受反倾销、反补贴调查时，WTO 其他成员仍可要求中方企业提供其所作产业已具备市场经济地位条件的声明 ,如果证明成立，

则成员方必须用中国的价格或成本。因此，其存在的意义仅为中方的举证责任，证明企业所在行业具备市场经济条件。

再次，WTO 成员仍可能对中国产品在反倾销、反补贴领域使用非市场经济地位的特殊规则。例如，在美国双反案中，上诉机构在对中国企业是否享有政府贷款补贴的调查时，援引《补贴与反补贴协定》第 14 条第 2 款，并推导出 WTO 成员方有权根据此条使用“替代国”利率作为可比标准。类似的规定还有《反倾销协定》第 2 条第 2 款。

最后，现行的 WTO 框架下，没有认定市场经济地位的规定，一般认为，由 WTO 成员根据本国国内法予以市场经济地位的承认，而不根据该国企业的经济条件是否已达到市场经济的标准。

3.2 Do you believe that “China would automatically be granted its MES because part (a)(ii) of Article 15 in China's WTO accession protocol expires on Dec. 11, 2016, fifteen years after China entered the WTO” ? Please elaborate the reason.
从 WTO 法律的角度来说，您是否认为可以由《中国入世议定书》中的第 15 条(d)款对于(a) (ii)部分在中国入世 15 年后（2016 年 12 月 11 日）到期失效的规定得出“中国市场经济地位”应该于中国入世满 15 年后自动被其他成员国承认的结论，为什么？

不能。因为，替代国价格适用与否和市场经济地位是有联系又有区别的两个不同概念，不可混淆。理由如下：

1.从第 15 条 a 款的语句和含义来看，其 a(i)款和 a(ii)款明确规定了 2 个选项，第一个选项是：中国涉案出口企业在 15 年内，如果不能自己证明其符合成员方的关于 市场经济的国内法规定 ,那么就要适用第二个选项：成员方可以对中国出口企业使用“替代国价格”。

2.《议定书》第 15 条 d 款第三句话则规定：“无论如何，(a)项 (ii) 目的规定应在加入之日后 15 年终止。”该款明确了“替代国价格”必须在中国“入世”15 年期满时终止。

因此，《议定书》第 15 条并没有规制市场经济地位问题。《议定书》第 15 条 d 款只解决了中国“入世”15 年期满后，其他成员方不能引用《议定书》第 15 条对中国的企业在反倾销中用“替代国价格”问题。

4. Dr Lin Guijun, Vice-President, UIBE, as a speaker in the WTO Public Forum 2012 Session 30, presented on “China’s stakes in the WTO and the role it could play”.He stated that China resents being discriminated in the WTO, citing: “*(i) the creation, for the first time, of special safeguard mechanism for manufactured goods; (ii) the invention of non-market economy status for China; (iii) the large number of anti-dumping and countervailing duties against China; and (iv) the review mechanism after eight years of accession*.” To what extent, do you agree with him on (ii) above? To be clear, do you think that “*non-market economy status for China”* was “invented” by WTO senior members, which represents a certain discrimination?
对外经济贸易大学副校长林桂军博士在 WTO2012 年公众论坛第三十场分论坛中就“中国在 WTO 中的挑战和应对”相关话题进行了演讲。其中他提到中国在 WTO 体制下受到歧视，表现有四：（1）WTO 第一次设计了特殊保障机制是针对中国出口的工业制品；（2）为中国量身定造了“非市场经济地位”这一表达并因此给中国带来实际损害；（3）大量针对中国的反倾销、反补贴诉讼；（4）中国入世八年后的审查机制。请问您认为林桂军所谓的“量身定造”非市场经济地位是一种对中国的歧视吗？

个人认为，这些量身订造的非市场经济地位不仅是对中国的歧视，而且是对社会主义国家的歧视。

首先，从国内层面看，非市场经济地位的概念由资本主义国家提出，其诞生之时受冷战影响即体现资本主义国家对社会主义国家的歧视，当中最受歧视的是中国。美国在 20 世纪 60 年代的捷克斯洛伐克自行车反倾销案调查中首先提出非市场经济地位的概念，而当时的捷克斯洛伐克未解体，属于社会主义国家。后美国修订贸易法案，该法案首次以成文法形式将适

用于非市场经济国家产品的替代国方法规定在美国反倾销法中。历史表明，在美国之后，欧洲国家也开始在反倾销、反补贴法律中确立“非市场经济地位”条款。其中，欧盟的前身欧共体反倾销立法中出现并发展“非市场经济地位概念”是在 20 世纪 40 年代到 80 年代之间，一开始针对的就是中东欧国家和苏联。同美国一样，尽管一开始并非针对中国，但欧共体及继任者欧盟的反倾销、反补贴立法的多次变化，针对的就是中国。

