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The EU Treatment of Non-Market Economy Countries in Antidumping Proceedings

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Summary

The system of differential treatment of so called non-market economies (NME:s) in antidumping proceedings seems to stem from the idea that NME:s are fundamentally different from “market economies” as concerns the amount of hidden subsidies (publicly financed goods and services) present in those markets. Apart from this questionable idea, there is no coherent theory of what the problem with “non-market economies” is in international trade. Neither is there a coherent idea as to how the system of discriminating against them in anti-dumping proceeding alleviates this problem.

The WTO-agreement offers no guidance as to what constitutes a non-market economy, nor as to how they should be treated in antidumping proceedings. Different users of the antidumping instrument use different methods.

As far as the EU practice goes, an examination of a number of recent cases reveals the following:

- The non-market economy treatment yields significantly higher dumping duties. On average, antidumping duties against those companies granted market economy treatment (MET) is 28 percentage points less than for those companies not granted MET.**
- Companies granted “Individual treatment” gets on average 15 percentage point lower antidumping duties than those not granted such treatment.**
- State interference and carry-overs from the NME system are the most common reasons for the EU not to grant MET to the applicant.**
- When a company is found to benefit from some kind of carry-over from the NME system, no quantification of the size of the benefit (or “subsidy”) is made.**
- China is the most often targeted NME in antidumping investigations.**
- The US is the most frequently used analogue country.**

As for the future, it can be noted that special system for NME:s in antidumping proceedings is today relevant only for China and Vietnam. Thus, the relevance of the entire system would expire if these two countries are granted MET by antidumping users such as EU and the US. In the case of China, the Chinese protocol of accession to the WTO states that NME-provisions can only be used until 2015.

Even if the entire concept of NME-treatment in antidumping proceedings can be questioned, there are a number of things which could be improved within the given system. These include:

- Stating the value benefits/subsidies/rebates that a company might receive due to a prevailing NME-system, or due to carry-overs from an NME-system**

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- **When subsidies are found, these should result in an adjustment to the production costs for the concerned company, rather than a refusal to grant MET to the company concerned.**
- **When choosing analogue country, preference should be given to countries with similar cost structure and level of development, as the target country.**
- **Each company should be individually assessed upon its own merits, and sampling should not be used when assessing market economy status of individual companies**

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1 Introduction

In April 2006 antidumping duties on imports of leather footwear from China and Vietnam were introduced in the EU. According to the official press release from the European Commission “The measures follow a preliminary Commission investigation that has identified clear evidence of disguised subsidies and unfair state intervention to the leather footwear sector in China and Vietnam.” Cheap finance, tax holidays, non-market land rents, improper asset valuation and export incentives were listed as examples of unfair state intervention.

The press release caused great confusion among media and the public. Nowhere was it explained how “subsidisation” is supposed to cause dumping. Dumping was being portrayed as a matter of “unfair subsidisation”. A plain explanation of the system of non-market economy treatment would have helped greatly.

The general confusion in the reporting of the recent shoe case clearly illustrates the lack of a coherent understanding of the concepts of “non-market economies”, dumping and subsidisation, and the interrelationship between these concepts. In the light of this, this study seeks to explore the origins of the non-market economy treatment of certain countries in antidumping proceedings. In this study we take a deeper look into the area of special conditions regarding non-market economies (NME:s) in antidumping investigations and analyse to what extent the problems that NME:s are believed to cause in world trade, are successfully tackled by the system of NME-treatment in antidumping proceedings.

The GATT foresees that there could be difficulties in doing antidumping investigations involving a “*country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State*”. The origin of this provision is of course the situation of “state trading” common in Soviet-bloc economies. Even though practically no countries today can be defined as state trading countries some users of the antidumping instrument still apply special rules for exporters in countries classified as non-market economies.

The paper is concerned with the way dumping is defined for exports from countries defined as non-market economies. The first part of this paper provides an economic and historical background to the system of non-market economy treatment of certain countries within the framework of antidumping procedures and examines at what motivates such a treatment. A second part this paper describes the EU treatment of NME, and attempts to find the economical reasoning behind the current system as well as critically evaluate it. This part is followed by a more empirical analysis of the EU practice over the past five years in the field. A final chapter offers some conclusions and recommendations on how to proceed with the treatment of non-market economies.

2 Background

2.1 General principles of antidumping law

The WTO-system for trade in goods is based on a number of basic rules. Two such rules are that any tariffs should apply equally to all members on a most-favoured-nation (MFN) basis, and that tariffs once bound should not be raised without a re-negotiation. To these basic rules there are a number of exceptions, most notably the one concerning antidumping measures. Antidumping measures mean that tariffs are unilaterally raised without renegotiations, contravening the rules of bound tariffs, and they can be used against specific countries, contravening the MFN-rule. Being a major exception to the general rule, the rules governing the use of antidumping measures are quite detailed. For antidumping measures to be WTO-compatible the imposing country need to show the occurrence of dumping which is causing injury to the local industry. "Dumping" means selling a product below its "normal value", and is defined in GATT article VI as one of the following:

- 1) selling at an export price which is below the home market price
- 2) selling at an export price which is below the export price to a third country, or
- 3) selling at an export price which is below the cost of production plus profit and selling cost

In addition to this, the GATT foresees that none of the above methods might be appropriate for countries where trade is conducted by a state monopoly which sets the prices. 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" (NME:s). In cases involving NME:s, dumping is defined as selling below either price or costs of production in an "analogue" or "third" country market.

2.2 Economic reasons for the special treatment of NME:s

The system of non-market economy treatment of certain countries stems from the idea that free trade only works if those trading with each other do so on "free market", i.e. essentially capitalist non-regulated markets. The distinction of market/non-market economies stems from a time when there was a clear divide between economies following the ideas of market-based economics and those which followed the idea of central planning.

According to the US Department of State *Glossary of Trade*, a non-market economy is defined as:

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“A national economy in which the government seeks to determine economic activity largely through a mechanism of central planning, as in the former Soviet Union, in contrast to a market economy, which depends heavily upon market forces to allocate productive resources. In a non-market economy, production targets, prices, costs, investment allocations, raw materials, labor, international trade, and most other economic aggregates are manipulated within a national economic plan drawn up by a central planning authority. Hence, the public sector makes the major decisions affecting demand and supply within the national economy.”¹

Needless to say there are few such markets in the world today, but rather all markets are more or less regulated and there is a certain level of state involvement in most economies. A comparison between how a number of countries, NME:s and market economies, fulfil the US criteria of “market economies” reveal that countries classified as market economies, such as China, do not necessarily have less state involvement in the economy than do those at present classified as market economies, such as France. India has for example 22 percent government income from state owned enterprises, while Chinas income from state owned enterprises is as low as 5%.

