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# China as a Market Economy After 2016: A Brazilian Perspective

CHINA COMO ECONOMIA DE MERCADO APÓS 2016: UMA PERSPECTIVA BRASILEIRA

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## Abstract

The purpose of this paper is to analyze the recognition of China as a market economy in the context of the Brazilian investigations into trade remedies after 2016 when a clause of China's protocol of accession to the World Trade Organization (WTO) expired. Although the interpretation of the Brazilian authority is now clear (a case-by-case evaluation of the sectors under analysis), some aspects of these applications should be further discussed. Among those aspects are the (in)adequate procedural time to address whether China is a market economy, the consequences of the absence of participation by Chinese exporters in these investigations, and the legal uncertainty as to the information that should be considered in the investigation. Finally, the research will provide an empirical analysis on the impact that a counterfactual and unrestricted recognition of China as a market economy might have on current anti-dumping duties currently enforced by Brazil.

## Keywords

Anti-dumping; market economy; China; trade remedies; Brazil.

## Resumo

O objetivo deste artigo é analisar o reconhecimento da China como economia de mercado no contexto das investigações brasileiras de defesa comercial depois de 2016, quando uma cláusula do Protocolo de Acesso da China à Organização Mundial do Comércio (OMC) expirou. Apesar de a interpretação da autoridade brasileira estar agora clara (uma avaliação caso a caso dos setores sob análise), alguns aspectos da aplicação dessa interpretação precisam ser mais profundamente discutidos. Entre esses aspectos estão o momento (in)adequado para discutir se a China é uma economia de mercado, a consequência da ausência de participação de exportadores chineses na investigação e a incerteza a respeito das informações que devem ser consideradas na investigação. Por fim, a pesquisa fornecerá uma análise empírica do impacto que um reconhecimento contrafactual e irrestrito da China como economia de mercado pode ter nos atuais direitos antidumping aplicados pelo Brasil.

## Palavras-chave

Antidumping; economia de mercado; China; defesa comercial; Brasil.

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## INTRODUCTION

Trade remedies are a country's guarantee that they will have the means to protect themselves from unfair exports (CORDOVIL, 2011, p. 30). Anti-dumping (AD) duties are the most used trade remedies by World Trade Organization (WTO) members.<sup>1</sup> Dumping happens when products of one country are introduced into the commerce of another country at less than the normal value of the products (GATT 1994, Art. VI [1]). If this practice causes an injury to the domestic industry, AD duties may be applied (GATT 1994, Art. VI [1]). The dumping margin is the difference between the normal value, *i.e.*, the value at which the product is sold in the market of the exporting country, and the export price, *i.e.*, the price at which the product is exported to the destination country (GATT 1994, Art. VI [1]).

Brazil is the fourth country that most applies AD duties (161), only behind the US (388), India (252), and Turkey (183).<sup>2</sup> Of all AD measures reported to the WTO in 2021, 645 were applied to Chinese exports.<sup>3</sup> This was a result of a specific clause in the Accession of the People's Republic of China (APC) to the WTO, among other factors.<sup>4</sup>

Section 15 (a) of the APC allowed WTO members that did not consider China as a market economy to use a methodology not based on a strict comparison.<sup>5</sup> When using such a