其次，从国际层面看，“市场经济地位”条款在 GATT/WTO 中的演变过程可体现这是对社会主义国家的歧视。WTO 的前身 GATT 体制诞生后，为增强多边贸易体制的包容性，吸纳了一些实行“非市场经济”或尚处于向市场经济转型的经济体作为缔约方，主要是原东欧几个社会主义国家。根据与“非市场经济”国家如波兰、匈牙利和罗马尼亚等国签署的《加入议定书》，在实施 GATT 第 19 条规定的“保障措施”方面，GATT 缔约方可不遵循最惠国待遇原则，以歧视性方式、专门针对这些国家的产品实施“特殊保障措施”。直至后期发展到 GATT 第 6 条第 1 款“注释二”，经过美欧等西方国家的推动，“市场经济地位”条款隐含于 WTO 规则中，明示在一些国家《加入议定书》的正式条款，终于从国内法走向国际法领域。从这一条款的演变中，我们看到政治因素和意识形态因素发挥了重要作用，东西方之间的“冷战”，美欧等国对社会主义国家的偏见、国际市场竞争的变化都是重要的影响因素。

最后，从越南的入世中，我们也可以印证这一点。越南是继中国之后加入 WTO 的，而越南在加入 WTO 时签订的文件中也出现了“市场经济地位”条款，几乎照搬中国《加入议定书》的相关内容。

因此，非市场经济地位不仅是对中国的歧视，而且体现资本主义国家对社会主义国家的歧视，而中国可能是当中最大的受害者。

5. If there are reasons that China hasn't deserve its MES, what do you think some countries, e.g. Australia, New Zealand, South Korea, etc. still grant it?
如果有理由可以不承认中国的市场经济地位，您怎么看澳大利亚、新西兰、韩国等国家承认中国的市场经济地位？

个人认为，出现这种局面的直接原因是：以澳大利亚、新西兰和韩国为代表的，承认中国市场经济地位的国家与中国签订了自由贸易协定（FTA），中国在正式启动 FTA 谈判之前，都要求对方国家首先承认中国的市场经济地位，这无疑与中国入世有关。因此这些国家承认中国的市场经济地位。但是，从根本上讲，还是经济要素所导致。承认中国市场经济地位的国家中，以澳大利亚、新西兰和韩国为代表的发达国家主要受中国庞大市场的诱惑。这些国家的国内经济结构单一，国内消费量少，必须依靠中国作为出口市场，以提升贸易量，拉动本国经济增长。另外，还有一些以巴基斯坦为代表的发展中国家，之所以承认中国的市场经济地位，也是出于发展本国经济的考虑。同时，这些承认中国市场经济地位的国家的经济规模有限，与美国、日本等国不同，它们亟需中国的市场。因此，这些国家无法抵抗中国市场的诱惑，与中国缔结 FTA，所以它们承认了中国的市场经济地位。

Appendix 7.2

The Interview with Professor Yang Guohua

Interviewer: Li Dan (LD, the author);
Interviewee: Professor Yang Guohua (YGH)
Time: 2017/03/02
Location: Beijing, via Wechat

The Background of thesis had provided to interviewee before the interview as following[8]:
The debate on China's MES issue mainly originates from the Article 15 'Price Comparability in Determining Subsidies and Dumping' in China's Protocol of Accession to WTO, citing:

> (a) In determining price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement, the importing WTO Member shall use either Chinese prices or costs for the industry under investigation or a methodology that is not based on a strict comparison with domestic prices or costs in China based on the following rules:
> (i) If the producers under investigation can clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product, the importing WTO Member shall use Chinese prices or costs for the industry under investigation in determining price comparability;
> (ii) The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product.
> ……
> (d) Once China has established, under the national law of the importing WTO Member, that it is a market economy, the provisions of subparagraph (a) shall be terminated provided that the importing Member's national law contains market economy criteria as of the date of accession. In any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession. In addition, should China establish, pursuant to the national law of the importing WTO Member, that market economy conditions prevail in a particular industry or sector, the non-market economy provisions of subparagraph (a) shall no longer apply to that industry or sector.

[8] The Questionnaire as Appendix 7.1 also provided to Professor Yang Guohua before the interview.

LD: Do you believe that “China would automatically be granted its MES because part (a)(ii) of Article 15 in China's WTO accession protocol expires on Dec. 11, 2016, fifteen years after China entered the WTO” ? Please elaborate the reason.

YGH：从法律专业角度来讲这个 15 条，其实问题容易说清楚。你看我们不是已经在 WTO 里起诉美国和欧盟了吗？

LD：“就是现在我们已经起诉美国欧盟了是吗？”

YGH：对啊，就是 12 月 12 日（2016 年）。

LD：“就是我们对于美欧不承认我们的 MES 已经进行起诉了，是吗？”