Table 1: Comparative Data on Some US Indicators of Market Economy

Criteria	NMEs		Recent market economies		Market economies		
	Vietnam	China	Kazakhstan	Russia	India	Bangladesh	France
Official exchange rate to parallel exchange rate ratio	95	96	90	73	94	84	99
Foreign direct investment, net inflows (% of GDP)	4.14	0.03	1.53	0.11	0.06	0.59	0.02
Revenues from SOE ² s and government ownership of property (% of total revenues)	4	5	3	4	22
Government Expenditures (% of GDP)	24	18	25	35	31	14	49
Government Consumption (% of GDP)	6	14	17	16	13	5	23
Private Income (% of GDP)	70	78	15	22
Domestic credit to private sector (% of GDP)	35	125	13	12	29	25	...
Trade in goods (% of GDP)	96	44	78	60	20	32	47
Weighted Average Tariff Rate	19	15	10	11	29	21	2

Source: Table taken from McCarty, and Kalapesi *The Economics of the “Non-Market Economy” Issue: Vietnam Catfish Study World* Original data from: *Development Indicators 2000*, ADB (2000), *Heritage Foundation Index of Economic Freedom (2002)*

¹ US Department of State Glossary of Trade available at <http://usinfo.state.gov/products/pubs/trade/glossjr.htm#nonmarkeco>

² State owned enterprises

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Some argue that there is economically no such concept as a non-market economy. Rather the concept is a legal one that exists merely in the framework of an antidumping investigation of certain countries. According to critics, “In effect the term non-market economy has become a non-tariff barrier, facilitating selective restrictions on imports from low-cost economies into developed country markets.”³

Given that there generally in economic theory might be little reason or justification for classifying countries as either market economies or non-market economies, there might still be justifications for such a classification within the system of antidumping measures. In fact, while there in economic literature exists a concept of “market-economies”, the concept of “non-market economies” seems to exist only within the boundaries of anti-dumping proceedings.⁴ The theoretical origin of a non-market definition of dumping rests with the idea that comparing prices on different markets is meaningless when markets do not actually set the price. Home-market prices and costs are thus meaningless when it comes to defining a “normal value” of a product traded or produced in a non-market economy.⁵ In most economies it is generally accepted that the state offers a number of services, such as roads and sewage systems, without a specific charge. Were costs of production in such a country to be compared to prices in a country where each firm was individually charged for such services, there would be similar problems.

The question of non-market economy status is intimately linked to the question of subsidies. Inherent in the discrimination, as it were, of non-market economies is the idea that there are hidden subsidies throughout a non-market system. This has in the US lead to court rulings that anti-subsidy measures cannot be used against NME:s, using the following logic:

“We believe a subsidy (or bounty or grant) is definitionally any action that distorts or subverts the market process and results in a misallocation of resources. . . . In NMEs resources are not allocated by a market. With varying degrees of control, allocation is achieved by central planning. Without a market, it is obviously meaningless to look for misallocation of resources caused by subsidies. There is no market process to distort or subvert.... It is this fundamental distinction—that in an NME system the government does not interfere in the market process but supplants it—that has led us to conclude that subsidies have no meaning outside the context of a market economy.”⁶

³ McCarty, Adam and Kalapesi, Carl, 2003, The Economics of the “Non-Market Economy” Issue: Vietnam Catfish Case Study Mekong Econom-ics, available at <http://www.mekongconomics.com/publications/Vietnam%20Non%20Market%20Economy.pdf> (2006-05-08)

⁴ If indeed there is such a concept as a “non-market economy” the term used is normally “planned economy”.

⁵ Gary Horlick and Shannon Shuman, 1984, “Nonmarket Economy Trade and U.S. Antidumping/Countervailing Duty Laws”, 18 *International Lawyer* 4 (Fall) p 818

⁶ 49 Fed. Reg. 19370, 19374 (May 7, 1984), as cited in United States Government Accountability Office *U.S.-CHINA TRADE Commerce Faces Practical and Legal Challenges in Applying Countervailing Duties*, (GAO 05-474) June 2005

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As can be seen from above, the idea is clear that the major problem of NME:s is that the entire NME system is one of subsidisation. As will be further explored in this paper, the lack of a coherent theory of what economic problems NME:s pose in international trade, means that the origins of the treatment of NME:s in antidumping proceedings is difficult to explain, and the treatment differs significantly between countries. As there is no coherent formulation of the “problem” there are also no coherent approaches to its “solution”.

2.3 Historical explanations for the special treatment of NME:s

The system of non-market economy treatment first appeared during the negotiations of the International Trade Organisation’s Charter after World War II. As the Soviet Union, which was virtually the only country with a state foreign trade monopoly at the time, was to be a party to this Charter, the Suggested Charter had a section on “Expansion of Trade by Complete State Monopolies of Import Trade”, essentially stating that state trading country need to import products at a minimum value to be agreed upon. This methodology was already included in the bilateral trade agreement between the US and Soviet Union, where the Soviet Union was under obligation to place order in the US for a certain amount each year, in exchange for most favoured nation treatment.⁷

With Soviet Union not joining GATT, the provision on State trading countries was eventually dropped from the GATT. As it was believed that “mixed economies” were a passing phenomenon of the post-war period, provisions concerning such economies were cut down to a minimum. In GATT 1947, a reference to state trading was made in article XVII, imposing a non-discrimination requirement on state trading enterprises.⁸

The only reference to state trading economies as such in GATT:s anti-dumping rules is the supplementary provision to article VI, which reads:

“It is recognized that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purposes of paragraph 1, and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate.”⁹

⁷ Polouektov, Alexander 2002 “Non-Market Economy Issues in the WTO Anti-Dumping Law and Accession Negotiations Revival of a Two-tier Membership?” *Journal of World Trade* 36(1): 1–37, p 6

⁸ Polouektov p 6

⁹ Second Supplementary Provision to paragraph 1 of Article VI in Annex I to GATT 1994. The Antidumping Agreement subsequently re-affirms this provision by stating that “This Article [2.7] is without prejudice to the second Supplementary Provision to paragraph 1 of Article VI in Annex I to GATT 1994.”

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Two things can be noted in this provision. Firstly, in a strict sense it applies only to countries where there is a complete or substantially complete monopoly of trade, and where all prices are fixed by the state. Even before the decline of the Soviet Union, such countries were hard to find, and it is unlikely that any of the countries classified as non-market economies today fit this description. Secondly, the provision simply states, as a matter of fact, that prices (all set by the state) might not be appropriate for comparison. The provision does not give any alternative solutions to this problem, and does not affirm the use of prices or costs in an analogue country as a basis for calculating normal value. This provision, however, remains, apart from time-limited protocols of accession, the only reference to a non-market system of price comparison, that exists in the WTO-agreement.

US conducted its first antidumping investigation involving a centrally planned economy in 1960¹⁰. The EU incorporated its first antidumping legislation in 1968¹¹, but its rules on non-market economies were first introduced in 1979¹². The EU, with its proximity to Eastern Europe, had more trade with non-market economies early on. Between 1968 and 1982 the EU completed 233 antidumping cases, of which 82 involved products from the non-market economies of what was then Comecon. Of these, 60 led to final measures that were implemented as “undertakings or other similar solution”.¹³ When using a system of undertakings, whereby the exporter undertakes not to sell below a certain price, the question of calculating dumping margins becomes less important. The EU also had agreements with a number of state trading countries, including China, which stipulated, for example, that trade should be effected at market-related prices.¹⁴ Historically the US has had its system of safeguards against Communist Countries¹⁵ and therefore there has been less of a need to use the NME-antidumping system for protection.