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- 1 “[A]nti-dumping has become widespread among developing members as well as developed members [...], and anti-dumping has dominated use of other provisions that sanction import restrictions” (NARLIKAR, DAUNTON and STERN, 2012, p. 422). As of the date of this research, there are 1911 AD duties in force. For comparison purposes, there are 274 countervailing and safeguard measures in force. Data obtained on the WTO website by searching the number of AD duties applied by all members. Available at: <http://i-tip.wto.org/goods/Forms/TableView.aspx?mode=modify&action=search>. Accessed on: May 16, 2021.
- 2 Data obtained on the WTO website by searching the number of AD duties applied by all members and the number of measures applied by each member. Available at: <http://i-tip.wto.org/goods/Default.aspx>. Accessed on: May 16, 2021.
- 3 Data obtained on the WTO website by searching the number of AD duties applied by all members against China. Available at: <http://i-tip.wto.org/goods/Default.aspx>. Accessed on: May 16, 2021.
- 4 The complete information on the Chinese Accession to the WTO can be found at: [https://www.wto.org/english/thewto\\_e/acc\\_e/a1\\_chine\\_e.htm](https://www.wto.org/english/thewto_e/acc_e/a1_chine_e.htm). The Protocol of Accession (WT/L/432) can be found at: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/L/432.pdf&Open=True>. Accessed on: December 2, 2021.
- 5 Section 15 of the Chinese protocol of accession was included in the text since China did not operate with market economy conditions. If Chinese normal values were used, there would be great distortions in the AD duties: “Those members noted that under those circumstances, in the case of imports of Chinese origin into a WTO Member, special difficulties could exist in determining cost and price comparability in the context of anti-dumping investigations and countervailing duty investigations. Those members stated that in such cases the importing WTO Member might find it necessary to take into account the possibility that a strict comparison with domestic costs and prices in China might not always be appropriate” (WT/ACC/CHN/49, 2001).

methodology, importing members may disregard Chinese prices and costs and use other prices to define the Chinese normal value. One alternative that is commonly used by WTO members is the use of prices from surrogate countries.<sup>6</sup> Those surrogate prices are normally higher than the prices practiced in China.<sup>7</sup> With those normal values, it is easier for importing members to find a dumping margin when comparing it with the export prices practiced by China. This is one of the main reasons for such a high number of AD duties on Chinese products.<sup>8</sup>

The second sentence in Section 15 (d) of the APC, however, indicates that subparagraph (a)(ii) would expire 15 years after China's accession to the WTO, *i.e.*, it would expire in December 2016. There is still discussion as to what are the consequences of this expiration.<sup>9</sup>

The position adopted by Brazil became clear only as of January 2019. This was when the Brazilian authority first mentioned the Section 15 provisions and presented an official version of the interpretation of the APC. According to the Trade Remedies and Public Interest Secretariat (*Subsecretaria de Defesa Comercial e Interesse Público – SDCOM*), the expiration of article 15(a)(ii), with 15(a) still in force, should have a legal meaning, producing concrete operational effects.<sup>10</sup> Thus, the use of an alternative methodology is no longer automatic, and

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- 6 “A ‘non-market economy methodology’ is a methodology for the calculation of dumping margins under which the export price is compared to a normal value that is based on ‘surrogate’ costs or prices from a third country.” WT/DS379/R, para. 14.68.
- 7 The present research calculated the actual difference between the normal value calculated when China is considered a market economy and when it is not considered a market economy. The European Commission (2016, p. 9) calculated that change in the Chinese economy status in terms of the potential jobs affected in the European Market.
- 8 According to a study from the European Commission (2016, p. 9), the recognition of China as a market economy “is expected to lower the imposed anti-dumping duties on imported products from China by around 30 percentage points, compared to an analogue country regime”.
- 9 China understands that, from December 2016 and on, Chinese prices and costs must be used. One day after the deadline of December 2016 set by the APC, China requested consultations regarding the WTO and the United States (DS515/15) and the European Union (DS516/9), alleging contradictory practices of those WTO members. Available at: [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds515\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds515_e.htm). and [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds516\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds516_e.htm). Accessed on: May 16, 2021.
- 10 The Brazilian authority informed that its interpretation derives from the interpretation rules of the Vienna Convention on the Law of Treaties, specifically its article 31. Furthermore, considering the *effet utile* principle, all treaty provisions should have a meaning. Brazil – China – Tires, of a kind used in motor cars, para. 5.2, apud Australia – Subsidies Provided to Producers and Exporters of Automotive Leather, Recourse to Article 21.5 of the DSU by the United States – WT/DS 126/RW: “6.25 The Appellate Body has repeatedly observed that, in interpreting the provisions of the WTO Agreement, including the SCM

each case should be analyzed. In the cases of Brazil – China – Nylon Yarns and Brazil – China – Garlic, for example, Chinese prices were used to determine the Chinese normal value **for the first time**.