YGH：不是不承认市场经济地位问题，反正是 15 条的问题。15 条问题这么说有点含糊，待会儿我再区分一下我所谓的这个“15 条问题”。刚才我讲的是：2016 年 12 月 12 日我国已经同时起诉美国和欧盟了。所以我们认为从法律的角度很容易说清楚。什么意思呢？那就是看这个 15 条怎么理解嘛。我国，包括我本人也是这么理解的：就是说现在 15 条里有(a)(b)(c)(d)四款，这种写法意味着 15 条写的“计算反倾销”的 methodology 过了 12 月 12 日（2016）就不能用了。这个从法律条约解释的角度来看，我觉得还是很明确的。但是，纯粹从法律的角度来讲，欧洲有一两个律师觉得不能这么解释。比如，奥康。我看 15 条这个问题挑起来，主要就是他。待会儿我会讲，他的这个观点为什么会引起广泛争论，这需要进入另外一个层面去看。我先说纯法律层面。其实不管是我，我国的其他律师，欧美的律师和一些经济学家，在谈到这个问题时，如果从纯粹法律角度来理解 15 条条款本身，那么绝大多数的观点是说：你过了这天你就不能再用那种 methodology。相反，我看到只有奥康说，这个不能这么解释。他的最核心观点是，(a)(ii)没了以后(a)(i)还在。但在我看来这是不能成立的。说完了这个以后，再来说为什么好多人在谈论这个 15 条。其实他们在谈 15 条时，不是在比如“我和奥康”两个律师怎么理解这个条款这个层面去谈的，是从所谓的“市场经济地位”这个角度去谈。那这个就麻烦了。这个从表面上看，世界范围内就可以分为两大阵营了，那就有很多很多人了，其中包括政府官员、反倾销调查官、律师、很多学政治经济法律相关方向的人等等。也就是说，这个角度争论的是：“从 2016 年 12 月 12 日起，中国是不是市场经济国家了？”认为中国从 12 月 12 日起应该是的核心观点是：“15 条说了，12 月 12 日起你应该承认中国市场经济地位，不承认就是你赖账。”比如中国自己这么认为，但欧美说“15 条里面没有说给你市场经济地位啊，只说了反倾销的 methodology 不能用了。”那么分为两大阵营，美国目前是没有任何举动，而欧洲修改法律，但受到批评说换汤不换药。所以我觉得你要讨论的层面可能是从这个层面，而不是法律的层面。法律层面很容易说清楚的。那如果是从这个层面说，我自己感觉你看 15 条里确实提到了 market economy 的字眼，比如你看 15 条(d):

> (d) Once China has established, under the national law of the importing WTO Member, that it is a market economy, the provisions of subparagraph (a) shall be terminated provided that the importing Member's national law contains market economy criteria as of the date of accession. In any event, the

provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession. In addition, should China establish, pursuant to the national law of the importing WTO Member, that market economy conditions prevail in a particular industry or sector, the non-market economy provisions of subparagraph (a) shall no longer apply to that industry or sector.
(a) In determining price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement, the importing WTO Member shall use either Chinese prices or costs for the industry under investigation or a methodology that is not based on a strict comparison with domestic prices or costs in China based on the following rules:
(i) If the producers under investigation can clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product, the importing WTO Member shall use Chinese prices or costs for the industry under investigation in determining price comparability;
(ii) The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product.

然后大家因为 15 条中反复涉及了“市场经济（条件）”这样的字眼就认为 15 条是一个“市场经济条款”。但我又回到法律的层面去理解，其实通读 15 条后可以发现，并没有“中国 15 年后，任何一个 WTO 成员要承认中国 MES”这样的表述。15 条中明确说明的情况是什么呢？当然都是涉及反倾销的问题，可以分三种：（1）(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。这种情况没有发生，我是指在 15 年之前，当然你现在也可以这么说。

LD:“这句话是不是也说明了，对于一国 MES 的判定，是由各国的国家法认定的。而 WTO 本身并没有一个统一的、一般的规定？

YGH：对，WTO 是没有标准的。这一点是肯定的。（d）里面包含的内容还挺多的。欧洲和美国在我们加入 WTO 的时候，2001 年，他们就有关于市场经济地位的国内法标准，到今天也是这样的。那么这句话含隐含着有层意思是：在中国加入的那天前，你这个国家的国内法就有 market economy criteria 你才能后来针对中国用 15 条中说的 methodology。言下之意就是，比如 2010 年，中国已经入世 9 年了，这个时候日本为了用 15 条中的 methodology，国内立法专门涉及 market economy criteria. 这样就不符合议定书的 15 条(d)项了。这是（d）项中的一层含义，但并不是最关键的。关键是，如果中国根据美国或欧盟的国内法来证明我是 market economy 那么那种 methodology 就不能用了。（shall be terminated）但这个目前没有发生。因为主语是 China，就是中国要向美欧按照美欧的国内法标准证明，如果达到了美欧的标准，那么美欧同意不用这种 methodology，但这个事情并没有发生。意思就是，中国也没有说我都符合你国内标准了，包括今天中国也不是这么说的。中国是说我 15 条 15 年过了。

（2）15 条（d）款第三句话“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.”是讲产业层面的，如果你能证明 industry or sector 满足市场经济条件，那这种 methodology 也可以不用了。这个事情也没有发生。就是中国没有获得也没有申请这个情况。

（3）(a)(i)中是讲 producers。就是说被调查的生产者能够证明其所在这个行业是满足市场经济条件的，那也可以不用。这个跟第二种情况的区别是，主语不一样：刚讲的第二种情况的主语是 China, 现在这种情况是 producers。