There is no mention of non-market economies in the 1995 WTO Anti-dumping Agreement. In a number of accession protocols to WTO, dating as early as that of Poland in 1968, there has however been an acceptance that a non-market economy exception should apply.¹⁶ The most recent is the accession protocol of China.¹⁷

¹⁰ Horlick p 808

¹¹ Li, Wenxi, *Antidumping Law of the WTO/GATT and the EC*, Juristförlaget i Lund 2003, p 69

¹² Van Bael & Bellis *Antidumping and Other Trade Protection Laws of the EC*, Fourth edition, 2004

¹³ Horlick p 815

¹⁴ Horlick p 815

¹⁵ Section 406, Trade Act of 1974

¹⁶ Horlick p 834

¹⁷ Accession of the People’s Republic of China (WT/L/432) para 15 states that 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.

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In conclusion, the historical origins of the special treatment of NME:s cannot easily be traced. One explanation for this could be that most formerly planned economies (essentially communist countries) were not signatories to the GATT, and a discriminatory treatment of these countries therefore need not be formalised. From the historical overview it can also be concluded that the system of treatment of NME:s was not substantially changed when these countries transformed their economies towards market economies. Instead, the system of differential treatment of NME:s have stayed, perhaps because it has proven to offer a quite simple, not apparently WTO-inconsistent way of granting contingent protection against imports from these very same countries.

3 The EU system for treatment of non-market economies

The EU has had a formal rules for the treatment of NME:s since 1979. In this chapter we explain how the system works and how it has changed over time. In this chapter we also try to find the logic within the system that has emerged, as well as to compare it to the NME-system of other antidumping users.

3.1 Normal value in non-market economies

As explained above, dumping is defined as exporting a product at a price lower than the “normal value” of the product. As it is believed that prices and cost do not represent normal values in NME:s, the special system of treating NME:s in antidumping proceedings has primarily to do with how to define normal value.

According to article 2 p 7 in the EU antidumping regulation¹⁸, normal value in a non-market economy should be determined on the basis of one of the following:

- 1) the price in a market economy third country,
- 2) the constructed value (cost of production and selling plus profit) in a market economy third country,
- 3) or the price from such a third country to other countries, including the Community, or
- 4) any other reasonable basis, including the price actually paid or payable in the Community for the like product.

In reality however only the first two methods are used, i.e. price or **constructed value in the analogue country**.

¹⁸ Council Regulation 384/96

3.2 The choice of analogue country

There are no detailed of rules governing the selection of the analogue country. According to article 2 p 7 an appropriate analogue country should be selected in a “not unreasonable manner” and due account should be taken of any reliable information made available at the time of selection. The Community itself may be selected as an analogue country. In practice, the choice of analogue country is restricted by the possibility to find producers in third countries that are willing to cooperate. The special system for calculating normal value for NME:s means that if an analogue country is chosen where prices or costs of production are higher than in the non-market country, the dumping margins will be inflated unless the investigated exporters are able to justify adjustments for differences in cost structures.

3.3 Non-market economies in the EU system

The EU antidumping regulation does not stipulate what constitutes a non-market economy. Instead the regulation lists 15 countries considered to be non-market economies, and presently divides them into the following three groups.

Table 2 Categories of NME:s in EU basic regulation

1	Those which have had reforms which have led to the emergence of firms for which market economy conditions might prevail ¹⁹	China, Vietnam and Kazakhstan
2	Any non-market-economy country which is a member of the WTO at the date of the initiation of the investigation	Albania, Armenia, Azerbaijan, Georgia, Kyrgyzstan, Moldova and Mongolia
3	Other non-market economies	Belarus, North Korea, Tajikistan, Turkmenistan and Uzbekistan

It can be debated on what basis these countries have been assigned the NME status in the first place, and what their possibilities are to be reclassified as market economies. The basic antidumping regulation does not stipulate any procedure or criteria classifying countries into market or non-market economies. The Commission however asserts that the criteria used when assessing an application for a NME to be reclassified, are inspired by the criteria applicable for individual companies.²⁰

¹⁹ Council Regulations No 905/98 and No 2238/2000

²⁰ European Commission *Update for the argumentaire concerning China's request for market economy status in trade defence investigations* (TRADE:B:1/AHS D(2006)D/1277 (Limited) p 3

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It needs to be noted however, that out of the 15 countries classified as non-market economies by the EU, the EU has only applied antidumping measures against six of them, namely Belarus, China, Kazakhstan, Moldova²¹, Uzbekistan and Vietnam. For the remaining nine countries market economy status would at present have little more than symbolic significance.

For the countries in the first two groups individual companies may apply for “market economy treatment (MET)” which means that their normal values will be calculated based on their own home market prices or costs. Alternatively they may apply for individual treatment, which means they can be assigned an individual dumping margin based on the company’s own export prices, rather than the country wide margin. For the countries in the third group normal value is established on the basis of prices or costs in the analogue country, as described above. For these countries individual companies cannot be granted MET or individual treatment.

Table 3 Three kinds of companies in NME:s?

Basic assumption for all companies in NME:s	Market economy treatment (MET)	Individual treatment (IT)
Costs and prices do not reflect market signals=> normal value based on costs and prices in analogue country	“Market economy companies” located in a NME, companies operate under market conditions => normal value based on company data	Export prices are set at market rates => companies own data for export prices is used when determining dumping margins

3.4 Market economy treatment (MET) of individual companies

Companies that are granted MET are treated the same ways as if they were situated in a market economy. Individual companies which seeks to be granted MET need to prove that:

1. decisions of firms regarding prices, costs and inputs, including for instance raw materials, cost of technology and labour, output, sales and investment, are made in response to market signals reflecting supply and demand, and without significant State interference in this regard, and costs of major inputs substantially reflect market values,
2. firms have one clear set of basic accounting records which are independently audited in line with international accounting standards and are applied for all purposes,

²¹ Against Moldova there has only been anti-circumvention measures, which means no normal value was calculated for Moldova.

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3. the production costs and financial situation of firms are not subject to significant distortions carried over from the former non-market economy system, in particular in relation to depreciation of assets, other write-offs, barter trade and payment via compensation of debts,
4. the firms concerned are subject to bankruptcy and property laws which guarantee legal certainty and stability for the operation of firms, and
5. exchange rate conversions are carried out at the market rate.

These criteria first appeared in the EU antidumping regulation in 1998, when the possibility for companies in China and Russia to be granted MET was introduced²². The preamble to this change in the regulation speaks of how China and Russia has fundamentally changed their economies, and that there therefore is a need for the antidumping regulation to recognise the emergence of firms for which market economy conditions prevail. Apart from this, there is in literature very little explanation as to how these criteria appeared, and why they are motivated. Below is an attempt to explain the logic behind the criteria for granting MET.

