The Great European Wall
Why the EU will not recognize China’s Market Economy Status

LLM Paper
by Bjorn Delbeecke
Student number : 00800119

Promoters: Prof. Dr. Jacques Bourgeois & Guillaume Van der Loo
ABSTRACT: The thesis seeks to contribute to the debate whether there is an automatic shift for China towards market economy status on 11 December 2016 on the basis of Section 15 of its Accession Protocol to the World Trade Organisation. A shift in status would imply that the EU can no longer use the analogue country method in determining dumping duties on products coming from China. Our approach, however, is a pragmatic approach. This means we will not provide an answer whether the EU should recognize China’s market economy status but rather if it will when the deadline has finally come. For our answer, we rely on the concept of paradigms. We argue that, since predatory pricing is the principal justification for the imposition of anti-dumping measures, it is possible to speak of a ‘predatory pricing paradigm’ that governs the way a significant part of industry, legal scholars and legislators think about ‘dumping’. This paradigm, or particular mode of thought, can be discovered through the analysis of discourse and has lead us to the conclusion that it is highly likely that the EU will not recognize China’s market economy status on 11 December 2016.

KEYWORDS: Paradigms – Discourse – Predatory Pricing – Market Economy Status – Section 15 – China – Dumping
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<td>ADA</td>
<td>Anti-Dumping Regulation</td>
<td>CEO</td>
<td>Chief Executive Officer</td>
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<td>EC</td>
<td>European Community</td>
<td>EU</td>
<td>European Union</td>
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<td>GATT</td>
<td>General Agreement on Tariffs and Trade</td>
<td>GDP</td>
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<td>MEP</td>
<td>Member of the European Parliament</td>
<td>MES</td>
<td>Market Economy Status</td>
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<td>MFN</td>
<td>Most Favoured Nation</td>
<td>NME</td>
<td>Non-Market Economy</td>
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<td>TFEU</td>
<td>Treaty on the Functioning of the EU</td>
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ACKNOWLEDGEMENT

This research project would not have been possible without the support and confidence of my supervisor, Prof. Dr. Jacques Bourgeois. The author wishes to express his gratitude to his supervisor for being abundantly helpful and for offering invaluable assistance, support and guidance.
PART I: FOREWORD

1.1 FOREWORD

The use of anti-dumping measures to protect domestic industries may arguably be the most widely abused trade policy instrument in the history of the European Union. China’s non-market economy designation and corresponding dumping treatment probably seems unspectacular to the proverbial unpractised eye, but many authors assert that it currently serves as an excuse for lawless protectionism, which has not only brought heated discussion but also imposes an enormous cost on downstream industries and consumers. The manner in which the Union conducts anti-dumping investigations opens up the possibility of error, and, what is even more, manipulation. The opaque nature of the process further fuels suspicions that an internal bias exists towards the imposition of anti-dumping measures as a means of protecting European industries faced with rising global competition. Some writers argue, however, that the conception of China as a non-market economy is justified because of the dominant role of the government in the economy. This may be so. But we believe that it does not automatically follow from this that anti-dumping measures are therefore justified as well. Going against the conventional wisdom, but walking along with respected legal scholars and economists, we feel that ‘dumping’ should not immediately be categorized as the conscious foppery of the Chinese government as if it were malicious by intent and utterly negative in effect.

The principal rationalization for the use of anti-dumping measures is that it prevents predatory pricing. Predatory pricing means that a company with significant market power in its home country sells its product in another market at a loss in order to drive out competitors and increase prices afterwards. But what is considered to be price-undercutting, i.e., selling products at a lower price than domestic producers, is not in itself illegal and may be a perfectly legitimate business strategy. However, for a non-market economy like China, investigators assert that domestic prices fail to reflect the ‘true’ or ‘fair’ cost of inputs as determined in the market. The European Union therefore disregards Chinese prices and instead uses production costs from other countries considered market economies to calculate the ‘true’ or ‘fair’ price of the products being exported to Europe. This is called the ‘surrogate’ or ‘analogue’ country method. If these costs are higher than the price of Chinese products in the European market, China is accused of predatory pricing or ‘dumping’. The rhetoric of ‘fairness’ certainly sounds very straightforward and appealing. But there are indications that this use of words is in fact nothing more than a discursive veil to usher in anti-

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1 The author uses ‘we’ to refer to his opinions throughout this document.
dumping actions which itself create unfair trade barriers for importers seeking access to the European market.

Against this background, we ask ourselves the question if these allegations carry any truth or if they are only verdicts quickly signed off with a strike of the pen without too much reflection or investigation. And if these accusations would prove to be correct, if anti-dumping measures are indeed a form of protectionism, what are the motives behind them and why are they shrouded in terms of fairness and the rule of law? These considerations are necessary if we want to contribute to the debate whether there currently is a possibility for a shift in China’s non-market economy status towards a market economy. A shift in status has potentially serious consequences as it would imply that the EU can no longer use the analogue country method to calculate the ‘true’ or ‘fair’ price of products being imported from China. Our approach, however, is a pragmatic approach. This means we are not looking for an answer whether the EU should recognize China as a market economy but rather if it would when its own interests are at stake. For our answer, we rely on the concept of paradigms. We will argue that, since predatory pricing is the principal justification for the imposition of anti-dumping measures, it is possible to speak of a ‘predatory pricing paradigm’ that governs the way a significant part of industry, legal scholars and legislators think about ‘dumping’.

A lot of attention is currently paid to the provisions in Section 15 of China’s Accession Protocol to the World Trade Organisation dealing with, as it seems, an automatic expiry of its non-market economy status in 2016. The ‘automatic’ shift towards a market economy has for a long time been taken for granted by scholars and government officials in the world. But as the crucial date is coming near, this perception has more recently been challenged by scholars such as Bernard O’Connor arguing that

> [t]here is no provision setting any date in the WTO agreements themselves and there is no deadline in the protocol signed by China when it acceded to the WTO. The idea that there is a deadline is an urban myth that seems to have gone global².

The apparently technical issue of granting market economy status to China has become a major point of discussion today, as it is only a couple of months before the supposed deadline of recognition. Karel De Gucht, the former EU Commissioner for trade, stated that “whether China is or is not a market economy is a technical question under EU law”³. But this is not correct. Although the eventual outcome of the debate is still uncertain, we are convinced that between

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² O’Connor, 2011.
³ Karel De Gucht quoted in Sun and Whally, 2015, p. 11.
seemingly technical arguments and the recognition of market economy status loom political decisions and practical considerations. The primary reason for applying anti-dumping legislation is more political than economic. It is a debate that is being governed by certain beliefs, ideas, concepts and values that are common to large industries, legal scholars and legislators. Many authors argue that ending China’s non-market economy designation in EU law is the only legal and logical option, and that it will no longer be permitted by the rules of the World Trade Organisation to treat China as such in anti-dumping actions on 11 December 2016. Yet, we believe, to paraphrase a verse of Eliot, because the Union cannot bear very much this reality, it almost certainly is not going to happen.
PART II: METHODOLOGY AND STRUCTURE

2.1 LANGUAGE AND THE LAW

Language and interpretation are central to the field of law. The Vienna Convention, for example, takes the elucidation of the meaning in a legal text as the starting point of interpretation. Several leading authors in the debate around China’s market economy status base their interpretation of the contentious Section 15 of China’s Accession Protocol on this convention and the related ‘ordinary meaning doctrine’. They subscribe to the idea that foremost among the rules of treaty interpretation is the principle that a “treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. The ordinary meaning doctrine, then, is based on an ‘objective’ view of meaning. It relies on a notion of “semantic objectivism” that posits that there are facts about what words mean and that these facts are independent of what individuals mean by the words they use. But this theory is not unproblematic. The question of what makes some meaning the ordinary one and the evidential question of how the determinants of ordinary meaning are identified and conceptualized remain largely unanswered. Indeed, the controversy around the interpretation of Section 15 precisely shows that the ordinary meaning of the words used is, contrary to what proponents of conflicting interpretations claim, debatable and certainly not clear. The meaning of the concept ‘non-market economy’ is particularly obscure.

When speaking of the “art of interpretation,” Waibel emphasises the important role interpreters such as judges and arbitrators themselves play in interpretation. Dworkin goes one step further by stating that “legal practice is an exercise in interpretation not only when lawyers interpret particular documents or statuses, but generally”. He suggests that the interpretation of a legal text “represents only the fiat of a particular critical community”. Contrary to “legal positivists who believe that propositions of law are indeed wholly descriptive,” Dworkin believes that legal interpretation entails that at least part of the statements made are “evaluative as distinct from descriptive” and that they express either “a preference of the speaker, a personal politics, or what he believes is

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4 Merrills, n.d., p. 56.
7 Ibid.
8 Waibel, 2011, p. 573.
10 Ibid., p. 528.
11 Ibid.
objectively required”\textsuperscript{12}. This could lead to the failure of producing a unique interpretation\textsuperscript{13}. Just as two readings of a poem may each find sufficient support in the text to demonstrate its unity and coherence, the interpretation of a legal text might find enough support to satisfy any plausible interpretation.

Against this background, the thesis contributes to the study of meaning in legal scholarship by introducing the concept of ‘paradigms,’ although this contribution is not our main goal. A paradigm relies on the existence of a critical community for its formulation, its unity and its coherence. We argue that, since predatory pricing is the principal justification for the imposition of anti-dumping measures, it is possible to speak of a ‘predatory pricing paradigm’ which governs the way a significant part of industry, legal scholars and legislators think about the subject. Our methodological framework, then, can broadly be divided in a base structure and two pillars. The base structure is composed of the fundamental building blocks of most of our understanding: \textit{discourse}. The first pillar that is erected upon this structure is the concept of \textit{paradigm}. Thomas Kuhn, the originator of the concept, wrote that paradigms come with a specific “vocabulary and syntax”\textsuperscript{14} which implies that they are “crystallized in discursive practices”\textsuperscript{15}. It follows from this that paradigms can be discovered and observed through the study of discourse, which reveals a particular mode of thought\textsuperscript{16}. The second pillar of the thesis, which relates to the first pillar in an essential way as the existence of paradigms has done away with claims of monistic truth, is \textit{pragmatism}. By this we mean that, regarding the interpretation of Section 15 of China’s Accession Protocol, there is no ‘one correct interpretation’. Following Dworkin, it implies that at least part of the interpretation of Section 15 is evaluative rather than descriptive and that it expresses the preference of the interpreter, such as the EU, or, at least, what the interpreter believes to be objectively required.

2.2 METHODOLOGY

2.2.1 Discourse Analysis

Underlying the word ‘discourse’ is the general idea that language is structured according to different patterns that people’s utterances follow when they take part in different domains of social life. A familiar example of this is ‘political discourse’. ‘Discourse analysis’ is the analysis of these patterns

\textsuperscript{12} \textcite{Dworkin2002, p. 528.}
\textsuperscript{13} \textcite{Ibid., p. 544.}
\textsuperscript{14} \textcite{Kuhn1996, p. 136.}
\textsuperscript{15} \textcite{Antonov2014, p. 18.}
\textsuperscript{16} \textcite{Ibid.}
and the particular ways of talking about and understanding the world or an aspect of the world. This means that our ways of talking do not neutrally reflect reality but, rather, play an active role in creating and changing them. This understanding of discourse can be applied to the analysis of many different domains, including organisations and institutions such as the EU or the WTO, and in exploring the role of language use in broad developments like globalisation and its consequences such as the proliferation of international trade, the shift of global industrial production or the use of anti-dumping measures.

We have chosen to firmly base this dissertation on the fundamentals of discourse because ‘discourse analysis,’ as we see it, is an instrument for critical research, that is, it is a means to investigate and analyse power relations in society and to formulate a perspective from which a critique of such relations can be made with an eye on the possibilities for change. The current configuration of power in the European Union regarding dumping practices comes in the form of a consensus between concentrated industrial sectors and the investigating authorities. We believe this is detrimental not only to the economic development of the EU, but also to the spread of wealth around the globe. The ultimate goal of this dissertation is therefore to provoke a change in the way we think about ‘dumping’. Marx said that the philosophers have only interpreted the world in various ways. The point, however, is to change it. The first step the reader has to take to accompany us along our path of critical research and ‘revolutionary’ change, be it in a Kuhnian sense, is to accept that discourse analysis is not just a method for data analysis, but a theoretical and methodological whole. It entails accepting philosophical premises regarding the role of language in the social construction of the world.

The first premise is a critical approach to knowledge of the world because it should not, yes, even cannot, be treated as objective truth. The same is true for our knowledge of the meaning of a legal text. The content of the world or a text is only accessible to us through categories such as ‘market’ and ‘non-market economy’, or ‘dumping,’ which are essentially analogies and thus products of discourse. Second, discourse is a form of social action that plays a part in producing the social reality, thereby maintaining specific relations and patterns. Third, there is a link between knowledge and social processes. Our ways of understanding the world are created and maintained by discursive practices. Knowledge is created through interaction, it is thus intersubjective or socially constructed, and we construct common truths and compete about what is true and false. Now, some critics of social constructionism have argued that if all knowledge and all social relationships are taken to be contingent, then it follows that everything is in flux and there are no constraints.

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and regularities in social life. But we believe that this is a caricature. The social field is rule-bound and regulative. Even though knowledge is always contingent in principle, it is also relatively inflexible in specific situations because these place restrictions on the statements which can be accepted as meaningful.