(a) (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;

所以大概就这三种情况。所以你通读 15 条后就可以发现，里面没有任何一句表述是“中国入世 15 年后，你就要给中国市场经济地位。”这是比较清楚的。因为这三种情况都没有发生。那么引起误解的在哪里呢？（d）中的第二句话“In any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession.”(a)(ii)就是那种我们讲的 methodology。现在我们跳到法律解释就是，这里是讲的(a)(ii)中的 methodology 到期不能用了。那你不能说(a)(i)还在相当于(a)(ii)还在，这个是解释不通的。我们可以争论这个。但是我现在要说的是 market economy 的问题，那么从（d）中的第二句话是推不出来说“12 月 12 日（2016）欧洲和美国就要承认中国的市场经济地位”，但欧美在 2016 年 12 月 12 日之后是不能再用(a)(ii)那种 methodology 了。所以逻辑上这么说很清楚，但你事实上又发现 methodology 和 market economy 是纠在一起的。那我再最后说一点，我们告美国告欧盟是告什么呢？

我们告他们说“如果你的国内法不改的话，你 12 月 12 日没有改你的 market economy national laws 的话，那你势必要涉及到你会继续用(a)(ii)中到 methodology。因为欧美的调查机关是要按照国内法来做调查的。所以我们告的是这个，就是你现有的法律本身和 15 条(a)(ii)的冲突。（你去看一下 WTO 网站上我们告欧美的起诉书 consultation request 已经写的很清楚了，515、516 这两号案件）

总结起来说，议定书 15 条提到的 15 年是什么概念？就是从法律专业角度讲，其实很清楚，就是那个 methodology 不能用了，这一点是很清楚的。第二点，这个 15 条不应该能直接推出来 2016 年 12 月 12 日起，欧美就应该有义务来承认中国的市场经济地位。法律里讲义务（obligation）的话可以分两种：一，积极义务，指必须要做什么；二，消极义务：不能做什么事。那么 15 条到期后，应该是 negative obligation，就是你之后“不能”再用这种 methodology 了，它并不意味着 12 月 12 日我就得做点什么事儿。这是我的一个区分。这样能比较清楚地看到 15 条对于欧美来说产生的 obligation 是什么。所以你要离开法律条款来写这个问题不太容易说清楚。大概情况就是那么多。

LD:“所以我想跟您确认的就是，这个 MES 问题在法律上是存在争议的空间的。那么，我才可以从其他角度，比如国际关系的角度去理解。因为我了解到像是澳大利亚、韩国等国他们已经承认了我们的市场经济地位。”

YGH: 法律上争议的空间是在国内法，不是在 15 条。

LD:“对，我的意思就是对于这个 MES 问题提供了各国按照自己国内法来解释的空间。”

YGH：对呀。那你澳大利亚、韩国按照自己国内法的要求承认，那是你自己的事。美欧就说你中国没达到我的标准，比如政府在价格竞价中的影响、成本问题、国际会计标准问题，等等。你没有用这些东西那我没有办法用你的价格。然后这个东西是我在反倾销调查中用的，但是它又确实是在我的市场经济立法中用的。所以我就不能承认你的市场经济地位。但是现在对于欧美来说会产生一个问题，是一个国内法的问题，它不是产生 WTO 国际法的问题。国内法的问题就是刚才说到的，如果美国不修改国内法，那它的调查机关仍然是要用 15 条(a)(ii)涉及的那种 methodology，因为你的法律里面有市场经济条款，然后国内市场经济条款要求我遵守五条标准，然后我就只能用那种 methodology。而现在国际义务里明确说 2016 年 12 月 12 日不能用了。这就存在一个潜在但现实的问题。这说明美国它国内法是有问题的。欧盟可能还好一点，它已经在修改法了，修改后就实行用某法。（20：05.44）但对于美国来说，一旦美国调查机关对中国某一产品进行调查（现在两三个月过去了还没有发生），仍然是按照它原来那一套去做的，对中国用替代国价格，这个时候就非常明显的违反了 15 条(d)项的第二句话“In any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession.”现在就是美国它的法律还没有改的情况下，我们就会认为你是有潜在的这些问题的。所以 MES 更多这个是国内法的问题。

LD:“我发现一个有意思的事情是，新闻里说据商务部统计，目前有 81 个国家承认了我国的市场经济地位，但这个具体的名单是没有公布的。只能零碎的从某一些新闻里面单独了解到某一个国家又承认了。我就比较好奇为什么官方不公布具体的名单。”