A natural question is if these criteria make sense in an antidumping context. That is, what is the problem with the pricing by companies in NME, that is not found with the pricing companies in NME:s that meet the MET criteria? Here it is important to revisit the question of why firms dump. Theoretically firms in market economies should be profit-maximising, i.e. they should sell a certain product at a certain price because they make a profit from it. Firms can sell at a profit even when they are dumping by the definition used in the Antidumping Agreement. Firms might sell products at different prices in different markets, but still make profits, albeit at different levels, in both markets. Alternatively it is believed that firms might dump to the extent that they sell without making a profit or even without recouping their costs (i.e. not profit maximizing), simply to kill their competitors, in order to later, in the absence of competition, make larger profits. This is indeed one of the main arguments used to defend the antidumping instrument. When it comes to firms in NME:s however, the reasons to dump might, theoretically, differ. Theoretically these firms are believed not to be profit maximizing, but are agents of the state who need to abide by the rules of production and sales set by state. These rules need not be governed by the aim that the individual firms should maximise their profits, but perhaps that employment should be provided in a certain area, that inputs for another industry should be supplied at a certain given price, that goods for consumers should be made available in a certain quantity and/or price, or that foreign exchange should flow into the country. For example, if a firm is ordered to export a certain amount of goods in order to achieve some advantage, this could be a reason for that firm sell below costs in the international market, simply to meet their export targets.

²² Council Regulation 905/98

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Given that the theoretical reasons for firms to dump might differ between market economies and the theoretical construct of a non-market economy, the question remains as to how the criteria set out above tackle this difference. If companies are granted MET, their export price should be compared to *their domestic selling price*, in order to determine their individual dumping margins. Domestic selling price can only be used as a normal value if domestic sales are done in the “ordinary cause of trade”²³. In the EU practice this means that there needs to be a certain volume of *profitable* sales in the home market. In order to determine if sales are profitable, one needs to look at the cost of production. This means that even if normal value is not to be constructed based on cost of production, the cost of production is still instrumental in determining normal value. As it is believed that the cost in NME:s are not set by the market, it is believed that the real “cost of production” cannot be determined in an NME. Hence, the criteria for granting MET to individual companies should reflect the extent to which the cost of production of these companies are true. This is where antidumping measures against NME:s becomes intimately linked to anti-subsidy measures. If the costs of production, i.e the price of inputs, labour and land, is set by the state and if such a price is lower than what would be the case in a market situation, this implies that production is subsidised. For the individual company in an NME however, the price paid represents the actual cost of production for that company. When these companies sell in their home market at prices above the cost of production they actually incur, this would have to be classified as “in the ordinary cause of trade”. Thus, had these companies been in a market economy, the home market price would be used as normal value.

To sum up, we can distinguish two problems with NME:s that could roughly be simplified as: 1) NME firms might dump because the state “orders” them to, and 2) below “true”cost dumping cannot be detected as costs are kept artificially low through government subsidised inputs. Below we critically assess to what extent the MET-criteria deals with these two problems.

1. Firm decisions taken without state interference: This criterion seem to address two problems, state interference in terms of output, which could cause firms to dump as described above, and state interference in terms of the prices of inputs, which could amount to a subsidy.
2. One set of accounting standards: This criterion does not seem to directly address any of the two problems, but is rather concerned with the problem of not being able to verify the information given by firms. In market economies, where it is in no way impossible for firms to have questionable accounting standards, this problem is addressed by the use of “facts available”.²⁴

²³ Antidumping Regulation article 2 a) p 1

²⁴ Article 18 p 1 of the Antidumping Regulation states that “where it is found that any interested party has supplied false or misleading information, the information shall be disregarded and use may be made of facts available”. Often such information is the

3. Distortions from non-market system: This criterion, like the first criterion, addresses distortions of costs. The difference between this criterion and the first one seems to be that while the first criterion appears to address ongoing distortions, this criteria addresses also distortions that happened at the point of transition. This transition could have included a one-off subsidy, which would have an ongoing effect on costs of production.²⁵ Systems of barter trade and payment via debt compensation, though uncommon, cannot be seen as alien to a market economy. The reason for including this element in the criteria could be that it would be difficult to assess if prices charged in such trade are in fact set by the market, and it would therefore also be difficult to see if the prices are subsidised.
4. Bankruptcy and property law: The issue of bankruptcy has to do with both reasons to dump and subsidisation. If an insolvent company is allowed to continue its business, this would mean that its creditors are in fact “subsidizing” production. This happens of course also in market economies, when creditors believe that it is better for companies to continue its operation, in order to improve its financial situation and be able to pay off its debt, rather than to be brought to bankruptcy. The difference here rests with the fact that when bankruptcy laws exist, creditors are given a choice as to file for bankruptcy. If creditors “choose” to continue “subsidizing” an insolvent business, this could be considered as a market driven decision, and thus does not amount to a subsidy. The other problem is that when a company does not have an option to file for bankruptcy, they might be force to continue their production, even if unprofitable, in order to minimise their losses. Hence the inability to go bankrupt could be an incentive to dump. This dumping would however be possible to detect even in a market situation since it would be a matter of selling below costs.

The criterion about property law is more problematic. If there is no respect for property rights in the sense that the firm investigated could use property which does not belong to the firm free of cost, this could amount to a subsidy. If, however, the lack of respect for property rights is such that the state has access to the property of the firm, this could not be construed as a subsidy. It would then be more difficult to argue how lack of respect for property right would affect a firms production costs, or how it would enable the firm to dump. As will be seen below, there seem to be no examples of when this part of the criterion has been referred to.

information provided by the complaining industry. The use of “facts available” is believed to increase dumping margins.

²⁵ The effect of non-recurring subsidies are dubious. See eg. Grossman and Mavroidis *Here Today, Gone Tomorrow? Privatization and the Injury Caused by Non-Recurring Subsidies**, September 2002 Paper prepared for the American Law Institute project on The Principles of World Trade Law, available on <http://www.princeton.edu/~grossman/steel090402.pdf>

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5. Exchange rate: The exchange criterion implies that if firms are able to use non-market exchange rates, this would mean that the state is subsidising either the firms exports or its imports (depending on the relationship between the non-market exchange rate and the exchange rate used). The criterion is silent on the matter of if fixed exchange rates per se are to be considered “market rates”.

In conclusion it can be said that there is no coherent theory of what exact problem the non-market economy system in antidumping proceedings seeks to address. The criteria discussed above go far beyond the two problems of detecting subsidisation and state interference causing companies to dump. Rather, the criteria set up for granting MET to individual companies address a number of different issues, which do not seem to address any specific NME-problem. They attempt the varying tasks of addressing the problems of verifying information, of preventing dumping and of addressing the problems of subsidisation.

3.5 Individual Treatment of companies not eligible for MET

The EU basic regulation also provides for individual treatment of companies in certain NME:s²⁶ whose decisions regarding exports are considered not to be distorted by state interventions. In order to be granted individual treatment the applicant will have to show that it fulfils the following criteria:

- a) in the case of wholly or partly foreign owned firms or joint ventures, exporters are free to repatriate capital and profits;
- b) export prices and quantities, and conditions and terms of sale are freely determined;
- c) the majority of the shares belong to private persons. State officials appearing on the board of Directors or holding key management positions shall either be in minority or it must be demonstrated that the company is nonetheless sufficiently independent from state interference;
- d) exchange rate conversions are carried out at the market rate; and
- e) State interference is not such as to permit circumvention of measures if individual exporters are given different rates of duty.²⁷

These criteria differ from the MET criteria in the sense that they focus solely on export issues and not on issues regarding domestic prices or costs. The applicant also has to show that it is not owned by the state and that members of the management, if state officials, do not have the power to interfere in export decisions. The rationale for this is that the state in the exporting country could decide that other companies exports should be made from the company granted a lower antidumping duty and thereby circumvent the measures.