The discussion now is not as to whether or not Brazil will recognize China as a market economy, but rather how each case will be analyzed. If there are no clear rules and procedures in the case-by-case analysis, the results can be imprecise. In some cases, sectors that should not be considered operating under market economy conditions may be considered as such. In other cases, some sectors operating under market economy conditions were not even analyzed.

Firstly, this article will address the Brazilian practice before and after 2016, to explain what changed in the Brazilian authority's analysis and how China was treated in trade remedies investigations.

Secondly, after the Brazilian authority presented its official APC interpretation, it developed a practice to analyze relevant cases. The approach adopted by Brazil when facing whether market economy conditions prevail in the Chinese sector will be analyzed. The article will focus on the optimal procedural time to determine whether the sector under analysis operates under market economy conditions, the impact of the absence of Chinese exporters participation in the investigation, and the information that the authorities should consider.

Thirdly, to understand how important an adequate analysis is, this study will estimate the impact a counterfactual full and unrestricted recognition of China as a market economy would have on the AD duties in force by Brazil.

## 1. THE BRAZILIAN PRACTICE BEFORE AND AFTER 2016

All Ordinances applying AD duties on Chinese products after December 2016 were gathered and analyzed.<sup>11</sup> By analyzing those Ordinances, it is possible to identify two different periods which are characterized by the posture adopted by the investigating Brazilian authority.

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Agreement, panels are to apply the general rules of treaty interpretation set out in the Vienna Convention on the Law of Treaties. These rules call, in the first place, for the treaty interpreter to attempt to ascertain the ordinary meaning of the terms of the treaty in their context and in the light of the object and purpose of the treaty, in accordance with Article 31(1) of the Vienna Convention. The Appellate Body has also recalled that the task of the treaty interpreter is to ascertain and give effect to a legally operative meaning for the terms of the treaty. The applicable fundamental principle of *effet utile* is that a treaty interpreter is not free to adopt a meaning that would reduce parts of a treaty to redundancy or inutility.”

11 The information on all investigations is available at: <https://www.gov.br/produtividade-e-comercio-exterior/pt-br/assuntos/comercio-exterior/defesa-comercial-e-interesse-publico/medidas-em-vigor/medidas-em-vigor>. Accessed on: Nov. 23, 2021.



From December 2016 to December 2018, Brazil applied eleven AD duties and one compensatory measure on products originating from China (BRAZIL – CHINA – CITRIC ACID; BRAZIL – CHINA – GARLIC; BRAZIL – CHINA – PC STRAND; BRAZIL – CHINA – PC STEEL WIRE; BRAZIL – CHINA – VACUUM FLASKS; BRAZIL – CHINA – HOT-ROLLED STEEL; BRAZIL – CHINA – HOT-ROLLED STEEL (COMPENSATORY MEASURES); BRAZIL – CHINA – KNITTED VISCOSE; BRAZIL – CHINA – GLASSWARE FOR TABLE; BRAZIL – CHINA – AGRICULTURAL TIRES; BRAZIL – CHINA – LINE PIPE (UP TO 5 INCHES); BRAZIL – CHINA – SAFETY GLASS LAMINATED AND TEMPERED FOR VEHICLES). In all these occasions, China was not considered a market economy. In the Ordinances applying AD duties, the justification was the same: China, for the purpose of trade remedies, is not considered a market economy (BRAZIL – CHINA – CITRIC ACID; BRAZIL – CHINA – GARLIC; BRAZIL – CHINA – PC STRAND; BRAZIL – CHINA – PC STEEL WIRE; BRAZIL – CHINA – VACUUM FLASKS; BRAZIL – CHINA – HOT-ROLLED STEEL; BRAZIL – CHINA – HOT-ROLLED STEEL (COMPENSATORY MEASURES); BRAZIL – CHINA – KNITTED VISCOSE; BRAZIL – CHINA – GLASSWARE FOR TABLE; BRAZIL – CHINA – AGRICULTURAL TIRES; BRAZIL – CHINA – LINE PIPE (UP TO 5 INCHES); BRAZIL – CHINA – SAFETY GLASS LAMINATED AND TEMPERED FOR VEHICLES).