### 2.2.2 Paradigms

The one concept that captures all of the above premises is Thomas Kuhn’s concept of paradigms. It prompts us to clarify the concept to avoid misunderstanding. Firstly, we do not have the ambition of contributing to the discussion of how far Kuhn was right in his analysis of the history of science. Secondly, we want to be clear about the fact that our understanding of paradigms does not correspond entirely with Kuhn’s original idea. It will suffice for our purposes to use the word paradigm in the sense of ‘consensus’ or ‘an approach which commands wide acceptance’. Industry representatives, legal scholars and legislators can be said to adhere to the same paradigm if they share beliefs, ideas, concepts and values with regard to a certain policy. Each paradigm defines “not only the goals of economic policy and the kind of instruments that can be used to attain them, but also the very nature of the problems they are meant to be addressing”\(^{19}\). EU dumping policy, for example, is not only characterized by keeping foreign competitors out of the market through the imposition of duties, but also by defining ‘dumping’ as a problem that needs to be remediated in the first place. The discourse of ‘fairness’ is crucial in this regard. Our less restricted understanding of the concept is, however, still close to what intellectuals less conversant with the philosophy of science mean by a paradigm today as well as fruitful enough to explain the existence of what we will call the ‘predatory pricing paradigm’ in international trade theory and practice.

### 2.2.3 Pragmatic

The third element of our methodology is pragmatism with regard to the interpretation of Section 15 of China’s Accession Protocol. What we mean by this is that between seemingly technical arguments and the recognition of market economy status stand paradigms which influence political decisions and practical considerations. This means that in the end we are convinced that, following Nietzsche, the recognition of China’s market economy status is subject to interpretation and that whichever interpretation prevails is a function of power and not ‘truth’. As we are outsiders to the field of law, with a background in literature, political science, economics and philosophy, it may be only normal that we approach legislative interpretation from a different angle than what is probably customary. But we are not apologetic about it. We believe that the responsibility of current


\(^{19}\) Hall, 1993, p. 279.
philosophers is to go where conventional interpretations of the law stop and to shine light from a different perspective.

Calling our approach ‘pragmatic’ means that we have an instrumental attitude towards legal interpretation: we see it as a power tool that is wielded with a certain objective rather than as describing the essence of a legal text. In doing this, we believe that the claims that will be made by the European Union will be those resulting from a specific acceptable explanatory practice, a certain discourse, with regard to the Chinese economy. There are several reasons for this approach. First, we believe that the perception of China as being engaged in predatory pricing is deeply ingrained in the minds of a significant part of industry representatives, legal scholars and legislators. Second, we take political and economic interests into account because they influence the type of explanation that is considered appropriate for a particular matter and influence the selection of arguments or properties of a situation that are deemed important – and which not – in a given context. Just as it can be expected that China will interpret the Accession Protocol in a way that is favourable to the advancement of their interests, we presume that the EU will read the text along the lines of its own concerns. The EU refuses to give China the status of a market economy on seemingly technical and objective grounds. But examining the rational drivers behind the imposition of anti-dumping measures makes clear that their concern is protectionist. Third, and related to the second reason, these context-dependent claims are more modest and therefore easier to accept relative to the monistic truth claim of the ‘one correct interpretation’.

2.3 STRUCTURE

The thesis is build up as follows. First we will present an overview of the anti-dumping law of both the WTO and the EU. After that we will argue that the use of anti-dumping measures is predicated on the theory of predatory dumping. However, this is ungrounded as there is no evidence for it in reality. To answer the question why, in the face of this lack of evidence, it is still the primary rationalisation of dumping policy we introduce the concept of a ‘predatory pricing paradigm’. We argue, on the basis of a discourse analysis, that this paradigm is the creation of industry lobbying activities and that is has influenced, and still influences, legislators and legislation. In order to convincingly do that we lay bare the inner machinery of the EU dumping policy. This argumentation is, we believe, fruitful enough to explain the existence of the anomaly of predatory pricing in international trade theory and policy.

The third part consists of our interpretation of Section 15 of China’s Accession Protocol. We make a broad distinction between a ‘national interpretation’ of Section 15, which is based on the idea that China’s market status will have to be accorded on a national basis, and a ‘threshold
interpretation,’ which is based on the idea that China cannot be regarded as a non-market economy on the basis of Section 15 because the threshold for such a label is too high; China does not hold a monopoly over all sectors of its economy. These two interpretations are both based on the ‘ordinary meaning doctrine’ and they both claim to give ‘full meaning’ to the provisions of the text. We argue that these attempts fail even before they have started since the meaning of the term ‘non-market economy’ has never been clear in the first place and has therefore been interpreted differently. Consequently, the ‘clear’ or ‘full meaning’ of Section 15 is a fantasy. We argue that the conception of a non-market economy by both parties is, in Kuhnian terms, incommensurable, which means that they are opposed to one another and cannot be reconciled because of the lack of a common standard. That is the reason why there is no sign of rapprochement between the two sides.

Finally, we argue that, because of the existence of the ‘predatory pricing paradigm,’ it is highly likely that the European Union will follow the ‘national interpretation’. The driving force behind paradigm formation is the manipulation and control of human activity and social phenomena. This means that the question around the interpretation of Section 15 can be reduced to the question of who is going to control whom and in whose interest is the controlling going to be? Concepts, categories, relationships and methods do not exist independently from the social relationships which exist in society. As particular industrial sectors are the driving force behind the imposition of anti-dumping duties, they are to a great extent responsible for the negative connotation of the term ‘dumping’. Consequently, it can be assumed that the use by those industries of negative evaluative terms, such as, for example, ‘unfair,’ ‘dishonest’, or ‘cheating,’ is going the have an impact, or rather, an absence of impact on legislation with respect to China’s market economy status. In other words, industry is going to control the EU’s interpretation of Section 15 and the controlling is going to be in their own business interest. Considering that industry is well positioned within the mechanism of anti-dumping regulation, and that neither industry nor legislators have significantly adapted their dumping rhetoric over the years, we can only conclude that it is highly likely that the European Union will not accord market economy status to China.

2.4 LEGISLATORS OF ALL COUNTRIES, UNITE!

I am not a Marxist. Quite the contrary, I am currently working as a lobbyist for an industry association in Brussels and have been part of the particular configuration of power I try to describe in this dissertation. However, one has to call a cat a cat, no matter if it is white or black, as long as it catches mice. We believe that our argumentation catches something essential about dumping and its related issues. Designating a country as a non-market economy is, according to us, currently
used as an excuse for imposing anti-dumping measures and as a justification for what is basically discursively veiled protectionism. The occasional references to Marx, then, serve as a humoristic wink to the fact that a Communist country is accused of distorting international trade while it actually is EU interventionism which impedes free trade. Another reason we introduce this caveat is that we call for a revolution in this dissertation and, maybe, the reader could be mistaken about our intention. We use the term ‘revolution,’ in the Kuhnian sense of the word, as a paradigmatic turn. What we mean by this is that it is necessary to provoke a paradigm shift in the dumping debate, which reevaluates our values and reconsiders what is considered ‘fair’. We seek a revolution of the mind, a different way of looking at dumping policy and another way of looking at the current formulation of legislation.

Still, we are aware that this implies a change in the power structures of society and consequently a certain amount of political upheaval. It is thus true that, at least in a limited sense, our revolution will need to uproot the currently existing relationship between concentrated industrial sectors and legislation. It falls, however, outside the scope of this dissertation to provide answers as to how exactly this relationship should be transformed, how the reformulation of dumping legislation should be attained or how it should look like. Maybe the requirement that a complaint shall be investigated if it is voiced by 25% of the Community industry needs to be adapted and the minimum percentage of involved actors increased. Or perhaps the problem has even deeper roots and such a proposition is only superficial compared to the more fundamental problem of the privileged access of industry to the highest regions of European decision-making and policy. In this thesis, we do not voice any practical answers to the problematic implications of the ‘predatory pricing paradigm’. We only lay bare its existence. The solutions to it are a matter of further research and another thesis.
PART III: GENERAL PRINCIPLES OF ANTI-DUMPING LAW

3.1 WTO ANTI-DUMPING LAW

The system of the WTO for trade in goods is based on two principles that enable a smooth flow of international trade\textsuperscript{20}. The first principle states that any tariff should apply equally to all members on a most-favoured-nation basis\textsuperscript{21}. The second principle holds that tariffs once bound should not be raised without renegotiation. Nevertheless, there are exceptions to these principles. Members are allowed to impose unilateral restrictions against other members through three trade defence instruments: safeguard measures on the one hand, and anti-dumping and anti-subsidy measures on the other. Firstly, safeguard measures are aimed at providing relief from the impact of ‘fair trade’\textsuperscript{22}. They are instruments which allow members to impose temporary trade restrictions in the face of unusual increases of imports, in order to help domestic producers to adjust to new situations\textsuperscript{23}. Secondly, anti-dumping and anti-subsidy measures are aimed at addressing actions by foreign exporters or governments that are considered ‘unfair’\textsuperscript{24}. Unlike safeguard measures, anti-dumping and countervailing duties can be raised unilaterally without renegotiations, contravening the rules of bound tariffs, and are applied against particular trading partners, which is an exception to the MFN rule\textsuperscript{25}.

The WTO basis which envisages the possibility that members take action against dumping is rooted in its definition in Article VI of the GATT and Article 2(1) of the WTO Anti-Dumping Agreement. According to Article 2(1) of the ADA, “dumping” means the introduction of a product “into the commerce of another country at less than its normal value”. “Normal value” is defined as either “the comparable price, in the ordinary course of trade, for the like product when destined for the consumption in the exporting country” or, in the absence of such domestic price,

the highest comparable price for the like product for export to any third country in the ordinary course of trade, or the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.\textsuperscript{26}

\textsuperscript{20} Detlof and Fridh, 2007, p. 6.
\textsuperscript{21} The MFN principle means that under the WTO agreements, countries cannot normally discriminate between their trading partners.
\textsuperscript{22} Rovegno and Vandenbussche, 2011, p. 2; Zunic, 2015, p. 5
\textsuperscript{23} Ibid.
\textsuperscript{24} Ibid.
\textsuperscript{25} Detlof and Fridh, 2007, p. 6.
\textsuperscript{26} Article 2(2) of the WTO ADA.
Dumping, in other words, is the practice of exporting a product at a price lower than the price a company normally charges on its own home market or at a price which is lower than the cost of production plus a reasonable profit. The imposition of anti-dumping measures requires that dumping is causing or threatens to cause injury to the local industry producing the like product\(^{27}\). The difference between the export and normal value is called the “dumping margin” and it is the relevant factor for the calculation of the anti-dumping rate\(^{28}\). The “ordinary course of trade” is considered essential for the concept of dumping. The idea behind this notion is to be able to compare two markets for the purposes of determining whether there is ‘fair’ or ‘unfair’ competition that sets the product’s price.

The economic and political reality of the world, however, exists of both market and non-market economies. Anti-dumping law therefore has to deal with situations in which imports from NMEs are taken into account. The WTO agreement does not pass judgement on whether ‘dumping’ is a form of unfair competition\(^ {29}\). But some governments consider unfair competition to include a situation in which prices are not determined by market forces. Establishing the ‘normal price’ in the usual way only requires only that one determines the product’s price in the exporter’s home market\(^ {30}\). However, it is thought that it might be more appropriate to use another benchmark for countries that are characterized by state intervention\(^ {31}\). The WTO therefore allows importing members to charge duties on particular products from a particular exporting country in derogation from the GATT’s general rules of binding tariffs and non-discrimination\(^ {32}\). The second Supplementary Provision to paragraph 1 of Article VI in Annex I to the GATT recognizes that certain difficulties may exist in determining the ‘normal price’ in cases where market conditions would not prevail:

> 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 […] 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\(^ {33}\).

\(^{27}\) Detlof and Fridh, 2007, p. 6.
\(^{28}\) Zunic, 2015, p. 18.
\(^{29}\) Barone, 2015, p. 6.
\(^{30}\) Zunic, 2015, p. 18.
\(^{31}\) Detlof and Fridh, 2007, p. 6; Zunic, 2015, p. 18.
\(^{32}\) Tietje and Nowrot, 2011, p. 4.
\(^{33}\) Paragraph 1(2) of the Annex of Article VI of GATT 1994.
This provision opens up the possibility to determine normal value and calculate dumping margins by using a methodology that is considered appropriate by the investigating country. This has prompted a number of countries, the EU and the US included, to add a fourth definition to be used for countries classified as ‘non-market economies’ in these cases, dumping is defined as selling below either price or costs of production in an “analogue” or “third country market”. Importing countries thus use the “surrogate” or “analogue” country method to determine the normal value of products imported from a non-market economy and compare this to the actual export price being charged.

3.2 EU ANTI-DUMPING LAW

Under the EU Anti-Dumping Regulation (hereafter: ‘the Regulation’), a product is considered to be dumped if its export price is less than the comparable price for the like product in the exporting country. Article VI of the GATT forms the basis for the EU legislation. But the Regulation contains additional provisions which go beyond WTO obligations, such as the ‘Community interest’ clause.