²⁶ China, Vietnam, Kazakhstan, Albania, Armenia, Azerbaijan, Georgia, Kyrgyzstan, Moldova and Mongolia.

²⁷ Article 9 (5) of the basic regulation

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The granting of individual treatment is rather exceptional in antidumping investigations regarding NME: s which may be because the criteria are essentially similar to those for granting MET. Since a large part of requests for MET fail on the applicant's inability to show that it is free from state interference, the same companies are could be likely to fail this part of the test for granting individual treatment as well. In this study we have chosen not to further discuss on the criteria for granting IT.

The differences in calculation methods for dumping margins in the four systems discussed above are summarized in table 4.

Table 4 Overview of dumping calculation method

Company category	Normal value	Export price
Market economy country	Exporters own data	Exporters own data
Market economy treatment	Exporters own data	Exporters own data
Individual treatment	Analogue country	Exporters own data
NME country	Analogue country	Exporting country data

3.6 Non-market economy sectors in market economies

The EU basic regulation on antidumping foresees that there could be problems in countries that are defined as market economies. This concept was introduced in 2002 when Russia was granted MES by the EU. The basic regulation since then provides for the possibility to use costs of productions in an analogue country if a "particular market situation" prevails in a sector. As summarized in the preamble of Council Regulation (EC) No 1972/2002, a particular market situation can prevail "because of the existence of barter-trade and other non-commercial processing arrangements or other market impediments". This may result in a market not reflecting supply and demand, and thereby cause costs and prices that are "out of line with world market prices or prices in other representative markets". Instead, the Commission might use data from other producers or exporters in the same country, or data from the world market or other representative markets.

This provision is worth mentioning since it applies in all antidumping investigations and it will apply to those countries that are defined as NME: s today. The system has its benefits, compared to the NME system, in so far that the Commission in its investigations have to point out exactly how the company's costs of production does not reflect true values and make adjustments for this. This seems to guarantee that there is a real issue that justifies adjustments in calculations of dumping margins, which may not always be the case for exporters in NME: s.

3.7 Comparison between the EU system and the system of other antidumping users

Most WTO-members have never used antidumping measures²⁸ and therefore the issue MET is irrelevant to them. For the large users, such as USA, EU and India, the issue of not granting MET is important. This is especially so since most antidumping measures are directed against China, a country not granted MET by the largest antidumping users.

For most target countries, there is no such thing as to be “granted MET”. Most countries, with the notable exception of formerly planned economies (former Soviet Union, Vietnam and China), have never been classified as NME:s. For those countries which have never been classified as “state traders” there has never been the issue of fulfilling “market economy”-criteria. The non-market economy system seems in most jurisdiction to be one where a country can only move in one direction, i.e. be granted MET, not have its’ MET withdrawn.

The EU and the US lists of NME:s correspond to each other with few exceptions²⁹. As the EU relies on a positive list, stated in the antidumping regulation, of what countries are NME:s, there is no actual criteria for actually granting MET. For the EU however, it is understood that the criteria for granting individual companies MET, are also the basic criteria for granting entire countries MET. In the table below the EU MET-criteria are compared to those of the USA, Mexico and Malaysia. As can be seen in table 5 there is no uniform definition of what is a market economy. All four countries give weight to the amount of state interference in firms’ business decisions. For some it is the actually state ownership that matters, whereas the EU does not equate state ownership with state interference. One criterion which the EU gives great importance to, and on which many firms fail, is the criterion that the firms must have one clear set of accounts which are independently audited. The US does not set up a similar criterion. This could be linked to the fact that the US system does not allow for granting MET to individual companies, so the issue of being able to verify individual companies’ data does not arise to the same extent.

The US, Malaysia and Mexico all take into account to what extent non-market economies allow free bargaining between labour and employer, something which is not specifically provided for in the EU system. However within EU, if wages cannot be freely set, this could be seen as a type of state interference.

Of the four countries examined in the table only the EU sets out a criterion concerning bankruptcy and property law.

²⁸ Since the inception of the WTO in 1995 only 42 out of the 124 members of the WTO (EU counted as one member) have reported to have initiated any antidumping procedures.

²⁹ Kazakstan is not classified as an NME by the US, but is so by the EU.

Table 5 Comparison of legal criteria for market economy treatment in four countries

EC (Regulation No. 905/98) 27.04.1998	USA (G/ADP/N/1/USA/1) 10.04.1995	Mexico (G/ADP/N/1/MEX/1/Suppl.1) 31.01.2001	Malaysia (G/ADP/Q1/MYS/6) 11.01.2001
1. Decisions of firms regarding prices, costs and inputs, including for instance raw materials, cost of technology and labour, output, sales and investment, are made in response to market signals reflecting supply and demand, and without significant State interference in this regard, and costs of major inputs substantially reflect market values	The extent of government ownership or control of the means of production	Decisions relating to prices, cost and supply of inputs, including raw material, technology, production, sales and investment, in the sector of industry under investigation, must be taken in response to market signals without any significant State interference	The degree of private investment, in particular whether private companies hold the majority of shares in whether government officials are on the board or in key management positions
Same as above	The extent of government control over the allocation of resources and over the price and output decisions of enterprises	Same as above	Company control over sourcing of raw materials and inputs. Freedom to determine export prices and export quantities
2. Firms have one clear set of basic accounting records which are independently audited in line with international accounting standards and are applied for all purposes,	No similar provision	The industry under investigation must have only one set of accounting records which it uses for all purposes and which is audited according to generally accepted accounting principles	No similar provision
3. The production costs and financial situation of firms are not subject to significant distortions carried over from the former non-market economy system, in particular in relation to depreciation of assets, other write-offs, barter trade and payment via compensation of debts,	No similar provision	The production costs and financial situation of the sector or industry under investigation must not be distorted in relation to the depreciation of assets, bad debts, barter trade and debt compensation or other factors considered relevant	No similar provision
4. The firms concerned are subject to bankruptcy and property laws which guarantee legal certainty and stability for the operation of firms	No similar provision	No similar provision	No similar provision
5. Exchange rate conversions are carried out a market rate	The extent to which the currency of the foreign country is convertible into the currency of other countries	The currency of the foreign country under investigation must be generally convertible in the international currency markets	No similar provision
No similar provision	The extent to which wage rates in the foreign country are determined by free bargaining between labour and management	Salaries in the said foreign country must be established through free negotiation between workers and employers	Freedom to hire and fire employees and to determine their salaries
No similar provision	The extent to which joint ventures or other investments by firms of other foreign countries are permitted in the country	No similar provision	No similar provision
No similar provision	Such other factors as the administering authority considers appropriate	No similar provision	No similar provision

Source: Taken from Polouektov, Alexander *Non-Market Economy Issues in the WTO Anti-Dumping Law and Accession Negotiations Revival of a Two-tier Membership?* Journal of World Trade 36(1): 1–37, 2002

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In addition to the differences in the criteria of what constitutes a market economy, there are big differences in the way the EU and the US treats NME:s in antidumping proceedings. Firstly, the use in the US does not take into account the concept of market economy treatment of individual companies. Instead the US Department of Commerce has the authority to designate individual industries that are market economy oriented.³⁰ However, no requests for such treatment have been granted. Interestingly enough, it happens that the complaining industry in the US argues that a certain industry in the NME is market oriented. The complaining industry does this in order to be allowed to file a countervailing duty application.