In only two cases there was a discussion as to whether China should be considered a market economy or not. Both cases were about hot-rolled steel and from early 2018 (BRAZIL – CHINA – HOT-ROLLED STEEL). These hot-rolled steel cases were the first time Chinese producers submitted information that questioned the Brazilian authority's interpretation of whether China should be considered a market economy. Joint submission by several producers argued that, according to Section 15 of the APC, using a price comparison not based on Chinese prices and costs would violate obligations assumed under the WTO.<sup>12</sup> Thus, according to APC, China should be considered a market economy.<sup>13</sup>

The Chinese arguments, however, were not considered by the Brazilian authority. SDCOM affirmed that the appropriate procedural time to discuss these questions was during the preliminary determination, which had already passed (BRAZIL – CHINA – HOT-ROLLED STEEL, para. 1.7.2). SDCOM considered that the investigating period was prior to the expiration provided in Section 15(d). Thus, it was understood that no material discussion was appropriate. Therefore, the conclusion was that China was not a market economy for the purpose of that investigation.

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<sup>12</sup> The arguments provided by the Chinese producers can be found on para. 1.7.1.1 of *Brazil – China – Hot-Rolled Steel*.

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Thus, from December 2016 to December 2018, China was not considered as operating under market economy conditions for the Brazilian authority. During the second period, after January 2019, the Brazilian authority changed its position. The Brazilian authority's justification not to mention the provisions of Section 15 before January 2019 was that this topic should only be considered when the period under investigation included a period after the expiration provided in paragraph 15 (d), i.e., after December 2016. Thus, the first cases considering the question as to whether China is a market economy or not are from 2019.

For the first time, the Brazilian authority presented an official version of the APC interpretation and analyzed the specific sectors under discussion to conclude whether they encompass market economy conditions or not. Even though the interpretation is now clear, some issues still need to be discussed and may impair the analysis of information.

## 2. CURRENT ISSUES

After the Brazilian authority presented its official interpretation of the APC, it developed a practice to analyze cases. This section will discuss the approach adopted by Brazilian authorities when analyzing whether market economy conditions prevail in a sector.

The first issue is that there is no clear procedural process to analyze a sector under consideration. In recent cases, Chinese producers submitted all the required information to the Brazilian authority, went through on-the-spot investigations, and only after that they were informed that the data from the company would not be considered because the sector under analysis was considered operating under non-market conditions (BRAZIL – CHINA – HOT-ROLLED STEEL, para. 1.7.2). There is already a suggestion as to how this problem could be addressed.

Another practice adopted by SDCOM is that if no Chinese producer/exporter participates in the investigation, the question as to whether the sector under analysis operates under market economy conditions is irrelevant (BRAZIL – CHINA – LINE PIPE (ABOVE 5 INCHES); BRAZIL – CHINA – HEAVY PLATES; BRAZIL – CHINA – PADLOCKS; BRAZIL – CHINA – MOTORCYCLE RUBBER TIRES; BRAZIL – CHINA – BICYCLE TIRES; BRAZIL – CHINA – PVC; BRAZIL – CHINA – FLOAT GLASS; BRAZIL – CHINA – ADIPIC ACID). As explained in further detail below, this practice is contradictory to the APC interpretation provided by SDCOM.

Lastly, it is important to understand which factors are considered by SDCOM in its analysis. SDCOM has not indicated any analysis parameters. With such a broad approach, it is not possible to know which information is necessary for SDCOM to understand that the sector under analysis does or does not operate under market economy conditions.

## 2.1. THE ADEQUATE PROCEDURAL TIME TO DISCUSS WHETHER A SECTOR UNDER ANALYSIS OPERATES UNDER MARKET ECONOMY CONDITIONS

The first time the Brazilian authority analyzed whether a sector under analysis operated under market economy conditions in China was in Ordinance<sup>14</sup> n° 506/2019 regarding the sunset review on seamed tubes (BRAZIL – CHINA – SEAMED TUBES OF AUSTENITIC STAINLESS STEEL).<sup>15</sup> This was the third investigation in which the investigating period encompassed a timeframe after December 2016, so the authority necessarily had to address the question as to whether or not the sector under analysis was operating under market economy conditions. The domestic industry did not present arguments related to this question at the beginning of the investigation. Thus, in the notice of initiation from July 26, 2018, the authorities did not make any remarks on this topic.