There are roughly four stages in an anti-dumping procedure. Firstly, investigations are typically triggered by a complainant, i.e., an individual firm or industry group acting on behalf of a section of the producers of a particular product. The Commission is obliged to investigate their request if a quarter of those producers allege that foreign products are being dumped on the EU market. Second, if the Commission decides to accept a complaint, it presents the case to the Anti-Dumping Advisory Committee, which consists of representatives of each Member State, before it launches a formal investigation of the firms allegedly engaged in dumping. Consultations address issues such as whether to initiate proceedings, whether measures should be imposed, or whether measures should be amended. During the third stage of the procedure, the Commission considers whether there is evidence that imported products are being dumped, cause or threaten to cause injury to European producers and whether there is a causal link between the dumped imports and the injury. The Commission will also verify whether measures are contrary to the European

34 Tietje and Nowrot, 2011, p. 4.
35 Detlof and Fridh 2007, p. 6.
36 Ibid.
38 See Article 1(2) of Council Regulation 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community.
39 Rovegno and Vandenbussche, 2011, p. 3.
41 Ibid.
43 Rovegno and Vandenbussche, 2011, p. 3.
Community’s interests or not, a topic to which we will return in the following chapter. In the fourth stage, the Commission again consults the Council’s Advisory Committee and can decide to impose preliminary anti-dumping duties for six months, with the possibility of a three month extension\(^44\). One month before the expiry of these provisional duties, the Commission is obliged to issue a proposal for definitive anti-dumping measures to the Council of Ministers\(^45\). The Council can approve or decline, by a simple majority, the imposition of definitive measures\(^46\). The Commission may conduct an expiry review after five years and extend the period of application by up to five more years if it is determined that revoking the duties would cause a recurrence of dumping and material injury\(^47\). This means that anti-dumping measures can be maintained for an indefinite period of time\(^48\).

\(^44\) De Bièvre and Eckhardt, 2009, p. 15.
\(^45\) Ibid.
\(^46\) Davis, 2009, p. 4.
\(^47\) Dunoff and Moore, 2014, p. 151.
\(^48\) Pickett, n.d., p. 137.
4.1 PREDATORY PRICING

4.1.1 Predatory Pricing: ‘Unfair’ Market Behaviour?

The principal rationalization for the use of anti-dumping measures is based on the theory that it prevents predatory pricing\(^49\). The theory is that an exporting company could sell its product at a price below costs to drive competitors out of the market, set high prices, recover all previously incurred costs and make a monopolistic profit\(^50\). Predatory pricing used to require not only a low price of imports but also evidence of *intent* on the part of foreign suppliers to injure current or potential domestic producers and to achieve a monopoly position in a domestic market\(^51\). Today, the application of anti-dumping measures does no longer require evidence of alleged foreign *intent* to achieve market power\(^52\). Dumping has been redefined as price discrimination, in which exporters sell a product abroad at a price below what is sells for in the home market\(^53\). The underlying principle of anti-dumping law has thus shifted from opposing monopolies to opposing a perceived unfair trade practice. The standard of proof consequently shifted from demonstrating intent, or predation, to showing the consequences and thus injury to domestic producers\(^54\). However, as we shall argue, there was no accompanying *mental* shift from predatory pricing towards price discrimination and the suspicion of conscious intent by part of foreign government still dominates the minds of legal scholars and legislators alike.

Producers often call for a “fair” assessment of a non-market economy in the context of international trade\(^55\). Anti-dumping legislation is indeed based on the rhetoric of “fairness” and establishing “level-playing fields” in global trade\(^56\). The defence of anti-dumping measures in Europe, but also in the rest of the world, rests on “the elimination of unfair and distortionary trade


\(^{50}\) Anonymous, 2005, p. 8; Bown and McCulloh, 2012, p. 8; Davis, 2009, p. 4; Kennedy, 2005, p. 415; Rovegno and Vandenbussche, 2011, p. 2; Watson, 2014, p. 3; Zunic, 2015.


\(^{52}\) Ibid.

\(^{53}\) Kennedy, 2005, p. 415.

\(^{54}\) Ibid.

\(^{55}\) See for example Manufacturers for Trade Enforcement, 2016, p. 2.

\(^{56}\) Davis, 2009, p. 3.
practices by foreign firms attempting to capture European markets”\textsuperscript{57}. Dumping is deemed unfair because

this behaviour, it is argued, can only occur when the exporters operate in a sheltered home market in which the government institutes high trade barriers, provides subsidies, or permits cartels. Firms can then sell their products abroad more cheaply than would be the case in a competitive market, and thus, the perpetrators take away customers (and profits) from competitors in the destination market\textsuperscript{58}.

Dumping is allegedly “the result of interventionist government policies”\textsuperscript{59} and price discrimination supposedly signals the existence of a protected “sanctuary”\textsuperscript{60} home market. The entire justification of providing protection against dumping seems thus implicitly still predicated on the notion that intentionally ‘unfair’ behaviour undermines and distorts competitive and well-functioning international markets. This is believed to be true despite dumping being redefined as price discrimination, which is, as we shall argue, not necessarily unfair.

4.1.2 Lack of Evidence for ‘Unfair’ Market Behaviour

Literature suggests that the necessary conditions for successful predatory pricing are unlikely to be met and cast doubt on the purposeful behaviour of foreign producers or governments\textsuperscript{61}. A more in depth analysis of predatory pricing reveals not only that the principle rationalization for anti-dumping measures is a mere spectre, but moreover indicates the problematic nature of the concept of ‘dumping’ as a whole. Dumping, we argue, is not only not ‘unfair,’ but it is not necessarily the consequence of intentional behaviour by part of foreign governments either. The entire idea of predatory pricing hinges on the fabricated justification that this trade practice leads to unfair prices that drive out innocent competitors from their domestic market, usurping their righteous place in the system. But as soon as one tries to define what a ‘fair’ price is, it quickly becomes apparent that the whole idea is elusive\textsuperscript{62}. On the basis of our analysis of the concept ‘fair,’ then, we reach the same conclusion as Yoon et al., namely, that predatory pricing either doesn’t exist, or, if it could exist, would benefit consumers\textsuperscript{63}.

\textsuperscript{57} Davis, 2009, p. 2.
\textsuperscript{58} Kennedy, 2005, p. 416.
\textsuperscript{59} Brink, 1999, p. 2.
\textsuperscript{60} Ibid.
\textsuperscript{61} Bown and McCulloh, 2012, p. 7; Rovegno and Vandenbussche, 2011, p. 2; Zunic, 2015, p. 6.
\textsuperscript{62} Mankiw and Swagel, 2005, p. 109.
\textsuperscript{63} Yoon, McGee and Block, n.d., p. 211.
Dumping is defined as the practice of a company selling at an export price below ‘fair value’. An appreciation of the concept of dumping thus requires a more precise consideration of the term ‘fair’. According to Article 2(1) and 2(2) of the WTO ADA, “fair” or “normal value” is defined as either the price charged by the exporting firm in its own market for the same product or, in the absence of such domestic price,

the highest comparable price for the like product for export to any third country in the ordinary course of trade, or the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.

These definitions are weak in terms of identifying economic behaviour that could be considered anti-competitive. Under the first definition, a company is dumping simply by charging different prices in different markets and thus by engaging in price discrimination. But this is not necessarily unfair. Price discrimination is not often the result of the conscious application of predatory pricing techniques. There are only a handful of cases in recent history in which it reasonably can be argued that such a systematic predatory strategy was being followed. In addition, in the hypothetical situation where a firm of one country obtains a monopoly in a foreign market, there is always the possibility to start importing from other countries. This means that to risk that an exporter will really obtain a dominant position in the market as to be able to increase prices to a monopolistic level is small to non-existent.

Moreover, designating international price discrimination as unfair amounts to condemning foreign firms for practices that are routinely engaged in by their domestic counterparts. From an economic standpoint, selling at prices below ‘fair value’ can be considered as normal marketplace behaviour. Market expansion dumping is even described as being pro-competitive. In order to penetrate the market a new company will have to cut prices to win customers, which benefits consumers and downstream industries that typically outsource part of their production and make use of foreign imports as an input for their own production. The respected economist Mankiw writes that in general, “if a country is a net importer of a product, lower prices are a good thing,

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64 Bloningen and Prusa, n.d., p. 4.  
65 Rovegno and Vandenbussche, 2011, p. 2.  
66 Brink, 1999, p. 3.  
70 Zunic, 2015, p. 6.
even if those prices are the result of practices that might be viewed as unfair,” such as subsidization71.

Another counter argument is the following. If competition in the domestic market is fiercer than competition in a foreign market, a foreign company might be able to maximize profits by selling its products there at lower prices instead of in its home country72. This does not necessarily imply that the foreign company receives subsidies or any other government support which would allow it to lower its prices. A company can on its own initiative decrease its prices in order to be competitive in a domestic market which is already marked by a high degree of competition. If a company is confident enough that it will sell more products in this manner, it is possible this consideration may result in higher profits compared to selling only in its home market. A comparison with third country prices using constructed value can thus only show international price discrimination. But it cannot reveal a “sanctuary market”73. All such a finding can show is that “domestic sales are being made below some baseline level of profitability; it cannot show that home-market sales are above any similar baseline, since home-market sales are excluded from the dumping calculation”74.

Several other authors have also raised the question how one can actually know whether there is price discrimination. While it makes sense to compare physically different merchandise by adjusting for differences in materials, direct labour and variable overhead costs, this is less the case in a real commercial context. Prices of goods are compared to prices of goods sold many months earlier or later without any adjustment for market fluctuations. Such comparisons will produce spurious price differences that are purely the product of “apples-and-oranges comparisons”75. Ikhenson writes that

affirmative dumping findings do not reflect price discrimination or selling below cost, but rather differences between an exporter’s price in the [domestic] market and a fictitious hodgepodge of estimated components serving as a proxy for his home market price76.

71 Mankiw and Sagel, 2005, p. 110.
72 Ibid., p. 111.
73 Brink, 1999, p. 6.
74 Ibid.
75 Ibid.
76 Ikhenson, 2005, p. 3.
European law frequently addresses the issue of dumping, as one author has put it, through a “smorgasbord of discretionary rules,” so that a final dumping determination depends as much on clever lawyering as it does on real-world prices.

The second definition of ‘fair’ value leads to another questionable outcome because it implies that “the standard for judging whether a firm is pricing in an unfair manner is to examine whether a firm’s price falls below its marginal cost.” Marginal costs are the increases or decreases in the total cost production for making one additional unit of an item. But these are “essentially unobservable.” However, through the efforts of industry lobbying it has managed to become the standard for believing that the firm is not maximizing short-term profits but is instead pricing in a predatory fashion. Bloningen and Prusa express themselves in unmistakable terms, stating that this definition is “ridiculous” since it implies prosecuting any firm that is making a loss. Yet, when anti-dumping authorities determine ‘fair value’ through the constructed costs of a product, they not only include fixed costs but also add their own estimate for what a normal profit should be for the firm in the market. As a result, they convict a foreign firm for not making enough economic profit.

In the end, the term ‘unfair’ has evolved to mean something completely different in the practice of anti-dumping protection than standard notions of the term would imply. What is investigated in dumping cases is whether a domestic industry has been injured or threatened with injury by the allegedly dumped imports. But this means that any changes in the market place that lead to less favourable outcomes for the domestic firm are considered unfair. Of course, any successful competitor in the world economy is, by definition, a threat to its competitors. Bloningen and Prusa write that saying that a foreign competitor in the market place is injurious to a domestic firm “is like saying that water is wet.” According to many economists, anti-dumping laws are truly about protecting domestic firms’ interests, not competition. Accordingly, the theoretical basis for

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77 Watson, 2014, p. 3.
78 Bloningen and Prusa, n.d., p. 3.
79 Ibid.
80 See Section 3.5 ‘Industry’ of this dissertation.
81 Bloningen and Prusa, n.d., p. 4.
82 Ibid.
84 Carrington et al., 2015, p. 73.
85 Bloningen and Prusa, n.d., p. 5.
86 See for example Mankiw and Swagel, 2005; Schaefer, 2012, p. 6.
employing anti-dumping duties for fear of predatory pricing is therefore, in euphemistic terms, “questionable”87.

4.2 THE FAIRNESS OF THE ANALOGUE COUNTRY METHOD

As we have argued, anti-dumping legislation is based on the questionable rhetoric of ‘fairness’. Under the WTO ADA, several approaches of calculating ‘fair’ prices are allowed. When considering the approach of the EU towards anti-dumping measures, we see it is characterized by a peculiar trait, namely, that the only requirement for the choice of an analogue country is that it is not chosen in an “unreasonable manner”. The following article stipulates the manner in which an analogue country is selected:

An appropriate market economy country shall be selected in a not unreasonable manner, due to the account being taken of any reliable information made available at the time of selection88.

The United States, on the other hand, require an analogue country to be at a similar level of development to the non-market economy in question and wage rates are determined by reference to wages prevailing in a market economy country at the per capita income level of the non-market economy being investigated89. The EU, however, does not stipulate such a requirement and only asks for a vague appropriateness of the analogue market. Each country is free to determine its own methodology for assessing dumping duties and thus they basically get a “carte blanche”90. As a result, “there is no unifying consistency in how nations adjust their normal value methodologies to account for non-market economies like China”91. One commonality is, not unsurprisingly, that whatever methodology is employed, it often results in high anti-dumping margins. However, the difference in rules does have a visible effect on the choice of analogue country.92 As it turns out, the most often chosen analogue country to China by the United states is India, while for the European Union it is the United States93.

The frequent use of the US as an analogue country is striking because there are deep differences in cost structures and level of sectorial development with China94. The fact that investigating

88 The Anti-Dumping Regulation Article 2(7)(a) paragraph 2, my emphasis.
90 Prusa and Vermulst, 2013, p. 211; Stoler, 2003, p. 3.
91 Pierce and Nicely, n.d., p. 2.
92 Ibid.
93 Detlof and Fridh, 2007, p. 21; Pierce and Nicely, n.d., p. 2.
94 Detlof and Fridh, 2007, p. 21; Eggert, 2006, p. 5 reports that between 2000 and 2006 the USA was chosen as an analogue country in 40% of the cases and that this suggests a serious lack of judgment in a significant number of cases.
authorities have substantial discretion in selecting an analogue country is troublesome given its importance in determining dumping margins. The selection of the analogue country can be manipulated to produce inflated normal value determinations, which in turn lead to inflated dumping margins. It can of course be expected that an analogue country such as the US will yield a higher dumping margin. But comparisons to other countries, too, can lead to a distortion of figures. The selection of Brazil in *Footwear* serves as illustration. While China has a higher GDP than Brazil, in many ways Brazil is a richer state at a different stage of economic development. Brazil’s GDP per capita in 2008–12 was double that of China, energy costs are significantly higher, and the costs of doing international business in Brazil is similar to that of mature economies such as the US. The EU selection of such analogue countries evidences the preference for markets that are at a different stage of economic development than the respondent country. This can hardly be called fair.