Another major difference between the EU and the US system is the way an analogue country is chosen. As explained above the only requirement in the EU system is that an analogue country should not be chosen in an “unreasonable manner”. In the US however, an analogue country should be at a similar level to the NME in question, and the analogue country should be a significant producer of the product concerned.³¹ Wage rates are determined by reference to wages prevailing in a market economy country at the per capita income level of the NME country being investigated.³² This difference in rules for selecting analogue countries has visible effects upon the choice of analogue country. The most often chosen analogue country to China by the US is India, while for the EU it is USA. It goes without saying that certain costs of production might differ significantly between India and the USA.

In conclusion, it can be noted that different countries set up different criteria for what constitutes a “market economy”. It could well be argued that these differences show that there is no coherent problem that the NME:treatment seeks to address. If there was indeed such a coherent problem, it is likely that countries would set up more similar criteria, since all countries trading with NME:s would be facing similar problems.

4 Empirical results from the investigation of recent EU-cases

This chapter presents our findings from our study of a number of recent cases where an assessment of individual companies MET-applications has been made.

³⁰ United States Government Accountability Office, January 2006, *U.S.-CHINA TRADE Eliminating Nonmarket Economy Methodology Would Lower Antidumping Duties for Some Chinese Companies*, p 26

³¹ Title 19 (Customs Duties) of United States Code § 1677b(c)

³² 19 C.F.R. §351.408(3)

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In order to investigate the EU practice of granting MET to individual companies we have studied all the cases where a market economy treatment assessment has been made since 2001.³³ As source for information we have used both the published regulations imposing provisional and final measures, as well as the Commission working documents in certain cases where they have offered more information. We have only included cases which have been concluded (terminated without measure or where final measures have been imposed) up until the year 2005. This means that the recent cases against certain footwear have not been included in this study.

The study covers the Commission assessment of 200 applications for individual market economy treatment. These applications involve 35 different products, and concern four non-market economies: China, Vietnam, Ukraine and Russia. Against 28 of these products, final antidumping measures were introduced, which allows us to see how the market economy status has affected the eventual duty.³⁴ Of the 200 applications, the vast majority (180) were from Chinese companies, 8 from Russian and Vietnamese companies respectively, and four from Ukrainian companies.

4.1 Use of the MET-possibility: applications filed...

The number of MET-applications per year has been fairly stable through the recent years, as can be seen in the table below. The number of applications received in each case seems to depend on the structure of the industry. In basic sectors, such as chemicals (urea, barium carbonate) and steel (ropes and cables, welded tubes) there seem to be a smaller number of exporting producers. For other sectors, such as consumer goods (bicycles and compact florescent lamps) there are usually a large number of producers.

³³ For some of these cases the actual assessment of MET was done in 2000.

³⁴ As we have only assessed the final duty imposed. Due to the lesser duty rule, which stipulates that the duty imposed should be the lower of the dumping and the injury margin, the final duty does not need to correspond to the dumping margin.

Table 6 Applications for MET in 2000-2005

Year	Product	No of claims	Granted MET
2000	Aluminium foil	2	1
	Compact fluorescent lamps	10	2
	Coke	1	-
	Colour television receivers	1	-
	Paracetamol	3	1
	Ropes and cables of steel or iron	2	-
2001	Bicycles	3	-
	Ferro molybdenum	16	1
	Granite stones	3	2
	Sulphanilic acid	1	-
	Urea	3	2
	Welded tubes	1	-
	Zinkoxide	5	3
	Lighters	7	6
2002	Para-cresol	2	2
	Carbon black	2	2
2003	Furfuryl alcohol	4	-
	Hollow sections	1	1
	Okoume	8	5
	Polyethylenetereftalate (PET)	8	2
	Silicon metal	2	2
	Sodium cyclamate	2	2
	Barium carbonate	6	2
	Bicycles	6	1
2004	Fasteners	1	-
	Glyphosate	1	-
	Hand pallet trucks	4	1
	Magnesia bricks	8	2
	Polyester staple fibres (PSF)	5	1
	Retail electronic weighing scales	1	-
	Silicon carbide	1	-
	Trichloroisocyanuric acid (TCCA)	6	3
	Tube or pipe fittings	1	1
	2005	Bicycles	4
Castings		17	5
Fasteners		1	-
Polyester fabrics		50	25
Polytetrafluorethylene (PTFE)		3	-
	Total	200	75

4.2 ... and success rate

In the period studied, 75 out of the 200 applications, or 38% were successful. The success rate of these cases stand in contrast to the assessment in the cases concerning footwear investigated in 2005, where none of more than 300 applications for MET were approved.

Table 7 Success rate of the 200 MET-applications examined

Country	No of applications	MET refused		MET granted	
		Count	Percentage	Count	Percentage
China	180	115	64%	65	36%
Russia	8	2	25%	6	75%
Ukraine	4	2	50%	2	50%
Vietnam	8	6	75%	2	25%
Totall	200	125	63%	75	38%

As mentioned above the companies applying for MET need to fulfil the five criteria set out in the basic regulation. The main reasons that MET is refused are that companies either are under state influence, or that they do not keep adequate accounts. 58% of the companies who failed MET, failed upon each of these grounds³⁵. A number of companies, 38% of the cases of unsuccessful applications, failed due to the existence of “carry-overs” from the non-market economy system. Only very few, eight of the 125 failing companies, were refused MET on the grounds that they were not subject to bankruptcy and property laws. No company in the investigation was refused MET on the grounds that they did not meet the currency criteria.

Problems with accounting generally have to do with the individual companies’ own systems, rather than problems of NME-countries in general. Similar problems could well be experienced also in market economies. Had similar problems of verification been found in companies operating in market economy systems the investigating authority could disregard the company’s own data and use facts available. Since the accounting criteria is concerned with individual company problems, and since these problems could be addressed outside the NME-system we have chosen here not to further discuss in what ways the individual companies examined fail to meet the accounting criteria. In the following part we therefore focus on the other three reasons for failing to meet the MET-standards.

³⁵ For a number of companies, not all criteria were investigated due to lack of co-operation. The figures here include only those companies for which the criteria were actually investigated.