YGH：“对，我也没看到具体名单。但过去有段时间经常听到，这个国家又承认了，那个国家又承认了。经常有这样的新闻在报道。但是我觉得这个你可以分为两类，一个就是像美国欧盟这样的国家。其实这个问题的产生主要就是美国和欧盟。就是反倾销中它们自己有国内法，对于 NME 国家用替代国方法。这个就是美国和欧盟。世界上有 190 个国家，但法律有的这么做的实际上就欧盟。所以其他国家你承认不承认，就不是法律问题，就是政治表态。在我看来就是一句话，没有法律意义的。那么你再结合到反倾销调查中 methodology 的问题，你就更会发现，他原来对中国反倾销调查都没有。那些已经承认我国 MES 的很多都是什么亚非拉那种小国什么的，本来就没有对中国有像欧美这样的反倾销调查。那么承认的国家中还有像澳大利亚、新西兰这种，它可能对中国的反倾销调查数额本身也不是很大。

LD:“对。我看到就像澳大利亚这种承认了我国的 MES 的，它也还是会对中国进行一些反倾销的起诉。”

YGH: 嗯，就是说澳大利亚在反倾销的过程中，它的一些什么具体的方法我不太

清楚，但就是 MES 不是它主要的问题，不适用。它就说那好我承认你吧。但我现在不知道澳大利亚、新西兰它们用不用替代国价格，它涉不涉及到第 15 条的问题。好像这个问题已经没有吵起来，所以我怀疑就没有这个问题了。所以它也仍然是一个政治表态。所以你看那些承认了我国 MES 地位的国家，从经济利益的角度对于我国来讲其实不重要。承认我国 MES 的核心关键、有实际意义的还是在美国欧盟。毕竟美国欧盟现在 2016 年 12 月 12 日前后采取的动作不同：美国是没有动作；欧盟是在改法。所以引起了大家的讨论。

LD:“老师您之前提到您不同意欧康的观点。”

YGH: 嗯。这是纯粹从法律条约解释的角度来争论 15 条的。欧康是从法律条文本身来解释 15 条的——二不在了，一还能用。但他那个就纯粹是字面的一个解释（文字游戏）。从中立的角度来讲，还是我讲过的，从这个条款的宗旨、目的来看，这个 15 条 15 年后就是存在 NME 的 methodology 不能用的问题。这是不能回避的。从条约解释的角度讲，两个律师是可以争论的很热烈的。但是跟市场经济地位这个问题其实是没有什么太多好吵的。所以简单来讲，吵 15 条的解释是真正的法律专业在吵，吵 15 条和市场经济地位的关系那是非法律专业的在吵。最没有依据的就是“你都说你要给中国 MES，你现在不给。”然后援引 15 条。但你通读后发现其实 15 条里根本没这么说。

LD: 老师我再确认一下，从法律的角度来讲，中国 MES 这个问题其实一般只在反倾销法中涉及，尤其是欧美的国内法会涉及。对吗？
YGH：不是一般，是“只有”。我们现在讨论的问题，只涉及反倾销中的计算方法问题。

LD: How can you interpret the relations between “market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product” and “market economy status” under the WTO framework? Are they referred to the same meaning? If not, in which condition, the “market economy conditions…” can be proved without the MES of a state? Could you give any cases?
从 WTO 法律的角度来说，中国“企业所处的行业的市场经济条件”和中国“市场经济地位“本身的关系是什么？是否当后者成立时，前者必然成立？若后者不成立，前者有可能成立吗？可否举出相关案例？

YGH：比如以我国一家被反倾销调查的自行车厂为例。自行车厂向美国商务部调查机关证明我们厂或行业是 market economy prevail。然后经过它们认定，如果自行车行业已经是市场经济情况了，我们就不用替代国价格了，就用中国自行车自己的价格。

LD：“那老师您的意思是，借用您举的这个自行车厂的例子，那么这个自行车厂所处的行业的市场经济条件和它所在的这个国家的市场经济地位其实是两个问题，二者之间没有什么必然的联系是吗？”
YGH：完全不相关，厂家本身证明自己所处的行业的市场经济条件是单独一种情况。虽然美国还没有给过我国的单个行业市场经济待遇，但欧盟在反倾销调查

中，有给过我国某些行业市场经济待遇，还不止一个案例，就是行业证明其处在市场经济条件下，然后欧盟就用我国这些行业提供的价格本身而不用替代国方法了。

LD: Dr Lin Guijun, Vice-President, UIBE, as a speaker in the WTO Public Forum 2012 Session 30, presented on "China's stakes in the WTO and the role it could play". He stated that China resents being discriminated in the WTO, citing: "*(i) the creation, for the first time, of special safeguard mechanism for manufactured goods; (ii) the invention of non-market economy status for China; (iii) the large number of anti-dumping and countervailing duties against China; and (iv) the review mechanism after eight years of accession*." To what extent, do you agree with him on (ii) above? To be clear, do you think that "*non-market economy status for China"* was "invented" by WTO senior members, which represents a certain discrimination?
对外经济贸易大学副校长林桂军博士在 WTO2012 年公众论坛第三十场分论坛中就"中国在 WTO 中的挑战和应对"相关话题进行了演讲。其中他提到中国在 WTO 体制下受到歧视，表现有四：（1）WTO 第一次设计了特殊保障机制是针对中国出口的工业制品；（2）为中国量身定造了"非市场经济地位"这一表达并因此给中国带来实际损害；（3）大量针对中国的反倾销、反补贴诉讼；（4）中国入世八年后的审查机制。请问您认为林桂军所谓的"量身定造"非市场经济地位是一种对中国的歧视吗？