4.3 THE POWER OF PARADIGMS

4.3.1 Paradigms

The widespread acceptance of the claim that predatory pricing is the principle justification for anti-dumping measures is, perhaps, the ultimate triumph of what we will call the ‘predatory pricing paradigm’. To understand what we mean by this, we first have to consider the concept ‘paradigm’ as originally formulated by Tomas Kuhn. Paradigms are

accepted examples of actual scientific practice, examples which include law, theory, application, and instrumentation together [that] provide models from which spring particular coherent traditions of scientific research […] Men whose research is based on shared paradigms are committed to the same rules and standards for scientific practice.

In the *Structure of Scientific Revolutions*, Kuhn argues that science does not progress as a linear accumulation of new knowledge but rather undergoes periodic revolutions called ‘paradigm shifts’. Prior to Kuhn’s book, historians and philosophers of science considered the scientific enterprise to be a rational endeavour in which progress and knowledge are achieved through the steady, day-

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96 Ibid.
97 Ibid.
99 Thorstensen et al. speaks of a paradigm without elaborating the concept.
100 Kuhn, 1996, p. 10.
to-day, painstaking accumulation of experimental data, accredited facts and new discoveries\textsuperscript{101}. Kuhn referred to this traditional approach as ‘normal science,’ and he used the term ‘paradigm’ to refer to the shared ideas and concepts that guide the members of a given scientific field or community. Kuhn’s great insight was to realize that real progress did not result from the ‘puzzle-solving of normal science. Instead, he argued that true breakthroughs arise in a totally different way – when the discovery of anomalies potentially leads scientists to question the paradigm. Kuhn based his model on the classic paradigm shifts in physics, such as the Copernican, Newtonian and Einsteinian revolutions\textsuperscript{102}. These in turn lead to the scientific revolutions that he termed ‘paradigm shifts’.

\subsection*{4.3.1.1 Normal Science as a Puzzle Solving Activity}

Kuhn wrote that during normal science, a term closely related to the concept of a paradigm,\textsuperscript{103} problems are anticipated before date collection, analysis and interpretation\textsuperscript{104}. Normal science means

\begin{quote}
research firmly based upon one or more past scientific achievements, achievements that some particular scientific community acknowledges for a time as supplying the foundation for its further practice.\textsuperscript{105}
\end{quote}

Problems that fit to a puzzle are selected on the basis of whether they have solutions\textsuperscript{106}. Normal science is committed to conceptual, theoretical, instrumental, and methodological rules which are derived from the respective paradigms\textsuperscript{107}. Similarly, puzzles have rules that limit both the nature of acceptable solutions and the steps by which they are to be obtained\textsuperscript{108}. Normal science satisfies all the criteria required to be fulfilled in the puzzle solving context. That is why Kuhn considered normal science as a puzzle solving activity\textsuperscript{109}.

\begin{flushright}
\textsuperscript{101} Goldstein, 2012, p. 3.
\textsuperscript{102} Ibid.
\textsuperscript{103} Kuhn, 1996, p. 36.
\textsuperscript{104} Ibid.
\textsuperscript{105} Ibid., p. 10.
\textsuperscript{106} Ibid., p. 37.
\textsuperscript{107} Ibid., p. 44.
\textsuperscript{108} Ibid., p. 38.
\textsuperscript{109} Melesse, 2013, p. 44.
\end{flushright}
4.3.1.2 Anomaly and Paradigm Shift

Anomalies are basically puzzles that cannot be solved within the paradigm. Kuhn writes that discovery commences with the awareness of anomaly:

i.e., with the recognition that nature has somehow violated the paradigm-induced expectations that govern normal science. It then continues with a more or less extended exploration of the area of anomaly. And it closes only when the paradigm theory has been adjusted so that the anomalous has become the expected\textsuperscript{110}.

It is during puzzle solving that anomalies appear, thereby potentially precipitating a crisis\textsuperscript{111}. However, awareness of anomalies takes a long time to create a crisis in the state of normal science because “it demands large-scale paradigm destruction and major shifts in the problems and techniques of normal science”\textsuperscript{112}. It therefore depends partly upon external factors such as the nature of the existing paradigm or the nature of the scientific community\textsuperscript{113}. Adherents to a paradigm are in the first place members of a community. As Kuhn wrote, a paradigm “governs, in the first instance, not subject matter but rather a group of practitioners”\textsuperscript{114}. The usual response to anomalies, then, is – maybe not unsurprisingly – denial\textsuperscript{115}. Although participants in a paradigm “may begin to lose faith and then to consider alternatives, they do not renounce the paradigm that has led them into crisis”\textsuperscript{116}.

4.3.1.3 The Social Sciences and a Legal Paradigm

Since the publication of *The Structure*, the question has risen to what extent the conception of paradigms is useful for the social sciences. Kuhn thought it to be unsuitable as he was struck by the “number and extent of the overt disagreement between social scientists about the nature of legitimate scientific problems and methods”\textsuperscript{117}. Kuhn saw the social sciences as “pre-scientific” in the sense that no one social science has really established a corpus of generally accepted concepts, categories, relationships, and methods which form a paradigm\textsuperscript{118}. Others, such as Dogan, suggest that paradigms cannot occur in the social sciences as they are engaged in the construction of what

\begin{itemize}
\item \textsuperscript{110} Kuhn, 1996, p. 52-53.
\item \textsuperscript{111} Frankfurter and McGoun, 2001, p. 411.
\item \textsuperscript{112} Kuhn, 1996, p. 67.
\item \textsuperscript{113} Melesse, 2013, p. 45.
\item \textsuperscript{114} Kuhn, 1996, p. 180.
\item \textsuperscript{115} Frankfurter and McGoun, 2001, p. 411.
\item \textsuperscript{116} Kuhn, 1970, p. 77 in Frankfurter and McGoun, 2001, p. 411.
\item \textsuperscript{117} Kuhn, 1996, p. viii.
\item \textsuperscript{118} Harvey, 1972, p. 111.
\end{itemize}
are basically “unverifiable theories”\textsuperscript{119}. Walker argues that paradigm mentalities may only be fitting for disciplines that demonstrate concrete scientific achievements and he remarks that paradigms are exactly the concepts that set the natural sciences apart from the humanities\textsuperscript{120}. Cotterrell suggests that in the social sciences, there is a “disciplinary effect” rather than a “full disciplinary matrix” or paradigm\textsuperscript{121}. What he means by this is that in the social sciences, “there are no objective tests of what counts as a discipline since each disciplinary field has its own unique discursive practice”\textsuperscript{122}.

We agree that the social sciences are evaluative in nature rather than verifiable by means of established instruments of verification such as experiments. The view of the social sciences as being ‘pre-scientific’ is in fact quite general among philosophers of science\textsuperscript{123}. But a survey of the history of economic thought shows that revolutions do indeed occur and that such occurrences are marked by many of the same features which Kuhn identified in the natural sciences\textsuperscript{124}. Johnson explores such revolutions of thought in economics and his analysis in many respects parallels that of Kuhn’s\textsuperscript{125}

by far the most helpful circumstance for the rapid propagation of a new and revolutionary theory is the existence of an established orthodoxy which is clearly inconsistent with the most salient facts of reality, and yet is sufficiently confident of its intellectual power to attempt to explain those facts, and in its efforts to do so exposes its incompetence in a ludicrous fashion.\textsuperscript{126}

We suggest the existence of an orthodoxy in European dumping policy. The shared ideas and concepts of this orthodoxy are the constituent parts of a “legal paradigm”\textsuperscript{127} which we will call the ‘predatory pricing paradigm’. Kuhn wrote that paradigms come with a specific “vocabulary and syntax”\textsuperscript{128} which implies that they are “crystallized in discursive practices”\textsuperscript{129}. The discourse that surrounds dumping supports our suggestion since “politicians and protectionist business leaders

\begin{footnotes}
\item[119] Dogan, 1996, p. 300.
\item[121] Cotterrell, 1995, p. 46 cited in De Vries, 2013, p. 11; according to Samian, 1994, p. 128, a ‘disciplinary matrix’ refers to shared elements in a social group which include values; also see Kuhn, 1996, p. 184.
\item[123] Harvey, 1972, p. 112.
\item[124] Johnson, 1971, p. 1; Harvey, 1972, p. 112: There is, for example, no doubt that Adam Smith provided a paradigmatic formulation for economic thought.
\item[125] Johnson, 1971.
\item[126] Ibid.
\item[127] De Vries, 2013, p. 7 describes a legal paradigms as a “particular state of affairs in respect of a particular issue subject to legal regulation.”
\item[129] Antonov, 2014, p. 18.
\end{footnotes}
rail against predatory dumping.”¹³⁰ There are, however, differences with Kuhn’s original concept¹³¹ and we will therefore go only as far as to understand a paradigm in the more limited sense of ‘consensus’ or “an approach which commands wide acceptance”¹³². This is still quite close to what intellectuals less conversant with the philosophy of science mean by a paradigm. Taking this as a starting point for the analysis of anti-dumping legislation is “fruitful”¹³³ because it opens up the possibility for a reflexive attitude towards the discourse of legal scholars, legislators and industry groups. This has been the main motivation of our use of paradigms here.

Next to a broad consensus about beliefs and values, we also find puzzles and anomalies in the predatory pricing debate which further support our claim that a paradigm exists in the context of dumping policy. First, for Kuhn, puzzles are problems which, “while the paradigm is taken for granted, can be assumed to have solutions”¹³⁴. In our view, many legal scholars and legislators regard not only the determination of dumping duties as a puzzle to be solved, but also the quest for the correct interpretation of Section 15 of China’s Accession Protocol is presumed to be a puzzle to which there is a solution which can be supplied by the predatory pricing perspective. Second, an anomaly is something to which there is no obvious answer and which is either ignored or provokes a crisis in the existing paradigm. The anomaly with regard to the ‘predatory pricing paradigm,’ then, is the lack of evidence for the intent and the potential danger of predatory pricing in international trade. In addition, the negation of the existence of any such evidence by part of legislators and legal scholars is indicative of a domineering paradigmatic influence. These observations lead us to the conclusion that the predatory pricing theory can indeed be regarded as a paradigm with “an entire constellation of beliefs”¹³⁵ that guides the interpretation of international price discrimination.

¹³⁰ Brink, 1999, p. 3; see also Mankiw and Swagel, 2005, p. 107.
¹³¹ For this, we refer back to the introduction of our methodology and section 2.2.2 on paradigms.
¹³² Gilbert, 2010, p. 5.
¹³³ Kuhn, 1996, p. ix.
¹³⁵ Kuhn, 1996, 175.
4.4 INDUSTRY

4.4.1 Power and the Law

Our paradigmatic approach starts with recognizing that the law in general, and dumping law in particular, is the result of “a particular configuration of power in society”\footnote{Cotterrell cited in Vick, 2004, p. 180.}. In this we do follow Cotterrell, who suggested that

Law’s basic ‘truth’ may be a merely provisional, pragmatic consensus of those legal actors who are perceived at any given time to be supported by the highest forms of authority within the legal system of the state\footnote{Ibid.}.

What he means by this is that, following Foucault, the field of law is structured by a direct relevance to particular structures of power in society\footnote{Cotterrell, 1995, p. 46 cited in De Vries, 2013, p. 11.}. Foucault describes the function of law as “an exercise of power over others that is conditioned upon it being exercised in correspondence with the structural purpose of the law.”\footnote{Miller, n.d., p. 155.} A relevant instance of this, we believe, is that power in dumping cases manifests itself as the prevalence of concentrated industry vis-à-vis downstream industries and consumers, a power exercised in correspondence with the structural purpose of the law because it can be shown that this purpose is to work in the benefit of concentrated industry. EU anti-dumping law, it appears, is highly beneficial for the concentrated industrial sectors of the European economy. We can therefore presume that the basic ‘truth’ of dumping legislation is determined by a consensus between those European industries and the highest form of authority within the legal system of the Union. This consensus is what we call the ‘predatory pricing paradigm’.

4.4.2 The Role of Industry in Paradigm Formation

We suggest that industry lobbying activities are a means of paradigm formation that impacts legislation through the successful creation and conveyance of accepted discourse. Participants of a paradigm are members of a “language community”\footnote{Kuhn, 1996, p. 202.} and paradigms are, as we wrote before, “crystallized in discursive practices”\footnote{Antonov, 2014, p. 18.}. It follows from this that paradigms can be discovered and
observed through the study of discourse, which reveals a particular mode of thought\textsuperscript{142}. In the following section we will give two examples of how industry contributes to the formation of the ‘predatory pricing paradigm’. The first is based on another consideration of the expression ‘fair value’. The second deals with derivative terms of ‘fair’ which imply that there is malicious intent involved that points towards conscious government action and the application of an unfair trade strategy.