Only on December 18, 2018, did the petitioner submit arguments explaining that China was not a market economy. Due to those arguments, SDCOM sent letters on January 1, 2019, requesting comments from the interested parties regarding this question. A Chinese company received that letter on January 1, 2019, and the on-the-spot investigation of that same company would take place the following week on January 7, 2019 (BRAZIL – CHINA – SEAMED TUBES OF AUSTENITIC STAINLESS STEEL, para. 5.2.1.3). This meant that the company would have an on-the-spot investigation without knowing whether or not its prices and costs would be used by the Brazilian authority. If China was not considered a market economy, all the effort placed in providing data would be useless. It is commonly known that the quantity of data requested by Brazilian authorities is significant and requires a significant amount of time from the company and specialized help to provide all the necessary information.

The Chinese company received SDCOM in China for an on-the-spot investigation. On March 27, 2019, however, SDCOM published a Technical Note deciding, amongst other things, that market economy conditions did not prevail in the sector under analysis (BRAZIL – CHINA – SEAMED TUBES OF AUSTENITIC STAINLESS STEEL, para. 5.2.1.3). Thus, all the data submitted and verified by SDCOM regarding the normal value would not be used.

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<sup>14</sup> *Circulares SECEX* are referred to in the text as Ordinances.

<sup>15</sup> As explained above, the first time the Brazilian authority discussed this topic was regarding two cases on hot-rolled steel from 2018 (Brazil – China – Hot-Rolled Steel and Brazil – China – Hot-Rolled Steel (Countervailing Measures)). Chinese producers submitted information questioning the interpretation of the Brazilian authority that China should be considered a market economy. The arguments, however, were not considered by the Brazilian authority. SDCOM affirmed that the appropriate procedural time to discuss those questions was before the preliminary determination, which had already passed. Para. 1.7.2 of Brazil – China – Hot-Rolled Steel.



The Chinese producer contested this approach, but its request was dismissed (BRAZIL – CHINA – SEAMED TUBES OF AUSTENITIC STAINLESS STEEL, para. 5.2.1.3).

Thus, in this particular case, the Chinese producer submitted its arguments, and the Brazilian authority verified its information on the spot. However, after all the Chinese information was gathered, the Brazilian authority decided that the sector under analysis did not operate under market economy conditions and, therefore, all the data from that Chinese exporter was disregarded (BRAZIL – CHINA – SEAMED TUBES OF AUSTENITIC STAINLESS STEEL, para. 5.2.1.3).

This is not a reasonable approach. The Brazilian authority must bear in mind how costly it is for parties to present required information and to further verify that information in a short time frame. Thus, if the Brazilian authority is going to require a Chinese company to provide this information it must also consider it in its analysis, rather than disregard it outright.

To avoid these situations, the definition as to whether or not a sector under analysis will be recognized as operating under market economy conditions should be clear before on-the-spot investigations.

One reasonable approach to that problem is requesting that the petitioner inform, from the beginning of the investigation, whether or not it considers a sector under analysis as operating under market economy conditions. If the authority deems this information consistent, it may indicate that it will not recognize that sector as operating under market economy conditions.

Then, together with the producer/exporter's arguments they may request comments from the parties in question. It is not reasonable to request comments in the middle of the deadline to submit information after the producer already submitted all its information and passed through the on-the-spot investigation.

The aforementioned approach respects the importance of the timelines provided by the Brazilian Decree. Furthermore, it does not render useless all the costly information collected by interested exporters.