4.2.1 Types of state interference

The type of state interference that the Commission has considered as reasons for not granting MET varies. In a large number of cases, state interference means either direct state ownership, or ownership by state owned companies. In some cases a full state ownership is the cause for refusal of market economy status whether the state actually interferes or not.³⁶ The amount of state ownership that would be allowed is unclear. In some cases it suffices to show that the state has a blocking majority, or that the other shareholders are so fragmented that the state can exercise influence³⁷. State interference can also mean that a number of members of the board of a company are directly appointed by the state or a local authority.

Another set of “state interference” refers limitations set on sale, or the fact that a certain part of what is produced need to be exported. Such requirements are often found to amount to state interference. In the case of bicycles from Vietnam, the companies located in “Industrial Zones” had to, as a requirement to be in those zones, export 80% of its produce. This requirement was found to constitute state interference.

A third set of state interference is that of restrictions on imports and exports. Systems of import quotas,³⁸ export quotas and minimum prices all means that the companies cannot take independent decisions. In the case of bicycles from China it was found that the existence of export quotas and minimum export prices meant that no company could be said to take free business decisions. However, in another case³⁹, it was noted that a minimum export price was in place, but that this should not be a reason to reject MET, as the reason for the minimum export price was to prevent dumping. Thus, the Commission practice in this regard is not entirely coherent.

4.2.2 Distortions carried over from the non-market economy system

For a number of companies, the reason they failed the criteria of distortions carried over from a non-market economy system have to do with how the company was privatised. In some cases, carry-overs from an early privatisation were not taken into account.⁴⁰ A frequent problem for many companies is that no proper record is kept of who paid what at the point of privatisation. Companies also frequently fail to prove that their assets were valued at market prices at the point of privatisation.

³⁶ Polyethylenetereftalate (PET) from China

³⁷ Urea from Ukraine (assessment of DniproAzot)

³⁸ In Colour Television Receivers from China an import quota of cathode ray tubes meant the company could not make free business decisions.

³⁹ Urea from Ukraine, assessment of Stirol

⁴⁰ In the assessment of Zhucheng in the case of Trichloroisocyanuric Acid (TCCA) from China it was found that the carry over from the privatisation in 1993 had already been depreciated, and thus were not a reason not to grant MET.

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The main carry over from non-market economy found is that of a distortion of the price paid for land. In no less than fifteen of the cases where MET was not granted due to carry over, the price of land was mentioned as an issue. The problem with price of land ranges from the fact that the price paid was not the market price⁴¹, that late payment of rent was in practice accepted, that the land use right was not properly depreciated⁴², and that provisions on land rent in contracts did not include a periodical review⁴³. A more peculiar case was found where the price of the land use right was indexed to the market price of wheat, which was believed by the Commission to be alien to a market economy system.⁴⁴

When it comes to barter trade, some actual instances of barter trade was found.⁴⁵ In other cases the Commission simply notes that there is a possibility of barter trade prescribed in the business licenses of the company.⁴⁶

It is important to note that in no cases is the value of the “carry over” from the non-market economy system quantified. As opposed to anti-subsidy/countervailing investigations, where the “value” of a subsidy needs to be calculated and needs to be above a certain *de minimis* margin for measures to be imposed, no similar quantification of level of subsidisation is done when assessing market economy status.⁴⁷

4.2.3 Bankruptcy and property laws

In the very few cases where it was found that companies did not meet the criterion of being subject to bankruptcy and property laws, it was the bankruptcy law that was the problem. In two cases it was found that there was a bankruptcy law in place, but it did in reality not apply to the companies investigated as they in fact continued to exist despite being insolvent.⁴⁸ In an unusual case the Commission argued that bankruptcy laws did in fact not apply to groups of companies which could, since they did not need to publish their accounts, hide a situation of bankruptcy!⁴⁹

4.2.4 Conclusion on success rate

The above analysis gives an idea of how diverse the situations are for companies based in NME:s and we conclude that it is important that every applicant is assessed on basis of its own merits.

⁴¹ Fasteners from Vietnam (assessment of Header), TCCA from China (assessment of Zhucheng)

⁴² Barium Carbonate from China (assessment of Hengyan)

⁴³ Castings from China (assessment of Zibo)

⁴⁴ Castings from China (assessment of Hebei)

⁴⁵ Ropes and cables from Russia (assessment of Cherepovetsky)

⁴⁶ Magnesia bricks from China (assessment of Dashiqiao City)

⁴⁷ In one case, Urea from Ukraine, it was noted that for one company at the point of privatisation, no valuation of the company had been done, but the company was still granted MET as it was considered that this problem could be corrected.

⁴⁸ Ferro Molybdenum from China (assessment of Fushun) and PET from China (assessment of Yuhua)

⁴⁹ Ropes and cables from Russia (assessment of Cherepovetsky)

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We have not been able to conclude that there is a certain trend towards more relaxed application of the provisions regarding MET over time. The success rate seems somewhat dependant on what sector is investigated.

4.3 Analogue country

The US is the most used analogue country in EU cases. The following countries have been used as analogue countries in the cases examined:

Table 8 Analogue countries used

Analogue country	Number of cases	Percentage
USA	14	40%
Lithuania	3	9%
Mexico	3	9%
Turkey	3	9%
India	2	6%
Indonesia	2	6%
Taiwan	2	6%
Brasil	1	3%
Canada	1	3%
Japan	1	3%
Korea	1	3%
Poland	1	3%
Thailand	1	3%
Total	35	100%

The frequent use of the US as analogue country is particularly striking, given the differences in cost structures and level of development, that exists in most sectors, between the US and the NME:s (read China).

It is however not possible to draw general conclusions on effects on dumping margins for companies operating in NME:s depending on choice of analogue country since many of the countries occur only in one or two investigations. Generally it could be expected that an analogue country with high costs (normally high level of development or GDP/capita) would yield higher dumping margin.

4.4 Duty levels

When it comes to analysing duty levels, we start with comparing the duties assigned to the NME:s in the cases examined, and those assigned to market economy actors (either market economy countries against which the same measure applied, or against individual companies granted MET). In the 28 cases⁵⁰ studied where final antidumping duties were imposed, the average duty against non-market producers was 38%, while the average duty imposed against market economies was 21%⁵¹ and the average duty imposed on producers from NME:s which had been granted MET was 11%.

⁵⁰ The number of cases refers to measures against one product from one country. Measures against a product from two countries are counted as two measures. The studies cases involves measures against 28 products, and were directed against 25 different countries, of which five were NME:s.

⁵¹ For market economies we have only looked at the "all others" rate, which is an inflated rate due to the use of "facts available" for non-cooperating companies.

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It is however more accurate to compare duties imposed on the same product, i.e. within the same measure. The following table compares the duties stemming from the different methods of calculating dumping margins.