Firstly, let us consider the definition of ‘fair value’. Bloningen and Prusa write that domestic industries, most notably the steel industry, were responsible for defining “fair value” as “the cost of the product constructed from firm-level accounting data” in order to make anti-dumping more protective\textsuperscript{143}. This notion of ‘fair value’ is, as we have seen earlier, not an innocent phrasing of facts. It distorts the meaning of ‘fair’ and ‘unfair’ and these terms have evolved to mean something completely different in the practice of anti-dumping protection compared to how these notions are normally conceived and interpreted\textsuperscript{144}. Any changes in the market place that lead to less favourable outcomes for a domestic firm are now considered unfair. This illustrates the impact discourse can have on how legal scholars and legislators think about dumping and the subsequent formulation of dumping law. As Brink has reported, US and EU anti-dumping disputes are now being dominated by cost-based allegations\textsuperscript{145}. Not only has it become “the dominant feature of US antidumping law”\textsuperscript{146}, it has become the principle way of thinking about ‘dumping’ as well.

Secondly, there are other discursive indications that reveal a particular mode of thought. Concentrated industries, intentionally or coincidentally, explicitly or implicitly, present China as purposefully driving competitors out of the market. They often describe dumping as a “threat,”\textsuperscript{147} a “trade weapon,”\textsuperscript{148} “cheating,”\textsuperscript{149} “dishonest,”\textsuperscript{150} “unfair,”\textsuperscript{151} “selfish”\textsuperscript{152} and even “unethical.”\textsuperscript{153}

\begin{itemize}
  \item \textsuperscript{142} Antonov, 2014, p. 18.
  \item \textsuperscript{143} Bloningen and Prusa, n.d., p. 3-4.
  \item \textsuperscript{144} See Bloningen and Prusa, n.d., p. 3-4 and the argumentation in section 4.1.2 of this thesis.
  \item \textsuperscript{145} Brink, 1999, p. 5.
  \item \textsuperscript{146} Horlick, 1989, p. 189 cited in Bloningen and Prusa, n.d., p. 4.
  \item \textsuperscript{147} EUROFER, 2016, p. 1.
  \item \textsuperscript{148} Obalade, 2014, p. 233.
  \item \textsuperscript{149} Carrington et al., 2015, p. 75.
  \item \textsuperscript{150} Ibid.
  \item \textsuperscript{151} Bloningen and Prusa, n.d.; Carrington et al., 2015; Davis, 2009, p. 2; Euromines, 2016, p. 3; Gifford and Kudrle, 2010; Rovegno and Vandenbussche, 2011, p. 2; Zunic, 2015, p. 5.
  \item \textsuperscript{152} Obalade, 2014, p. 238.
  \item \textsuperscript{153} Ibid.
\end{itemize}
Numerous examples can be found in press releases, position papers and other communication from major industry groups. For example, while describing the concept of dumping as predatory pricing, Carrington et al. claim, on the basis of industry reports, that dumping is intentional “cheating” by the Chinese government to drive competitors out of foreign markets. Heidi Brock, President and CEO of the American Aluminum Association said, “our industries can compete against any other market-other competitors, but we cannot compete against the Chinese government.” Euromines even describes dumping as an instrument “used by China to make the EU the ‘Trojan horse’ for exporting their dumped exports to the United States.” It is by consequence assumed that measures to counter dumping, and thus to eliminate ‘distortions’, are ‘fair’ or beneficial. For that reason we find Article 21 in the EU Anti-Dumping Regulation, which indicates that a “trade distortion,” as an effect of dumping, is something negative that needs to be eliminated. There is no room to consider this ‘trade distortion’ – increased imports as an effect of lower prices – as something that is in the interest of the importing economy. These elements indicate that lobbying activities have had, and still have, an influential impact on dumping discourse and legislation.

4.4.3 Concentrated Economic Sectors v. Small Firms

The utilization of negative dumping discourse serves a purpose. Many authors indicate that anti-dumping law is being used as a protectionist device. One study found that “the EU presents some worrying symptoms” pointing in the direction that firms are applying for anti-dumping protection in order to force competitors to keep prices at a higher level. Wyzycka and Hasmath also remark that the EU’s strategic orientation is predominantly driven by “a mercantilist strategy.” Ironically, the most critical concern regarding anti-dumping policy is its potential anti-competitive effects. This is especially perverse because the impact of dumping duties falls most

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154 E.g. EUROFER, 2016, p. 1 speaks of a “threat”.
155 E.g. Euromines, 2016, p. 3 speaks of “unfair trade”. AEGIS claims that “China’s overcapacity is so high that it could invade Europe” (Workshop, 2016, p. 40).
156 Carrington et al., 2015, p. 75.
160 Bown and McCulloh, 2012, p. 2; Davis, 2009, p. 4; Yoon, McGee and Bock, n.d., p. 211.
162 Wyzycka and Hasmath, 2015, p. 1.
harshly on two groups whose interests the political system is presumed to protect: consumers and the vast majority of producers.\(^\text{164}\)

The configuration of power within the European Union with regards to anti-dumping falls along the lines of concentrated industry on the one hand and downstream industries and consumers on the other. The first benefit from anti-dumping measures because it raises the price of foreign products and keeps competition out of the market.\(^\text{165}\) Downstream industries, such as retailers, consumption industries and importers are potentially among the opponents of dumping actions because they typically outsource a part of their production and use the affected items as production inputs.\(^\text{166}\) Consumer product manufacturing sectors tend to have international supply chains that turn them into importers next to remaining producers in a particular product market.\(^\text{167}\) They have, of course, sometimes filed for anti-dumping protection as well.\(^\text{168}\) But less so than concentrated industries and when they do, cases result in lower duties and shorter periods imposed than is normally the case.\(^\text{169}\) The dispute whether to recognize China as a market economy or not illustrates this difference in structure of global manufacturing to a certain extent. The case highlights how the eventual outcome of the debate will ultimately depend on the struggle between different production patterns.

There are several reasons why concentrated industries have a dominant position in the construction of the ‘predatory pricing paradigm’. First of all, producers in concentrated sectors have lower collective action problems than the high number of small firms in other product niches and thus need to coordinate their actions with a lower number of actors in order to effectively influence public policy making. Second, a set of dominant firms within the sector may have disproportionate incentives to assume the costs of getting organized. Thirdly, and a consequence of the latter, firms in large scale manufacturing rely on long-term investment and have an incentive to ensure that these turn a profit in the face of a potential increase in foreign competition. Their large economies of scale provide them with the incentive to ensure that they can recoup their large-scale and long-term investments.\(^\text{170}\) Finally, next to the collective action advantages, the dominance of a couple of large producers in a particular product market makes it easier to meet the requirement written into the EU Anti-Dumping Regulation that an anti-dumping complaint can only be initiated if it is

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\(^{164}\) Mankiw and Swagel, 2005, p. 108.

\(^{165}\) De Bièvre and Eckhardt, 2009 p. 4-5.

\(^{166}\) Dunoff and Moore 2014, p. 150.

\(^{167}\) De Bièvre and Eckhardt, 2009, p. 6.

\(^{168}\) Ibid.

\(^{169}\) Dunoff and Moore, 2014, p. 150.

\(^{170}\) De Bièvre and Eckhardt, 2009, p. 5.
supported by a minimum of 25% of the total production in the Union of the product in question. Anti-dumping duties can only be imposed if at least 50% of the producers of this product support the complaint. It makes a difference whether you have to mobilize several thousand firms or just a few dozen\textsuperscript{171}.

Looking at the past decades of anti-dumping cases, we see that most complaints have indeed come from heavy industry and manufacturing such as raw materials, steel, chemicals, and metal products\textsuperscript{172}. In fact, almost 80% of cases and measures worldwide involve the top 5 industries. Moreover, two industries, metals and chemicals, concentrate half of all anti-dumping activity. There are small differences in the share of different sector on initiations and measures in the EU. In particular, metals and chemicals present a greater share of measures than of initiations, which suggest these industries are more successful than others at obtaining protection […] For metals and chemicals more than 70% of all AD petitions result in protection. Even more successful are plastics with almost 80% of all petitions resulting in measures\textsuperscript{173}.

Highly fragmented economic sectors, on the other hand, are composed of small and medium sized enterprises, consuming industries and services providers with little or no incentive to try and identify dumping and mobilize politically to file an anti-dumping complaint\textsuperscript{174}. The frequency of complaints coming from these producers is consequently lower than those from heavy industry. These considerations explain why “industries dominated by a few companies win more often than less-concentrated ones,”\textsuperscript{175} as well as why they are so influential in setting the ‘predatory pricing paradigm’ in the first place.

4.5 THE COMMUNITY INTEREST CLAUSE

The effects of industry lobbying are particularly salient if one considers the Community interest clause. EU legislation adds the condition that anti-dumping measures should not be against the interest of the community to the requirements of Article VI of the GATT. According to Article 21 of the Regulation

\textsuperscript{171} De Bièvre and Eckhardt, 2009, p. 5.
\textsuperscript{172} Ibid.
\textsuperscript{173} Rovegno and Vandenbussche, 2011, p. 11-12.
\textsuperscript{174} De Bièvre and Eckhardt, 2009, p. 7.
\textsuperscript{175} Kennedy, 2005, p. 422.
a determination as to whether the Community interest calls for intervention shall be based on an appreciation of all the various interests taken as a whole, including the interests of the domestic industry and users and consumers.

The Community interest test should, in principle, avoid the automatic imposition of duties where duties would create adverse effects on other sectors of economic activity. However, many authors have pointed out that the Community interest test is hardly ever used to reject anti-dumping measures. To the contrary, in many cases, once it has been decided that dumping and injury are proven and measures are expected to give relief to the complainant industry, it is presumed almost automatically that these measures are in the Community interest\textsuperscript{176}. Once a complaint has been made by industry producers from concentrated sectors and an investigation initiated, “the overriding bias is towards imposition of definitive duties and thereafter to maintain these duties through extension in expiry reviews”\textsuperscript{177}. The clause is therefore seen as “nothing more than adding a positive spin to EC anti-dumping investigations, in which the decision to impose measures is usually a foregone conclusion”\textsuperscript{178}. A number of observations support the existence of an internal bias in favour of industry.

Firstly, although the Regulation bestows equal rights on the parties involved, there are no guarantees that all views are actually taken into account\textsuperscript{179}. As Pickett write, the EU institutions are not required to give specific reasons for a decision not to take account of the various arguments raised by the interested parties\textsuperscript{180}. Consider the following example. In the decision of 2005 to impose duties on polyester filament fabric originating in China, it was argued that “although measures would be expected to increase the price of imports, importers have not expressed concern about possible measures and it is therefore considered that they would not be significantly affected”\textsuperscript{181}. In addition, the 2008 investigation of alleged dumping of compressors from China concluded that anti-dumping measures would have a negative impact on consumers and other economic operators within the EU, but as none had cooperated in the investigation, this conclusion could not be used\textsuperscript{182}. However, the same does not hold true when large industry representatives fail to provide information:

\begin{itemize}
\item[\textsuperscript{176}] De Bièvre and Eckhardt, 2009, p. 15.
\item[\textsuperscript{177}] Davis, 2009, p. 2.
\item[\textsuperscript{178}] Ibid., p. 5.
\item[\textsuperscript{179}] Anonymous, 2005, p. 3.
\item[\textsuperscript{180}] Pickett, n.d., p. 141.
\item[\textsuperscript{181}] Davis, 2009, p. 7; Certain finished polyester filament fabrics, China, OJ L240, 12 September 2005, p. 1, para. 130.
\item[\textsuperscript{182}] Davis, 2009, p. 7.
\end{itemize}
No Community suppliers of hand pallet trucks have made representations in this investigation by replying to the questionnaire. However, it is clear that if no measures are imposed, several suppliers would be seriously affected and would probably have to close down\textsuperscript{183}.

Apparently, no economic evidence was required to validate this conclusion. The Commission’s way of arguing is the opposite for large industries compared to downstream industries and consumers\textsuperscript{184}. As long as there is no evidence against what is being claimed it is considered to be true. The fact that some industries have not made themselves known does not exclude the possibility of their interest being taken into account. But the Commission should not interpret the lack of response by consumers and other industries as an indication that there are no objections to the imposition of duties or that the imposition of duties would be in the best interest of the Community\textsuperscript{185}. It is simply absurd, from an economical point of view, that even where potential injury to consumers or user industries is acknowledged in the investigations, lack of response from these parties invalidates any case that could be made against imposing measures\textsuperscript{186}. There is, for example, the possibility that users and consumers to whom the cost of anti-dumping measures are marginal would not consider it worthwhile to contact the Commission. Most interested parties do not even get the information about the proceedings until provisional anti-dumping duties are a fact, and then it is often too late to put ones views forward\textsuperscript{187}.

A second observation is the following. Article 4(1) of the Regulation states that the “Community industry” shall be interpreted as referring to “the Community producers as a whole of the like products or to those whose collective output of the products constitutes a major proportion … of the total Community production of those products”. Article 5(4), which determines on what grounds an investigation can be initiated following the filing of a complaint, defines “major proportion” as 50\%. The same article goes on to say that no investigation shall be initiated on the basis of a complaint where this figure is less than 25\%. These provisions allow the Commission to initiate an investigation on behalf of a complaint by representatives of as little as 25\% of Community production. This leads to cases such as \textit{Plastic Bags from China, Malaysia and Thailand} that are based on Commission figures which claim that complainants represent 26,7\% of Community production\textsuperscript{188}. But it is clear that, as Eggert correctly remarks, this is hardly a major

\textsuperscript{184} Anonymous, 2005, p. 9.
\textsuperscript{185} Eggert, 2006, p. 5.
\textsuperscript{186} Davis, 2009, p. 7.
\textsuperscript{187} Anonymous, 2005, p. 9.
\textsuperscript{188} Eggert, 2006, p. 4.
proportion and rather constitutes a “significant minority”\textsuperscript{189} that works in the advantage of Community industry. The dominance of a couple of large producers in a particular market makes it very easy to meet these requirements\textsuperscript{190}.