YGH：我认为说的更完整一点比较好，不是这么简单来表达。首先，回到 15 条本义来看。15 条本义就是为了"确定反倾销计算方法"。那么，美国和欧盟一直就有这种非市场经济地位的这个条件的。就是在中国入世前一直 就对中国是这样的。不是因为中国入世才这样的。它们一直有自己的国内法。对中国被反倾销调查的产品的价格绝大多少都是用替代国价格来计算，然后算出一个高倾销幅度然后来征越高的税。这个你可以说他是歧视性的，因为它们跟别的国家不一样。第二，15 条其实是规定了三种例外。就是在什么情况下，你其实还可以用你自己的价格。但这三种例外里也有根据美国欧盟自己的国内法来设定的。特别是 Industry 自己证明市场经济条件的那种情况。但是（d）款第一句和第三句，以 China 为主语的，让国家本身证明的时候，基本上是在一个国际条约中给你增加了两个例外。那么从当时那个情境下讲，其实我国面临的反倾销调查情况是在法律层面上有所好转的。第三，更重要的是，这个 methodology 如果没有中国加入世贸组织。没有中国入世议定书中 15 条的规定，它的替代国方法是一直就可以用下去的。所以其实这是给欧美自己的国内法设了一个期限。当时看来，15 年时间很长啊，但实际上给欧美设了一个 negative obligation 的期限。这个不是中国的义务。从这个角度来讲，你说是歧视。怎么说呢，只能说如果中国入世时，对于这个条款坚决不同意。中国说你必须现在就承认我 MES，从现在开始你就不能在反倾销中用那种替代国价格比较。或者说你条款中不能明确提到我中国是不是 market economy 的问题。除非现在回过头来，事后诸葛亮来讲这个问题。但是讲这个问题当时是不是能谈判成。这里面有个问题我觉得你要提及的就是：你知道这个问题最根源最核心的问题是什么么？是那个反倾销调查官在调查倾销案件的时候，那个被起诉的产品的价格到底要怎么计算。就是技术上怎么解决找到一个可信的参考系来计算一个被调查的出口产品的真实价格。比如中国的自

行车销往丹麦，这种自行车在中国售价 450 元，在丹麦售价换算后 480 元。表面上看好像这个自行车在丹麦没有倾销，但是丹麦自行车厂仍要求对这个中国出口的自行车进行反倾销调查。因为丹麦认为这个 450 元人民币的价格不真实，不能以中国提供的这个 450 元为参照系。理由比如是：中国这个自行车行业是国营的、是享受政府补贴的、水电是低价的、工人的劳动工资是很低的、会计标准不是国际通用的，所以它的价格不是一个正常的价格，不反应在市场经济条件下这个自行车的真实价格。于是反倾销调查官认可丹麦的理由后就要找一个“替代国家”，比如找印度，或其他一个在完全市场经济条件下的国家，用这个自行车在市场经济条件下的国家的价格来判定中国是否倾销。比如算出来是 510 元，那就比你卖到我丹麦的 480 元价格高，那么就判定中国的这个自行车倾销了。所以这个技术计算的核心问题确实又和市场经济相关。如果你整个的市场经济活动受到政府的影响太多，那么你的真实价格就无法计算，那么调查官就说那我就不用你的价格，选择替代国价格。所以问题的根源在这里。并且涉及到企业的实际利益。所以不是说简单的在政治上呼吁，你该给我们市场经济地位了。这都是表象。

LD：“ 所以本质上来说，MES 涉及的是反倾销调查中对于一国产品价格计算的技术问题。是吗？”

YGH：“对啊。就接着拿丹麦自行车厂申请对中国出口的自行车进行反倾销调查的例子来说。丹麦自行车厂申请丹麦政府保护自行车这个行业，说中国出口的自行车价格太低了。那中国 MES 这个问题不解决，丹麦自行车厂和调查官都无法得到它们认为真实可信的价格。那就没办法判中国自行车是否在丹麦倾销这件事了。”

LD：“所以老师您的意思是，即使一个国家在政治上表态我承认中国的市场经济地位，但它在具体的反倾销案件中还是有可能会运用到替代国的计算方法是吗？”