## **2.2. THE ABSENCE OF CHINESE EXPORTERS IN THE INVESTIGATION DOES NOT ALLOW SDCOM TO BYPASS ITS ANALYSIS**

The SDCOM interpretation regarding the APC expiration is that each specific sector under investigation must be analyzed to understand whether there are distortions in the sector weighing the evidence provided by the parties.<sup>16</sup>

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<sup>16</sup> The first cases where this interpretation was provided were Brazil – China – Non-oriented silicon steel, Brazil – China – Tires, of a kind used in motor cars, and Brazil – China – Tires, of a kind used in motor cars.

This interpretation is correct<sup>17</sup> as countries can still disregard Chinese prices based on the APC after the expiration of Section 15(a)(ii). The change is that there is no longer a Chinese-specific burden. This interpretation was also provided by the US and the European Union in DSB 516/15 (EUROPEAN COMMISSION, 2017).

However, the Brazilian authority has a practical approach that seems contradictory to the correct APC interpretation. If an interested party argues that no market economy conditions prevail in a sector under analysis and no Chinese exporter participates in the investigation, **SDCOM will not analyze any information** related to market economy conditions (BRAZIL – CHINA – LINE PIPE (ABOVE 5 INCHES); BRAZIL – CHINA – HEAVY PLATES; BRAZIL – CHINA – PADLOCKS; BRAZIL – CHINA – MOTORCYCLE RUBBER TIRES; BRAZIL – CHINA – BICYCLE TIRES; BRAZIL – CHINA – PVC; BRAZIL – CHINA – FLOAT GLASS; BRAZIL – CHINA – ADIPIC ACID). According to SDCOM, without the participation of Chinese exporters, this discussion is no longer relevant and instead it considers the construction of a Chinese normal value (BRAZIL – CHINA – LINE PIPE (ABOVE 5 INCHES); BRAZIL – CHINA – HEAVY PLATES; BRAZIL – CHINA – PADLOCKS; BRAZIL – CHINA – MOTORCYCLE RUBBER TIRES; BRAZIL – CHINA – BICYCLE TIRES; BRAZIL – CHINA – PVC; BRAZIL – CHINA – FLOAT GLASS; BRAZIL – CHINA – ADIPIC ACID).

This approach has two problems. If the parameters used in the construction of a normal value are from China (for example, raw material prices considering import prices in China), SDCOM is considering that the market under analysis is operating under market economy conditions. If this is not true, the normal value might be significantly distorted.

Likewise, if the parameters used in the construction are from third countries, SDCOM is considering, without any analysis or discussion, that the market under analysis does not operate under market economy conditions. This practice would, once again, place the burden on Chinese producers. If they do not participate in the investigation, the sector under analysis is not considered as operating under market economy conditions, and this practice is inconsistent with the correct APC interpretation, as it renders the expiration provision meaningless.

Thus, despite providing a correct interpretation of the APC sunset clause, the practical approach is inconsistent with the conclusions reached by that interpretation. This approach may prejudice both the Brazilian domestic industry and Chinese exporters.

### 2.3. THE INFORMATION THAT SHOULD BE CONSIDERED

In the cases analyzed, SDCOM has not indicated any analysis parameters. With such a broad approach, it is not possible to know which information is considered enough for

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<sup>17</sup> Authors who fall under this category of interpretation are Amaral Jr. and Heringer (2018) and Tietje and Nowrot (2011).

SDCOM to understand that a sector under analysis does or does not operate under market economy conditions.

There should be legal certainty as to the basic elements which would indicate that market economy conditions do not prevail in a sector under analysis. This would provide legal certainty both for the petitioner, which would know which information it should provide, and the Chinese producer/exporter, which would know which information would be assessed.

In its Commission Staff Working Document, the European Commission (2017) provided a clear topic division that could be used as guidance by the Brazilian authority. The analysis consists of three parts: cross-cutting distortions, distortions in production factors, and distortions in selected sectors. This division is adequate as it analyzes general distortions in the Chinese economy, distortions regarding factors of production which could have a significant impact on the price, and distortions in selected sectors that could be a result of specific policies directed at that sector.

Furthermore, a general guiding principle should also be established. This is necessary as it is impossible to foresee all the mechanisms which can be used by a State to affect prices and costs.