4.6 ANOMALY AND POLICY SHIFT

Next, we turn to the question why the absence of evidence for predatory pricing in international trade has not yet resulted in a paradigmatic policy shift. According to Kuhn, novelty emerges only with difficulty and is characterized by resistance of the paradigm which is reacted against\textsuperscript{191}. There is much reason to doubt that participants of a paradigm will reject their believes when confronted with anomalies. This because the aim of normal science is not to call forth new sorts of phenomena; indeed those that will not fit the box are often not seen at all. Nor do scientists normally aim to invent new theories, and they are often intolerant of those invented by others. Instead, normal-scientific research is directed to the articulation of those phenomena and theories that the paradigm already supplies.\textsuperscript{192}

Anomalies can “at best help to create a crisis, or, more accurately, to reinforce one that is already very much in existence”\textsuperscript{193}. By themselves they cannot and will not falsify the theory, for its defenders will “devise numerous articulations and \textit{ad hoc} modifications of their theory in order to eliminate any apparent conflict.”\textsuperscript{194} Repetition of terms and concepts, in our case by industry groups but also by legal scholars and legislators themselves, could be seen as another technique of articulation to eliminate conflict.

Heclo writes that politics finds its sources not only in power but also in uncertainty; “governments not only ‘power’ but “they also puzzle”\textsuperscript{195}. Policy making is thus a form of “collective puzzlement” on society’s behalf\textsuperscript{196}. Hall uses the terminology of Kuhn to speak about policy change. He writes that “normal policymaking” is very much like “normal science.”\textsuperscript{197} But changes in policy, by contrast, reflect a different process, marked by the radical changes in overarching terms of policy

\textsuperscript{189} Eggert, 2006, p. 4.
\textsuperscript{190} De Bièvre and Eckhardt, 2009, p. 5.
\textsuperscript{191} Kuhn, 1996, p. 64.
\textsuperscript{192} Ibid., p. 24.
\textsuperscript{193} Ibid., p. 78.
\textsuperscript{194} Ibid.
\textsuperscript{195} Heclo, 1974, p. 305.
\textsuperscript{196} Ibid., p. 306.
\textsuperscript{197} Hall, 1993, p. 279.
discourse associated with a “paradigm shift”\textsuperscript{198}. Whereas normal policymaking preserves the broad continuities found in patterns of policy, policy change is a more disjunctive process associated with periodic discontinuities in policy\textsuperscript{199}. This implies that normal policymaking does not automatically lead to change. As in the case of scientific change, normal policymaking can proceed for some time without necessarily precipitating a paradigm shift. Awareness of anomalies can take a long time to create a crisis in the state of normal science or normal policymaking. This awareness can be the result of external factors such as the nature of the existing paradigm or the nature of the community which may accelerate or decrease the speed by which scientific or policy change is ushered in.

Each paradigm contains its own account of how the world facing policymakers operates and each account is different. It is often impossible for the advocates of different paradigms to agree on a common body of data against which technical judgment in favour of one paradigm over another might be made\textsuperscript{200}. Instances of policy failure are likely to play a key role in the movement from one paradigm to another. Like scientific paradigms, a policy paradigm can be threatened by the appearance of anomalies. As these accumulate, \textit{ad hoc} attempts are made to stretch the terms of the paradigm to cover them, but this gradually undermines the coherence and precision of the original paradigm. Efforts to deal with such anomalies may also entail experiments to adjust existing policy, but if the paradigm is genuinely incapable of dealing with anomalous developments, these experiments will result in policy failures that gradually undermine the authority of the existing paradigm and its advocates even further\textsuperscript{201}. Therefore, the movement from one paradigm to another is likely to involve the accumulation of anomalies, experimentation with new forms of policy, and policy failures that precipitate a shift in the locus of authority over policy and initiate a wider contest between competing paradigms\textsuperscript{202}.

Dumping policy has not yet been marked by radical changes in discourse that could be associated with a paradigm shift. There are several reasons for this. First, it may be that the ‘predatory pricing paradigm’ is threatened by the appearance of anomalies such as the crumbling evidence for the danger of predatory dumping. But this has not yet caused a revolution in the minds of industry and legislators. There are, however, many critics of orthodox theory to be found among legal scholars but not enough, it seems, to weigh in on the legislative debate. Second, and related to the first reason, there has not been an instance of grave policy failure yet, such as, for example, a failure of

\textsuperscript{198} Hall, 1993, p. 279.
\textsuperscript{199} Ibid.
\textsuperscript{200} Ibid., p. 280.
\textsuperscript{201} Ibid.
\textsuperscript{202} Ibid.
the global economy in the form of decreasing economic growth due to protectionism, that could prompt the movement from the ‘predatory pricing paradigm’ to another view of international price discrimination. Third, the locus of power over anti-dumping policy is still very much in the hands of industry which enjoys support from the highest authority within the legal system of the EU. Considering how dumping law is structured by a direct relevance to this particular configuration of power in society, the tenacity of the idea of predatory pricing comes as no surprise. That, we believe, are the reasons why our anomaly has not yet caused a paradigm shift.
PART V: CHINA’S LONG MARCH TOWARDS MARKET ECONOMY STATUS

5.1 CHINA’S MARKET ECONOMY STATUS

China joined the WTO on December 11, 2001. This was, as Barone emphasizes, a “milestone in the history of the multilateral trading system and a major leap in the WTO’s evolution towards a truly global organization”\(^\text{203}\). Wouters and Burnay express themselves in similar terms, writing that the Chinese accession constituted “a major accomplishment in the process of integrating China in the global economic order”\(^\text{204}\). Panitchpakdi and Clifford exclaim that it is “virtually impossible to overstate the importance of bringing the world’s most populous nation into a system that establishes internationally accepted rules for a market-based economy”\(^\text{205}\). Pascal Lamy, in 2001 the EU trade commissioner who negotiated Chinese WTO entry on behalf of the EU and later became WTO Director-General, deemed China’s accession a “win-win agreement” that would “serve to boost the rule of law in China” while giving countries “predictable, rules-based access to other markets”\(^\text{206}\). The WTO itself stated,

> China has agreed to undertake a series of important commitments to open and liberalize its regime in order to better integrate into the world of economy and offer a more predictable environment for trade and foreign investment in accordance with WTO rules.\(^\text{207}\)

China indeed made strong commitments during its WTO accession negotiations. These are included in its Accession Protocol and in its legally binding annexes on specific issues related to the Chinese trade regime\(^\text{208}\). However, as Wouters and Burnay are quick to point out, China paid a high price for their accession and made deeper concessions than other developing countries\(^\text{209}\). In addition to the commitment to respect the WTO acquis and translate it into Chinese law, China has been bound to so-called “WTO plus” obligations\(^\text{210}\). Those ‘China-specific’ obligations include a safeguard clause available to other Members when confronted with increased Chinese imports as well as the possibility for other Members to treat China as a non-market economy for anti-dumping calculations until at least 2016\(^\text{211}\). The non-recognition of market economy status has clear implications since it makes it possible for trade partners to evaluate the prices of a product in

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\(^{203}\) Barone, 2015, p. 4.
\(^{204}\) Wouters and Burnay, 2011, p. 6.
\(^{206}\) Pascal Lamy, 2000 and 2010.
\(^{208}\) Barone, 2015, p. 4.
\(^{209}\) Wouters and Burnay, 2011, p. 6.
\(^{210}\) Qin, 2003.
\(^{211}\) Wouters and Burnay, 2011, p. 6.
function of the prices applied in an analogue country with which the Chinese market, *in principle*, shares some similarities.\(^{212}\)

### 5.2 Relevant Provisions of China’s Accession Protocol

Article VI of GATT and the provisions of the WTO ADA are currently applicable to anti-dumping proceedings initiated by WTO members against imports from China. They are mentioned in paragraph 15(1) of the Accession Protocol:

15. Price Comparability in Determining Subsidies and Dumping

Article VI of the GATT 1994, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (“Anti-Dumping Agreement”) and the SCM Agreement shall apply in proceedings involving imports of Chinese origin into a WTO Member consistent with the following:

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

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

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

The provision itself does not explicitly bestow the status of NME on China.\(^{213}\) Nevertheless, it is precisely this regulation that permits other WTO members to deviate from the requirements of Article 2(1) of the ADA when determining the normal value of imported products from China.\(^{214}\) It basically subjects goods of Chinese origin to the same treatment as imports from NME countries in the sense of the second Annex to Article VI(1) of the GATT.\(^{215}\)

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\(^{212}\) Wouters and Burnay, 2011, p. 6.

\(^{213}\) Tietje and Nowrot, 2011, p. 6.

\(^{214}\) Ibid.

\(^{215}\) The Accession Protocol grants Chinese producers however a more favourable status as paragraph 15(a)(i) provides them with the option of proving that market economy conditions prevail in the respective industry, thereby potentially giving rise to a valid claim for industrywide market economy treatment. But as the reader surely understands, this poses a considerable barrier to entry.
The claim that China can be regarded as a NME under paragraph 15(a) of the Accession Protocol is based on the wording of the first and the third sentence of paragraph 15(d). That paragraph reads as follows:

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

This provision has led to the question whether or not China will be granted market economy status from 11 December 2016 onwards. The second sentence of paragraph 15(d) has been interpreted by several authors, as well as the Chinese government, as resulting in an ‘automatic’ shift from non-market economy status to market economy status. But other authors, industry groups and legislators disagree and argue that, if the expiration of subparagraph 15(a)(ii) means that WTO members must treat China as a market economy in all instances, there is no need for the provisions of subparagraph 15(a)(i) or the first and third sentences of paragraph 15(d).

5.3 THE MEANING OF SECTION 15

5.3.1 The Ordinary Meaning Doctrine

The Vienna Convention states that “a legal text is the authentic expression of the intensions of the parties; and that, in consequence, the starting point of interpretation is the elucidation of the meaning in the text”. Several leading authors base their interpretation of Section 15 of China’s Accession Protocol on this convention and the related “ordinary meaning doctrine”. It is clear that for these authors, foremost among the rules of treaty interpretation applied by the WTO is the principle that a “treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. An interpretation of a legal text may in other words not have the effect of reducing the remaining parts of the text to redundancy or inutility. As one scholar points out, this would be prohibited by the rules of treaty interpretation and such a result would also be contrary to the

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216 E.g. Tietje and Nowrot, 2011; Rao, 2013.
217 Merrills, n.d., p. 56.
218 See e.g. Price et al., 2015; Rao, 2013; Tietje and Nowrot, 2011.
221 Price et al., 2015, p. 2; Rao, 2013, p. 165; Tietje and Nowrot, 2011, p. 8.
requirement that a treaty’s interpretation must be consistent with the purpose of the provision in question. Other authors confirm that it is a “well-recognized rule that the interpretation of a treaty must give meaning and effect to all of its clauses and is thus not free to reduce individual provisions to inutility.”

The ordinary meaning concept is based on an ‘objective’ view of meaning. It relies on a notion of “semantic objectivism” that posits that “there are facts about what words mean and that these facts are independent of what individuals mean by the words they use.” This theory is, however, not unproblematic. The question of what makes some meaning the ordinary one and the evidential question of how the determinants of ordinary meaning are identified and conceptualized remain largely unanswered. Indeed, as Slocum writes, these “questions are greatly undertheorized in legal scholarship.” Moreover, the term “meaning” is notoriously ambiguous because “it has distinct senses with different referents.” Consider the problematization by Solum of meaning in a legal text:

> When we ask the question, “What does this provision mean?,” we might refer to the linguistic meaning or semantic content. Call this first sense of meaning the semantic sense. But the term “meaning” can also be used to refer to implications, consequences, or applications. Call this second sense of meaning the implicative sense. We might also use the term meaning to refer to the purpose or function of a given constitutional provision. Call this third sense of meaning the teleological sense. These three senses of meaning are non-equivalent. The semantic content of a text is not the same as its implications. The implications of a text are not the same as its purposes. The purposes of a text are not the same as its semantic content.

The semantic meaning of a text is a different kind of thing than the implications or purpose of a text. With regard to Section 15 of the Accession Protocol, we will argue that the implications and purpose of the text are clear, but that the semantic meaning of the term on which the entire Section hinges, i.e., the concept of a non-market economy, is not. This leads to different – but logically equally acceptable – interpretations that are based on different assumptions of what it means to be a non-market economy. These conflicting interpretations of Section 15 have therefore not reached, and unless the concept of a non-market economy is defined, will probably never reach, their Hegelian synthesis.

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222 Price et al., 2015, p. 2.
225 Ibid.
227 Ibid.
228 See Section 4.4 of the thesis on incommensurability.
Authors arguing against the automatic recognition of China’s MES can be grouped under the heading of ‘national interpretation’. They claim that the designation of the term ‘market economy,’ and by extension also a ‘non-market economy,’ ultimately depends on the importing country. Authors we place under this heading are O’Connor, who is a leading figure of this interpretation, and Price\textsuperscript{229}. They argue that there is no automatic shift for China from NME to MES and that it consequently will still be allowed to use the analogue country method after 11 December 2016 in dumping cases. The ‘threshold interpretation,’ on the other hand, claims that the designation of the term ‘non-market economy’ is a purely theoretical concept. It tells us nothing about the price comparability of Chinese products because no country in the world is characterized by a complete or substantially complete monopoly on trade where all domestic prices are set by the state. Authors who subscribe to this interpretation are, among others, Tietje and Nowrot, Watson, Prusa and Vermulst, and Rao\textsuperscript{230}. They argue that there is indeed an automatic shift in China’s status and that consequently only normal dumping rules will apply after the shift. The entire dispute around the ‘correct’ interpretation of Section 15 ultimately rests on the shaky foundation that “the words actually used are clear”\textsuperscript{231}. But surely, if this were the case, there would be no debate.