YGH：“说的再远一点，WTO 里有一个反倾销协定。其中第二条第一款说到：“调查官应该用企业价格来作为参照系进行比较，这是原则。但是在有些情况下，可能会出现它那个价格你找不到。就算是美国反欧盟，欧盟反美国，都是市场经济吧，它也可能不用那个企业的价格，它有一个所谓的“结构性价格”——就是得把这个产品的各项成本分开来计算，得出一个价格表示这个产品从成本角度来说应该是多少。还有种可能是，这种产品你国内没有厂家卖，那就可以看看你销售的第三国的价格来进行对比。所以理论上讲，那个不是“替代国方法”应该叫“不用你那个企业的价格的方法”，不仅仅是对非市场经济国家用的，对市场经济国家也可以用。只是说性质上有个区别是：对你非市场经济国家“不用”你企业自身的价格是原则，“用”是例外；而对市场经济国家来说正好相反，用是原则，不用是例外。这个是一个性质上的区别。就比如中国被当作 NME 的时候，外国提起反倾销诉讼，如果你不证明你这个产品所处行业的市场经济条件，那么我就直接用替代国价格，这就是“对你非市场经济国家“不用”你企业自身的价格是原则”。但是比如美国反欧盟的时候，那我一上来就直接用你企业的价格。但如果我再调查过程种发现你的价格由于种种原因我无法相信他是真实价格，那我可以再用结构性价格来算，但这是例外。所以也不能说不用你企业的价格的 methodology 只针

对非市场经济国家。

LD：“所以一国的市场经济地位和在反倾销案件调查产品价格采用的methodology，其实也只是有例外和原则的区别。”

“Any analysis of the impact of granting early recognition of MES to China would have to take into account the fact that, first of all, some firms, located in an NME, might receive market economy treatment” (MAP)

YGH：“对啊，但你不要忘了我国入世议定书中 15 条一上来就重复说到 market economy。这就导致了一般人就直接将市场经济地位和这个本来是规定反倾销价格计算比较问题的 15 条混在一起说。”

LD: If there are reasons that China hasn’t deserve its MES, what do you think some countries, e.g. Australia, New Zealand, South Korea, etc. still grant it? 如果有理由可以不承认中国的市场经济地位，您怎么看澳大利亚、新西兰、韩国等国家承认中国的市场经济地位？

YGH：I do not believe that “China would automatically be granted its MES because part (a)(ii) of Article 15 in China's WTO accession protocol expires on Dec. 11, 2016, fifteen years after China entered the WTO” ? Because the texts do not show this obligation for other WTO members as I explained.那么
我现在从政治的角度来说，比如欧盟就掀起了轩然大波，到底给还是不给。
还投票表决，他是因为有企业的利益在。欧盟投票议员里也有企业的代表。那美国也不是说总统一人说了算，还有国会要通过立法。国会的后面是谁啊？就是那些产业嘛，那这就涉及具体经济利益的。产业的代表会争论你要是给了之后，我们反倾销调查的价格计算怎么算？所以从政治的角度来讲，不能简单讲美国你要给、欧盟你要给。你要看看它为什么不给你。你看它是不是纯粹的那种一句话政治就能解决的问题。说到根就是，它们的调查机关在最后调查产品成本的时候，怎么办？所以为什么我强调说“技术官员实际操作过程中的遇到的问题”才是这个问题的最核心。这样你写的时候，你可能要把美国国内的决策程序和利益集团的博弈，欧盟同理，这个过程你要写出来，你就能知道这个问题的严重性和核心在哪里了。不能回避这件事情，不能简单的只看一个国家表态的结果。

LD：I got it. Thanks for your time!

Appendix 7.3

The Components of Economic Freedom of the World

1. Size of Government

A. Government consumption
B. Transfers and subsidies
C. Government enterprises and investment
D. Top marginal tax rate
  (i) Top marginal income tax rate
  (ii) Top marginal income and payroll tax rate

2. Legal System and Property Rights

A. Judicial independence
B. Impartial courts
C. Protection of property rights
D. Military interference in rule of law and politics
E. Integrity of the legal system
F. Legal enforcement of contracts
G. Regulatory costs of the sale of real property
H. Reliability of police
I. Business costs of crime

3. Sound Money

A. Money growth
B. Standard deviation of inflation
C. Inflation: most recent year
D. Freedom to own foreign currency bank accounts

4. Freedom to Trade Internationally

A. Tariffs
  (i) Revenue from trade taxes (% of trade sector)
  (ii) Mean tariff rate
  (iii) Standard deviation of tariff rates
B. Regulatory trade barriers
  (i) Non-tariff trade barriers
  (ii) Compliance costs of importing and exporting
C. Black-market exchange rates
D. Controls of the movement of capital and people
  (i) Foreign ownership / investment restrictions
  (ii) Capital controls
  (iii) Freedom of foreigners to visit

5. Regulation

A. Credit market regulations

(i) Ownership of banks
(ii) Private sector credit
(iii) Interest rate controls / negative real interest rates

B. Labor market regulations

(i) Hiring regulations and minimum wage
(ii) Hiring and firing regulations
(iii) Centralized collective bargaining
(iv) Hours regulations
(v) Mandated cost of worker dismissal
(vi) Conscription

C. Business regulations

(i) Administrative requirements
(ii) Bureaucracy costs
(iii) Starting a business
(iv) Extra payments / bribes / favoritism
(v) Licensing restrictions
(vi) Cost of tax compliance

Appendix 7.4

REPORT OF THE WORKING PARTY ON THE ACCESSION OF CHINA
WT/ACC/CHN/49
1 October 2001

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

151. The representative of China expressed concern with regard to past measures taken by certain WTO Members which had treated China as a non-market economy and imposed anti-dumping duties on Chinese companies without identifying or publishing the criteria used, without giving Chinese companies sufficient opportunity to present evidence and defend their interests in a fair manner, and without explaining the rationale underlying their determinations, including with respect to the method of price comparison in the determinations.