The adequate guiding principle is price comparability. The parties may provide, in this analysis, an element that influences the price practiced by the exporter. The price is the main preoccupation here since the core reason for establishing that there are countries that are market economies and countries which are not market economies is that this difference affects price comparisons.

### 3. IMPACT ANALYSIS

If the problems discussed above are not changed, the Brazilian investigations into trade remedies will face a *sui generis* situation, where the APC interpretation is correct, yet the practical approach is not. These problems may lead to cases where Chinese prices and costs are used when they should not be used.

This research estimated the impact that a full and unrestricted recognition of China as a market economy would have on the AD duties in force in Brazil. The three steps below describe the methodological decisions made, which were: (a) designing the project, (b) collecting and coding data, and (c) analyzing the data.<sup>18</sup>

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<sup>18</sup> This approach follows the suggested approach found in Epstein and Martin (2014, p. 8).

### 3.1. DESIGNING THE PROJECT

This research must compare two scenarios in order to evaluate the impacts of such recognition, *i.e.*, one where the sector under analysis is considered as operating under market economy conditions and one where it is not.

All Brazilian investigations before December 2016 (and even investigations after that but with a different justification) did not use Chinese prices and costs since China was not considered a market economy.<sup>19</sup> This is the first scenario and what is currently practiced in Brazil.

If due to investigation-related inaccuracies, the sector under analysis is considered as operating under market economy conditions, there would be a different scenario, as the Brazilian authority would use the data directly provided by Chinese producers. This is the second scenario, which is one where the sector under analysis is recognized as operating under market economy conditions and Chinese prices and costs are used to calculate the normal value. This research compares these two scenarios.

The measurement of the first scenario was already made by the Brazilian authority when it applied the AD duties in force, so it will not need to be calculated by the present research. The measurement of the second scenario will be identified by calculating the Chinese normal value using the export price of a similar product to an appropriate third country. There are three alternatives to find a normal value: the price practiced in the country (normally assessed through specialized publications), the export price to a relevant destination, or the construction of a normal value (Art. 14 of Decree n. 8.058/2013).

The general guiding principle was to choose the alternative which would enable the research to analyze the greatest number of cases. The first alternative was not adequate as it is virtually impossible to obtain the prices practiced in all Chinese sectors under investigation. In many cases, this information simply does not exist. However, when it does exist, it is the object of confidential paid publications not shared with the public.

The third alternative, which is the construction of a normal price, is not possible as well. The construction of a normal value is made by calculating the price of each input and considering the amount of each input necessary for the production of the product. Those inputs range from the number of raw materials utilized to the number of employers in the production line. A petitioner is normally able to indicate a required number of those inputs for a product under investigation. This information, however, is confidential in the majority of the cases, and the domestic industry does not share the amount of each input used on its production lines. Without those inputs, it is not possible to construct a normal value.

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<sup>19</sup> Analysis made by the author based on all AD measures in force after December 2016.

The second alternative is the most adequate because, with it, it is possible to determine the normal value (and therefore the dumping margin) for most cases under discussion.

This alternative will be applied with a minor change. The Brazilian legislation foresees that an export price should be compared to an adequate third country. Choosing the adequate third country, however, includes a series of considerations, such as economic and market similarities (BRAZIL – GERMANY AND OTHERS – ELASTOMERIC RUBBER TUBES, para. 4.1.2.1), exported volumes (BRAZIL – GERMANY AND OTHERS – ELASTOMERIC RUBBER TUBES, para. 4.1.4.1), and the degree of data available (BRAZIL – CHINA – FOOTWEAR, para. 2.10).

In order to avoid the use of inadequate countries, the present research will consider the export price to the most relevant destinations. The Brazilian Decree defines in article 31, paragraph 2 that the volume of imports is considered insignificant when below 3%. Thus, the significant exports will be to those countries to which China exports more than 3% of the total product under analysis.

There are, however, cases where Brazil is among the significant countries. When this is the case, Brazilian prices will be excluded from the analysis, considering that it would distort the analysis. The export price to Brazil is close to the export price already considered in the original investigation and using this price may distort the calculations.