5.3.2 The National Interpretation

Those in favour of the ‘national interpretation’ argue that the standard to be met in the evaluation of China’s market economy status is set out in the national law of the importing WTO member\textsuperscript{232}. Whether China is a market economy or not is thus considered to be a question for the domestic laws of the importer. Because it is up to each and every national member of the WTO to decide about China’s market economy status, there is no acknowledgement of any automatic transition of China from a non-market economy designation to the status of a market economy. The price comparisons for the purposes of anti-dumping measures will therefore still be able to be determined on the basis of the analogue country method.

According to the ‘national interpretation’, the second sentence of paragraph 15(d) specifies that only paragraph 15(a)(ii) will expire after 15 years\textsuperscript{233}. The ‘ordinary meaning’ of these words, then, is that, while paragraph 15(a)(ii) will expire on 11 December 2016, the remainder of paragraph 15(a) will remain in full force and effect. After all, they claim, if the expiration of subparagraph 15(a)(ii) means that WTO members must treat China as a market economy in all instances, then there would

\textsuperscript{229} O’Connor, n.d.; Price et al., 2015.
\textsuperscript{230} Prusa and Vermulst, 2013; Rao, 2013; Tietje and Nowrot, 2011; Watson, 2014.
\textsuperscript{231} Price et al., 2015, p. 2; see also O’Connor, n.d., p. 2.
\textsuperscript{232} O’Connor, n.d., p. 2.
\textsuperscript{233} O’Connor, n.d.; Price et al., 2015.
be no need for the provisions of subparagraph 15(a)(i) or the first and third sentences of paragraph 15(d). Consequently, the possibility of adopting an alternative methodology not based on a strict comparison with Chinese prices or costs will still exist after the expiry of subparagraph 15(a)(ii). Otherwise, the remaining parts in the chapeau of paragraph 15(a) would become inutile, which would go against the rules of treaty interpretation. In addition, it is argued that the purpose of Section 15 was “to enable WTO members to use non-Chinese prices or costs to make dumping comparisons in cases involving Chinese producers until China had in fact allowed the market to set prices.” It would thus be contrary to the underlying purpose of Section 15 to require WTO members to apply market economy treatment for anti-dumping purposes to China when “China has not fulfilled its obligations under the protocol to allow prices to be set by market forces.” A correct interpretation of the language of Section 15 consequently leads, according to these authors, to the conclusion that there is no automatic shift from non-market economy to market economy status.

The language of this interpretation reveals something crucial. The statement that China has not yet “allowed to set prices” and that it has therefore “not fulfilled its obligation under the protocol,” allows for the deduction of the crux of the confusion around the interpretation of Section 15. The ‘national interpretation’ says that it is up to domestic law to determine if China is a market economy. But at the same time it assumes that China is a non-market economy. However, Section 15 itself does not explicitly bestow the status of NME on China. Nowhere is it ‘clear’ what the meaning of the term ‘non-market economy’ is supposed to be. It is consequently, to a certain extent, an assertion to say that China is a non-market economy; it a claim to truth that cannot articulate what that truth exactly is. As the comparison with the ‘threshold interpretation’ will further clarify, interpretations of Section 15 focus so much on the syntax, i.e., which sentence indicates what, that they seem to forget about the vocabulary. It is in this fundamental omission of a clarification of what a ‘non-market economy’ in essence is that the entire debate around the ‘one correct interpretation’ of Section 15 finds its origin.

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234 Price et al., 2015, p. 2.
236 Price, 2015, p. 2.
237 Ibid.
238 Ibid.
239 Ibid.
241 We do not claim that China is not a non-market economy. We merely observe that there are conflicting interpretations of what a ‘non-market economy’ is supposed to be.
The Threshold Interpretation

The ‘threshold interpretation’ is based on the ‘objective meaning doctrine’ as well. A number of authors state that they take into account “the well-recognized rule that the interpretation of a treaty must give meaning and effect to all of its clauses” and that it is “not free to reduce individual provisions to inutility”\(^{242}\). Rao speaks of his interpretation as giving the second sentence of paragraph 15(d) “full meaning”\(^{243}\). Tietje and Nowrot initially agree that “the only legally sound conclusion” is indeed that there is a theoretical possibility that China can be regarded as a non-market economy after the expiry of paragraph 15(a)(ii). In practice, however, they claim that it cannot be completely considered a ‘non-market economy’.

For the meaning of a non-market economy, they refer to the second Supplementary Provision to paragraph 1 of Article VI in Annex I to the GATT 1994:

> in the case of imports from countries where the state has a complete or substantially complete monopoly of trade and where all domestic prices are fixed by the State, importing Members may determine that a comparison with domestic prices may not be appropriate due to special difficulties in determining price comparability\(^{244}\).

They recognize that this provision provides the possibility for importing members to derogate from the general rule with regard to calculating the normal value of imports from non-market economies. However, the invocation of this provision requires the investigating authority to demonstrate that “the exporting State monopolizes trade and sets all domestic prices”\(^{245}\). Watson, for example, admits that “price controls and state ownership remain embedded in certain industries”\(^{246}\) but adds that “China’s economy is sufficiently liberalized that domestic prices generally provide adequate evidence of normal value”\(^{247}\). Prusa and Vermulst also write that it is hard to find a country with a complete or substantially complete monopoly on trade and where all domestic prices are fixed by the state\(^{248}\). Stoler writes that because of this high threshold, it is “doubtful that the Chinese economy today would be accurately characterized by the description in the note to Ad Article VI:1”\(^{249}\).

\(^{243}\) Rao, 2013, p. 165.
\(^{244}\) Rao, 2013, p. 156; Tietje and Nowrot, 2011, p. 11.
\(^{245}\) Rao, 2013, p. 156; Tietje and Nowrot, 2011, p. 10, my emphasis.
\(^{246}\) Watson, 2014, p. 2.
\(^{247}\) Ibid., p. 7.
\(^{248}\) Prusa and Vermulst, 2013, p. 212.
\(^{249}\) Stoler, 2003, p. 2.
Therefore, according to the ‘threshold interpretation,’ because China does not fulfil the characterization given in the second Supplementary Provision to paragraph 1 of Article VI in Annex I to the GATT 1994, there is in principle an automatic shift to market status from 11 December 2016 onwards. According to this interpretation, it should no longer be possible to make a determination of the normal value of products targeted by an anti-dumping proceeding on the bases of the analogous third country methodology. Since the only possibility to do so, they claim, rests on the second Supplementary Provision, “chances to convincingly and thus successfully to do are almost non-existing.” Consequently, the importation of Chinese products will have to be treated in the same way as imports from any other WTO Member with regard to the determination of normal value.

5.3.4 Non-Market Economy

China’s status of non-market economy is referred at in Section 15 where concerns are raised about the difficulties arising from the absence of market economy conditions for the determination of dumping and subsidies. Nevertheless, there is no definition, under the Protocol, of the expression “non-market economy.” The provisions of Article 15 “only presume that China is a NME, but give no further clarifications.” China’s Accession Working Party Report, when referring to Article 15 of the Chinese Accession Protocol, states that:

Several members of the Working Party noted that China was continuing the process of transition towards a full market economy. Those members noted that under those circumstances, in the case of imports of Chinese origin into a WTO Member, special difficulties could exist in determining cost and price comparability in the context of anti-dumping investigations and countervailing duty investigations.

The Working Party evidenced some non-market economy effects on the WTO system, especially on the proper functioning of its mechanisms, but did not give a definition of what it deemed to be a non-market economy. This reminds us of Solum’s discussion of a legal text and the fact that the semantic, implicative and teleological sense of meaning are not necessarily identical. The implication of a non-market economy, i.e. that special difficulties could exist in determining cost

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250 Tietje and Nowrot, 2011, p. 11.
251 Ibid.
252 Ibid.
253 Thorstensen et al., 2013, p. 3.
254 Ibid., p. 3.
256 Thorstensen et al., 2013, p. 4.
and price comparability, is clear. But the semantics of the concept are unclear and the ‘meaning’ of the provisions containing the term remains ambiguous. The ‘clear meaning’ that both the ‘national interpretation’ and the ‘threshold interpretation’ claim to find in the words used in Section 15 is therefore not as straightforward as the adherents of the respective interpretations want us to believe.

The definition of a non-market economy is imprecise, especially when it attempts to cover multiple economic situations in which a country relies upon different degrees of government interference in its economy\(^{257}\). There are a diversity of economic parameters and subtle gradations between a centrally planned and a market economy. Hence, the difficulty of legally defining a market or non-market economy\(^{258}\). A legally \textit{detailed} description has still not been produced among influential international organizations, such as the WTO or the World Bank, nor can it be found in any national definition\(^{259}\). The case of transitional economics is particularly difficult to comprehend. During a transitional period, an economy is “neither centrally planned nor a market economy”\(^{260}\). Many authors note that China is in the process of the transition from a command economy to a market economy\(^{261}\). Qian and Wu call China a “socialist market economy” and note that the word “socialist” is an adjective to the noun “market economy”\(^{262}\). Others use the term “hybrid economy”\(^{263}\) or “guided market economy”\(^{264}\). Some, like Wang, even claim that China already successfully made the transition “from a command economy to a market-oriented one”\(^{265}\). Indeed, Stoler also writes that “the circumstances prevailing in the Chinese market are more characteristic of a market-based economy than they are of a non-market economy”\(^{266}\). Jinglian supports this, writing that “China has been transformed from a centrally planned economy to a market economy”\(^{267}\).

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\(^{257}\) Thorstensen et al., 2013, p. 13.
\(^{258}\) Ibid., p. 4.
\(^{259}\) Ibid.; the broad descriptions of a non-market economy also vary among countries, which is not conducive to a clear understanding of the concept when it figures undefined in texts such as China’s Accession Protocol.
\(^{260}\) Ibid., p. 13.
\(^{262}\) Guo et al., 2005, p. 6; Qian and Wu, 2000, p. 6; Virmani, 2005 gives a good overview of the socialist and market traits of China’s economy; Wang, n.d., p. 1.
\(^{264}\) Pan, 2010, p. 5.
\(^{265}\) Wang, n.d., p. 2.
\(^{266}\) Stoler, 2003, p. 1.
We claim that the interpretation of Section 15 by both interpretations is ‘incommensurable’, which means that there is no common external standard for evaluation due to the absence of shared concepts among them. This is the reason why they have not reached their Hegelian synthesis yet. In *The Structure of Scientific Revolutions*, Kuhn uses Gestalt shifts as an analogy to illustrate his incommensurability thesis. He later drops this analogy because of the implied perceptual interpretation and develops a metaphor based on language. The lack of a common measure becomes “no common language.” Incommensurability becomes some sort of untranslatability. He later modifies the concept again and introduces “local incommensurability,” which means that most terms common to the two theories function the same way in both; their translation common to the two theories function the same way in both; their translation is simply homophonic. Only for a small subgroup of (usually interdefined) terms and for sentences containing them do problems of translatability arise.

Incommensurability, in other words, comes to mean untranslatability caused by the meaning change of a small group of terms. This more limited notion of incommensurability is sometimes called “semantic incommensurability”.

In our case, it is evident that most terms in Section 15 function in the same way for both interpretations. Their meaning is ‘clear’. Both interpretations can be compared to each other since most of the terms used are unchanged concepts that are shared between them. It is only for a subgroup of terms, more specifically the term ‘non-market economy’ and derivative evaluative terms such as ‘unfair,’ ‘threat,’ ‘dishonest’ or ‘distortion,’ and for provisions containing them, that problems of translatability arise. It shows that individuals from different communities define the same terms by different lexical connections, and may develop irreconcilable “examplars” or models, so that they apply it to referents or situations that the other categorically denies. This different structuring of “the relevant universe of discourse” means that communication between

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268 Kuhn, 1996, 148.
270 Marletta, 2013, p. 104.
276 Hoyningen-Huene and Sankey, 2001, p. 65
the two communities fails. Whereas the ‘national interpretation’ sees no difficulties in putting China forward as a model of a non-market economy, the ‘threshold interpretation’ has a restrictive interpretation of the term as referring to a theoretical concept that may only exists in principle. This communication failure is severe because the difference, although it is local, inevitably results in a communication breakdown between the two paradigmatic communities. The prerequisite for full translatability between the interpretations, and the key to solving the puzzle of Section 15, therefore seems to be a shared lexical taxonomy or, in other words, a shared classification of the term ‘non-market economy’.

Contrary to “legal positivists who believe that propositions of law are indeed wholly descriptive,” the incommensurability of both interpretations on the basis of a different understanding of the concept ‘non-market economy’ entails that at least part of the statements made are “evaluative as distinct from descriptive” and that they express either “a preference of the speaker, a personal politics, or what he believes is objectively required”\(^{278}\). The evaluation of paradigms is necessarily “a practical process, which involves decisional, deliberative and subjective elements”\(^{279}\). Incommensurability blocks the possibility of a neutral comparison between theories\(^{280}\). This statement does not mean that paradigms are incomparable, because we can always compare their accuracy, consistency and so on. But the two interpretations will

inevitably talk through each other when debating the relative merits of their respective paradigms.