Table 9 Comparison of duties by company status

<u>Product</u>	<u>Analogue country</u>	<u>Non-MET all others</u>	<u>MET (companies)</u>	<u>Market economy country (all others rate)</u>	<u>Individual treatment</u>	<u>Difference between MET and non-MET⁵²</u>
Aluminium foil	USA	15	14,9			0,1
Ammonium nitrate	Lithuania	45	21,9	14	28,5	23,1
Barium carbonate	USA	56,4	7			49,4
Bicycles	Mexico	41,5	15,8			25,7
Castings	India	47,8	0			47,8
CFL	Mexico	66,1	16,1		29,6	50
Coke	USA	43,6				X
Fasteners	Taiwan	17,6				X
Ferro molybdenum	USA	22,5				X
Furfuryl alcohol	USA	32,1			13,9	X
Glyphosate	Brasil	29,9				X
Hand pallet trucks	Canada	46,7	7,6		33,5	39,1
Magnesia bricks	USA	39,9	5,4		20	34,5
Okumé	Turkey	66,7	14,1			52,6
Para-cresol	USA	40,7	11,6			29,1
PET	USA	22,9	1,3	8	18,5	21,6
Polyester filament fabrics	Turkey	56,2	14,1		36	42,1
PSF	USA	49,7			18,6	33,9
PTFE	USA	55,5				18,9
REWS	Indonesia	30,7		19,2	7,3	11,5
Ropes and cables	Korea	50,7		40,3		10,4
Sodium cyclamate	Indonesia	17,6	4,6	18,1		13
Sulphanilic acid	India	21		18,3		2,7
TCCA	Japan	42,6	9,8		40,5	32,8
Tube and pipe fittings	Thailand	49,4		15,8		21,4
Tubes and pipes	Turkey	44,1		36,6	30,9	14,9
Urea	USA	19,5	18,7	12,5	9,2	0,8
Zink oxide	USA	28	12,4		26,3	15,6
Average	-	39	11	22	24	28

As can be seen from Table 9, antidumping duties are significantly higher for those companies not granted MET than for those companies granted MET. Individual treatment also lowers the antidumping. Not surprisingly, the conclusion is thus that there is lot to be gained for those investigated companies that get MET or individual treatment.

⁵² This column shows the difference between the "all others" rate and the average rate for those companies granted MET. When no company was granted MET, the difference between the all others rate and the rate granted "all others" in the market economy countries involved in the proceedings. These figures are marked in italics.

5 Conclusions and Recommendations

5.1 Conclusions on general issues

GATT-negotiators originally foresaw problems with calculating dumping margins for countries where there is basically a complete monopoly of trade, and where all prices are fixed by the state. It is unlikely that any of the countries which today are classified as “non-market economies” fit this description. Furthermore, the only applicable GATT provision that deals with the problem of state trading countries in antidumping proceedings, simply states that prices set by the state might not be appropriate for comparison. No solution is given to this problem, and GATT does not affirm the use of prices or costs in an analogue country as a basis for calculating normal value. Nor does the WTO antidumping agreement regulate what countries should be defined as non-market economies or how exporters in non-market economies should be treated. Thus, the WTO-agreement neither defines the problem for non-market economies, nor provides a solution. Thus questions and answers need to be sought in national legislation.

There is no coherent theory as to what the exact problem of NME: s in antidumping proceedings is. Consequently different countries use different approaches to defining and treating NME: s in antidumping proceedings.

A comparison of level of state expenditures and related variables show that countries that for historic reasons are considered to be market economies do not necessarily have more state interference in the economy than countries that for the same historic reasons today are defined as non-market economies.

Member states application of the non-market economy concept has not been contested before WTO panels. The reason for this may be that most WTO members marked as NME: s have not been subject to antidumping investigations. China, being the world’s largest target of antidumping duties, has in her accession protocol agreed to be considered to be an economy in transition until 2015, and can possibly not contest other member’s application of their own legislation regarding NME: s in dispute settlement.

From comparing the criteria regarding market economy treatment for individual companies in the EU and in other jurisdictions, and taken from the fact that the criteria differs between the two, we draw the conclusion that there is no clear cut way to define if a company makes business decisions based upon market signals or not. There seems to be no coherent problem that the NME treatment seeks to address. Again, WTO does not give much guidance on these issues, and member states are not forbidden to set their own parameters.

5.2 Conclusion on EU practice

The EU has no rules for what constitutes an NME, and instead relies on a list of given countries. There is little explanation given to why the given countries are on the list. The five criteria set up for granting individual companies MET go beyond the problems of countervailing subsidisation and government influence on sales decision. The criteria seem to tackle a number of other problems, such as lack for respect of property rights, and the possibility to verify company data.

With reference to our analysis of the EU: s practice concerning NME:s, we conclude that:

- The non-market economy treatment yield significantly higher dumping duties. On average, antidumping duties against those companies granted MET is 28 percentage points less than for those companies not granted MET.
- Companies granted “Individual treatment” gets on average 15 percentage point lower antidumping duties than those not granted such treatment.
- State interference and carry-overs from the NME system are the most common reasons for the EU not to grant MET to the applicant.
- When a company is found to benefit from some kind of carry-over from the NME system, no quantification of the size of the benefit (or “subsidy”) is made.
- China is the most often targeted NME in antidumping investigations.
- US is the most frequently used analogue country.

We have not been able to conclude that there has been a change in the EU: s practice during the last five years, i.e. the share of applicants granted MET and IT seems not move in a certain direction. However, this conclusion would have been different if the recent case regarding shoes from China and Vietnam had been included in our analysis, since in that case no applicants out of several hundreds were granted MET.

5.3 Recommendations

The analysis in this paper brings the system of special treatment of NME countries into serious questioning. It could well be argued that the entire system is unnecessary and could be scrapped altogether. If China and Vietnam were to be granted market economy status, the relevance of an NME-system in antidumping would be minimised, and there would be the opportunity to do away with the entire system. However, below we discuss how the system could be improved under its given parameters.

The provisions concerning “particular market situations” in the EU basic regulation should be enough to deal with hidden subsidies or discounts in certain sectors of former state trading countries. This system has already been used for Russia, and should be further explored.

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Should the system of NME:s be kept, there is some room for improvements. In the system of granting MET to certain competitors in an industry lies an inherent problem of giving competitive advantages to some companies over others. It is therefore important that companies that compete within the same sector are given similar treatment with respect to antidumping measures. We propose that the present system for assessing of MET and IT replaced by a system for treatment of companies that focus on costs and if decisions regarding production and prices reflect market signals. The general rule should be that a company buying inputs for production and then selling its' output according to market prices should be granted MET. In cases where parts of a company's costs are not set by the market, adjustments should be made in line with the provisions for "particular market situations" in the basic regulation whenever possible, rather than refusing MET-status.

Further we propose that the level of "subsidy" or "discounts" as well as the value of carry-overs from the planned economy for companies based in non-market economies should be assessed and quantified in the Commission's working documents. Today companies are not granted MET if they are found to be subsidised. We would prefer that MET be granted and that the Commission makes adjustments for discounts in its dumping calculations.

The EU should explicitly make preference for choosing an analogue country with a level of development comparable to that one of the investigated country. The use of analogue countries with like level of development should most likely lessen the burden of the exporter in terms of justifying adjustments due to differences in comparative advantages and cost structures that can not be attributed to the NME situation.

The EU system should not provide for the possibility to grant MET or IT on basis of sampling. Each and every applicant should in this context be treated by own merits, since companies differ in structure and since the outcome of the investigation is often crucial to the exporter's future trade.

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