In response to these concerns, members of the Working Party confirmed that in implementing subparagraph (a)(ii) of Section 15 of the Draft Protocol, WTO Members would comply with the following:

(a) When determining price comparability in a particular case in a manner not based on a strict comparison with domestic prices or costs in China, the importing WTO Member should ensure that it had established and published in advance (1) the criteria that it used for determining whether market economy conditions prevailed in the industry or company producing the like product and (2) the methodology that it used in determining price comparability. With regard to importing WTO Members other than those that had an established practice of

applying a methodology that included, inter alia, guidelines that the investigating authorities should normally utilize, to the extent possible, and where necessary cooperation was received, the prices or costs in one or more market economy countries that were significant producers of comparable merchandise and that either were at a level of economic development comparable to that of China or were otherwise an appropriate source for the prices or costs to be utilized in light of the nature of the industry under investigation, they should make best efforts to ensure that their methodology for determining price comparability included provisions similar to those described above.

(b) The importing WTO Member should ensure that it had notified its market-economy criteria and its methodology for determining price comparability to the Committee on

Anti-Dumping Practices before they were applied.

(c) The process of investigation should be transparent and sufficient opportunities should be given to Chinese producers or exporters to make comments, especially comments on the application of the methodology for determining price comparability in a particular case.

(d) The importing WTO Member should give notice of information which it required and provide Chinese producers and exporters ample opportunity to present evidence in writing in a particular case.

(e) The importing WTO Member should provide Chinese producers and exporters a full opportunity for the defence of their interests in a particular case.

(f) The importing WTO Member should provide a sufficiently detailed reasoning of its preliminary and final determinations in a particular case.

Appendix 7.5

COMPREHENSIVE ANALYSIS OF CHINA'S STATUS AS A NON-MARKET ECONOMY UNDER THE U.S. ANTIDUMPING LAWS FACT SHEET

Comprehensive Analysis of China's Status as a Non-Market Economy

• In considering this request for a review of China's non-market economy (NME) status, the Department of Commerce (the Department) took note of the economic reforms that China has implemented to date, as well as the significant areas of China's economy where, it is generally recognized, fundamental reforms remain incomplete, e.g., the banking sector, land ownership and property rights, and the rule of law.

• In conducting its analysis, the Department has considered the totality of China's economic reforms. While China has enacted significant and sustained economic reforms, the Department continues to find that market forces in China are not yet sufficiently developed to permit the use of prices and costs in that country for purposes of the Department's dumping analysis.

• China, therefore, remains an NME for purposes of the U.S. antidumping laws.

Background

• The Department designates China as an NME under the U.S. antidumping laws. As a result, the Department uses a surrogate country methodology to calculate normal value in antidumping investigations and administrative reviews involving China. A country's status as an NME is relevant only to U.S. antidumping proceedings and in no way affects other aspects of that country's bilateral trade relationship with the United States.

• Under China's World Trade Organization (WTO) Protocol of Accession, the United States and other WTO Members can treat China as an NME country for antidumping purposes through 2016. However, the United States can grant China market economy status before that time, if the Government of the People's Republic of China (PRC) requests (or formally supports a PRC respondent's request for) market economy status and if the Department determines that the six statutory factors analyzed in determining whether to graduate a country from NME status are satisfied. The memorandum issued by the Department on August 30 marks the first time the Department has completed a review of China's status as an NME.

• On December 22, 2005, a PRC respondent requested a review of China's non-market economy status in the investigation of Certain Lined Paper Products (Lined Paper). On February 2, 2006, the Department received a submission from the PRC's Ministry of Fair Trade for Imports and Exports formally supporting the request for market economy status for China in the Lined Paper investigation.

• On May 15, 2006, the Department issued a memorandum in the Lined Paper investigation determining that China remains an NME for purposes of the U.S. antidumping law. The Department cited deeply rooted distortions in China's economy, particularly in the fifth factor, "the extent of government control over

the allocation of resources"(use EFW Index to compare Russia and China) and stated that it would issue at a later stage of the Lined Paper investigation a comprehensive analysis of all six statutory factors that govern NME country designations. Consistent with this commitment, the Department issued a memorandum on August 30, 2006, providing a full analysis of all six statutory factors.

Six Statutory Criteria of the Non-Market Economy Analysis

• A non-market economy is defined in statute as any country that the Department determines "does not operate on market principles of costs or pricing structures, so that the sales of merchandise in such country do not reflect the fair value of the merchandise."(find final texts) US criteria reference This designation is based on a comprehensive analysis of six statutory criteria. Those criteria are:

- ✧ currency convertibility;
- ✧ free bargaining for wages;
- ✧ foreign investment;
- ✧ government ownership or control of production;
- ✧ government control over prices and the allocation of resources; and
- ✧ other appropriate factors.