In the partially circular arguments that regularly result, each paradigm will be shown to satisfy more or less the criteria that it dictates for itself and to fall short of a few of those dictated by its opponent\(^{281}\).

We do not say that the interpretations of Section 15 are not logical. Rather, the problem is that logic is not able to force a choice between the two interpretations until the concept of a non-market economy is clearly defined. It is only when the two parties discover that they differ about what the term ‘non-market economy’ really means that the confusion and debate around the interpretation of Section 15 can be resolved.

Our conclusion, then, with respect to Section 15 of China’s Accession Protocol goes against both the ‘national’ and ‘threshold interpretation’. It is impossible to deduce the ‘clear meaning’ from its provisions because the entire section is predicated on the consideration whether or not China is a

\(^{278}\) Dworkin, 2002, p. 528.
\(^{279}\) Marletta, 2013, p. 93.
\(^{280}\) Ibid., p. 96.
'non-market economy'. But this is not absolutely clear as it is not even clear what this term really means. The “full meaning” of the text has thus never been “clear” and it is impossible to give “full meaning” to “all of its clauses”\textsuperscript{282}. One can reason both for and against an automatic shift towards market economy status, based on different conceptions of what the concept ‘non-market economy’ means. Since there is no definition and thus not a clear determination of the meaning, in the semantic sense of the word, we feel that we have to suspend our judgment. Ironically, some industry associations agree with us, albeit for fear that the EU will recognize China’s market economy status. Euromines, for example, writes in a recent press release that “until the WTO establishes an agreed interpretation, no WTO member can be sure that its own interpretation of one part of the Protocol is correct”\textsuperscript{283}.

\textsuperscript{282} Price et al., 2015, p. 2.
\textsuperscript{283} Euromines, 2016, p. 3.
6.1 INDUSTRIAL CONTROL

The question “which interpretation of Section 15 of China’s Accession Protocol is the EU more likely to follow?” can be answered by first accepting that “the driving force behind paradigm formation … is the manipulation and control of human activity and social phenomena”\textsuperscript{284}. It is, in other words, a question of “who is going to control whom [and] in whose interest is the controlling going to be?”\textsuperscript{285} We are thus confronted by

the social bases and implications of control and manipulation. We would be extraordinarily foolish to presuppose that these bases are equitably distributed throughout society. Our history up until the present time shows that they are usually highly concentrated within a few key groupings in society\textsuperscript{286}.

The point is that concepts, categories, relationships and methods are constructed and do not exist independently from the social relationships which exist in society\textsuperscript{287}. We have argued that particular industries are “driving the political agenda on anti-dumping”\textsuperscript{288}. They are to a great extent responsible for the negative connotation around the term ‘dumping’ and non-market economies. Consequently, it can be presumed that this kind of evaluation is going to have an impact, or rather, an absence of impact on legislation with respect to China’s market economy status. It is therefore industry that is going to control the EU’s interpretation of Section 15 and the controlling is going to be in their own business interest.

A second part of the answer is provided by accepting that the question is not a purely technical one. Karel De Gucht, the former EU Commissioner for trade, stated that “whether China is or is not a market economy is a technical question under EU law”\textsuperscript{289}. But this is not correct. The primary justification for anti-dumping legislation is really, as Brink writes, “more political than economic”\textsuperscript{290}. Other authors confirm this, writing that the decision to accord market economy status to China “remains mostly political”\textsuperscript{291}. Zunic writes that “one does not need a crystal ball to

\textsuperscript{284} Harvey, 1972, p. 113-114.
\textsuperscript{285} Ibid., p. 114.
\textsuperscript{286} Ibid.
\textsuperscript{287} Ibid.
\textsuperscript{288} Davis, 2009, p. 8.
\textsuperscript{289} Karel De Gucht quoted in Sun and Whally, 2015, p. 11. De Gucht was EU Commissioner for trade from February 2010 to October 2014.
\textsuperscript{290} Brink, 1999, p. 3.
\textsuperscript{291} Urdinez and Masiero, 2015, p. 156.
predict that the EU will try to find a way to shield the domestic industry”.\textsuperscript{292} Even when we allow for the possibility of a paradigm shift in trade policy, “the choice between paradigms can rarely be made on technical arguments alone”\textsuperscript{293}:

The movement from one paradigm to another will ultimately entail a set of judgments that is more political in tone, and the outcome will depend, not only on the arguments of competing actions, but on their positional advantages within a broader institutional framework, … and on the power of one set of actors to impose its paradigm over other\textsuperscript{294}.

Issues of authority are central to the process of paradigm change. We believe that this is not any different with regard to the ‘predatory dumping paradigm’ and the dispute around China’s market economy status. Faced with conflicting opinions from the experts, legislators will have to decide whom to regard as authoritative, especially on matters of such complexity, and the policy and legal community will engage in a contest for authority over the issues at hand. As we have argued, the movement from one paradigm to another should be preceded by “significant shifts in the locus of authority over policy”\textsuperscript{295} and accompanying changes in discourse. Considering that industry is well positioned within the mechanism of European anti-dumping regulation, and that neither industry nor legislators have significantly adapted their dumping rhetoric over the years, we can only conclude that it is highly likely that the European Union will not accord market economy status to China.

6.2 INDICATIONS

Next to the justification for our claim mentioned above, there are other indications that support our assumption. Firstly, a number of members of the European parliament expressed their support for O’Connor’s interpretation at a workshop. They argued against the recognition of China as a market economy and thus for the special regime in calculating dumping duties. The workshop was requested by the European Parliament’s Committee on International Trade on the question. O’Connor mentioned the “legal certainty” that China was not a market economy as far as the EU was concerned\textsuperscript{296}. As the provisions in Section 15 did not state that China was or would automatically become a market economy, the expiry of Section 15(a)(ii) did not remove its obligation to demonstrate that it was a market economy according to the law of the importing WTO member, and nor did it diminish the EU’s right to do something different in respect of China

\textsuperscript{292} Zunic, 2015, p. 27.
\textsuperscript{293} Hall, 1993, p. 280.
\textsuperscript{294} Ibid.
\textsuperscript{295} Ibid.
\textsuperscript{296} Workshop, 2016, p. 9.
when it calculated the normal value\textsuperscript{297}. MEP Büttikofer said that “China was obviously not a market economy”. China could argue that it was a “market economy with Chinese characteristics,” but then perhaps the EU should be entitled to grant “MES with characteristics,” i.e. while keeping its trade defence instruments\textsuperscript{298}. MEP Fernández supported this view and stressed that there was “a dumping problem”\textsuperscript{299}. Second, industry voiced its opposition to the recognition of China’s market economy status as follows. Euromines agrees with us, albeit for reasons which are informed by their own interest, that “until the WTO establishes an agreed interpretation, no WTO member can be sure that its own interpretation of one part of the Protocol is correct”\textsuperscript{300}. They fear that if China was to be considered a market economy, “any anti-dumping measures would have to be recalculated to the disadvantage of the European industry” and “Chinese steel could replace 10-15% of the EU steel production and, as a consequence, would make a similar percentage of the EU refractories production obsolete”\textsuperscript{301}. But although Euromines claims that it is impossible to agree over a correct interpretation of Section 15, they clearly follow the ‘national interpretation,’ as they write that “China is not a market economy according to EU law”\textsuperscript{302}. The Dutch Confederation of Industries also views the legal interpretation as unclear but says that “granting MES to China would not correspond to the situation on the ground”\textsuperscript{303}. AEGIS EUROPE, a manufacturing industry association, said that the only thing that was clear at the moment was how unclear the legal interpretation of Section 15 was\textsuperscript{304}.

6.3 TEAR DOWN THIS WALL.

From the testimonies above, as well as our theoretical argumentation, we believe that it is highly likely that the EU will not recognize China’s market economy status and will continue to use the analogue country method in determining anti-dumping duties. This will restrict cheap imports and deny the benefit thereof to downstream industries and consumers. The question whether China is a market or non-market economy is actually irrelevant for the whole discussion around the advantages or disadvantages of international price discrimination. But the premise upon which the possibility for the use of the analogue country method is build is contained within Section 15 of

\textsuperscript{297} Workshop, 2016, p. 10.
\textsuperscript{298} Ibid., p. 13.
\textsuperscript{299} Ibid., my emphasis.
\textsuperscript{300} Euromines, 2016, p. 3.
\textsuperscript{301} Ibid., p. 4.
\textsuperscript{302} Ibid.
\textsuperscript{303} Workshop, 2016, p. 14.
\textsuperscript{304} Ibid.
China’s Accession Protocol and hinges on the consideration whether China can be considered a market economy or not. However, we believe, following economists such as Gregory Mankiw and Paul Krugman,\textsuperscript{305} price discrimination is not necessarily a bad thing or invariably the result of malicious intentions. In fact, in most cases it is not something negative. We understand, however, that such a “revolutionary theory,”\textsuperscript{306} in the Kuhnian sense of the word, which forms the basis for a new paradigm, will only gain general acceptance when certain social relationships are adapted. Recognizing that there is a lack of evidence for the danger of predatory pricing in international trade implies doing away with both the influencing power of concentrated industrial sectors and the discretionary power of investigating authorities. Together, these form a great European wall around fortress Europe. We would therefore like to end this section by exclaiming, as a purportedly true believer in the free market, Ronald Raegan, did in 1987: “tear down this wall!”

\textsuperscript{305} Davis, 2009, p. 4.
\textsuperscript{306} Harvey, 1972, p. 114.
A spectre is haunting the European Union – the spectre of predatory pricing. The current configuration of power in the EU regarding dumping practices is characterized by a consensus between concentrated industrial sectors and the investigating authorities. A significant part of industry, legal scholars and legislators share the same beliefs, ideas, concepts and values with regard to dumping. The ‘fairness’ narrative is crucial in this regard as a justification for anti-dumping actions. We have introduced the ‘predatory pricing paradigm’ to answer the question why, in the face of the crumbling evidence for the supportability of this consensus, dumping policy is still predicated upon certain common convictions. The widespread acceptance of the claim that predatory pricing is the principle justification for anti-dumping measures is, perhaps, the ultimate triumph of the predatory pricing paradigm. However, we have argued that price discrimination should not immediately be categorized as the foppery of foreign governments. The threat it poses is a creation of the mind, its aggregate economic consequences phantom pain, and the overall injury to Community industry a mere figment of the imagination. On the basis of a thorough analysis of the discourse of the relevant actors involved, we have concluded that the paradigm is the result of lobbying activities that have influenced, and still influence, legislators and legislation.

In addition, we have made a distinction between a ‘national’ and ‘threshold interpretation’ of Section 15 of China’s Accession Protocol. These interpretations are both based on the ‘ordinary meaning doctrine’ and claim to give ‘full meaning’ to the provisions of the text. We have shown that these attempts fail even before they have started since the meaning of the word on which a convincing interpretation of Section 15 rests, namely that of a ‘non-market economy,’ has never been clear to begin with. The conception of a ‘non-market economy’ by both parties is, in Kuhnian terms, incommensurable. This is the reason why the ‘national’ and ‘threshold interpretation’ have not, and, unless the term ‘non-market economy’ is defined, will not reach their Hegelian synthesis. The ‘clear’ or ‘full meaning’ these interpretations purport to find is as much a fabrication as the spectre of predatory pricing mentioned above. One can reason both for and against an automatic shift towards market economy status, based on different conceptions of what the term ‘non-market economy’ means. Since there is no definition and thus no clear determination of the meaning of the word, we believe that we currently have to suspend our judgment. That is, until the concept of a ‘non-market economy’ has been uniformly defined and accepted.

Finally, we have argued that, because of the existence of the ‘predatory pricing paradigm,’ it is highly likely that the EU will follow the ‘national interpretation’. We have argued that the question
around the interpretation of Section 15 can be reduced to the question of who is going to control whom and in whose interest is the controlling going to be? Concepts do not exist independently from the social relationships which exist in society. The lobbying efforts of particular industries are the driving force behind the agenda on anti-dumping and to a great extent responsible for the negative connotation around the term ‘dumping’. Consequently, we have argued that this kind of evaluation is going the have an impact, or rather, an absence of impact on legislation with respect to China’s market economy status. In other words, we have come to the conclusion that the lobbying activities of concentrated industrial sectors are going to influence the EU’s interpretation of Section 15 with their own business interests in mind. Considering that large industries are well positioned within the corridors of power of European anti-dumping policy, and that neither industry nor legislators have significantly adapted their dumping rhetoric over the years, we can only conclude that it is highly likely that the European Union will not accord market economy status to China.

The designation of China as a non-market economy is currently being used by the EU as an excuse for imposing anti-dumping measures, thereby protecting particular industrial sectors faced with rising global competition. It implies that dumping duties are a discursively veiled form of protectionism based on the rhetoric of fairness and dressed in the garb of the rule of law. We have argued that China is being accused of distorting international trade while it actually is EU interventionism which impedes free trade. It makes dumping the most widely abused trade policy instrument in the history of the European Union. This is not something to be proud of. It is detrimental not only to the economic development of the EU but also to the spread of wealth around the globe. It not only bereaves consumers and downstream industries of the benefit of cheap imports but also creates unfair trade barriers for importers seeking access to the European market. The ultimate goal of this dissertation, then, is to provoke a ‘revolutionary’ change in the way we think about ‘dumping’. A paradigm shift is needed in the dumping debate, which revaluates our values and reconsiders what is to be considered ‘fair’. We hope to have contributed to widening the crack in this mental barrier, even if only a little. Therefore, this repeated call, may it echo as footfalls in the corridors of power: tear down this great European wall!
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