### 3.2. COLLECTING AND CODING DATA

In order to provide reliable and consistent data, the present research will adhere to the replication standard, which means that “anyone should be able to understand, evaluate, build on, or reproduce the research without any additional information from the author” (EPSTEIN and MARTIN, 2014, p. 59).

It is important to stress that this analysis is limited to the availability of data. The export data was extracted from TradeMap. TradeMap is a website from the International Trade Center which provides international trade data with the support of the United Nations, the European Union, and the WTO. The website covers 220 countries and territories and 5300 products from the Harmonized System (INTERNATIONAL TRADE CENTER, s.d.). The Brazilian authority already indicated the reliability and easy access of the tool when it affirmed that TradeMap is the research tool used to gather international trade statistics and is available to all users (BRAZIL – GERMANY AND OTHERS – VACUUM PLASTIC TUBES FOR BLOOD COLLECTION).

The similar product under investigation usually is part of a MERCOSUR Common Nomenclature (NCM) 8-digit product. The NCM is a creation of MERCOSUR and was

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20 Available at: <https://www.gov.br/receitafederal/pt-br/assuntos/aduana-e-comercio-exterior/classificacao-fiscal-de-mercadorias/ncm>. Accessed on: Nov. 22, 2021.



designed according to the decisions made by its members.<sup>20</sup> TradeMap, however, only provides information using the 6-digit Harmonized System (HS). So, the information extracted from TradeMap is a much broader definition than the similar product under investigation.

Even if the information from TradeMap may not be an exact reflection of the product under investigation, it is consistently used by authorities.<sup>21</sup> The Brazilian authority emphasized that although TradeMap might consider other items, it is considered public knowledge that TradeMap is the best resource to reflect the product.<sup>22</sup>

At the same time, SDCOM does not accept TradeMap data as valid normal value information. Thus, a normal value calculated using Chinese export prices is only used as a proxy of a normal value, not as valid normal value information.

It is important to stress that it was not possible to test all cases, as there were cases with particularities that could not be overcome by the author. Cases, for example, whose AD duties were applied in units, but the authority considered the conversion of kilograms to confidential units. In order to avoid distortions using unofficial data, those cases were not analyzed.

The scenario where China is not considered a market economy will be named Y. The export price in this scenario will be named Y1. The normal value in this scenario will be Y2. The dumping margin, which is  $(Y2 - Y1)$ , will be Y3. Those values will be obtained in the Ordinance which applied the AD duties.

The other scenario, a simulation where China is considered a market economy, will be named X. In the same way, X2 will be the normal value and X3 the dumping margin. In this case, the basis of comparison will also be Y1 (the export price). Y1 will be the reference value as this value will not change. Irrespective of China being a market economy or not, the export price to Brazil is the same.

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21 Brazil – Germany and others – Elastomeric Rubber Tubes: “The data used were obtained from the research tool made available on the Trade Map website [...]. It should be noted that the tool does not allow detailed descriptions of the exports falling under these items of the HS. Therefore, it is possible that the data obtained contain exports that do not fall under the definition of the product under investigation. Such information, however, represents the information readily available for the purposes of initiating the investigation” (translated). Similarly, Ordinance n. 12/2016: “[a]s for the questions about the indicators of export potential of synthetic fiber blankets from China, the export data extracted from the Trade Map website was considered sufficient, even though the classification 6301.40 encompasses products other than those under the scope of this sunset review” (translated).

22 Brazil – China and others – Presensitized offset aluminium printing plates: “As for the level of disaggregation of the Trade Map and Eurostat statistics, it is recalled that both classifications meet the HS, the World Customs Organization – WCO, and that, therefore, item 3701.30 does include other products than those investigated, being of public knowledge the absence of more disaggregated data, at least not on public basis” (translated).

In order to calculate the dumping margin when China is considered a market economy, the new normal value, X2, will be compared with Y1. Thus, we would have the following equation:

<b>X3 =</b>	<b>X2</b>	<b>-</b>	<b>Y1</b>
THE DUMPING MARGIN WHEN CHINA IS CONSIDERED A MARKET ECONOMY	THE NORMAL VALUE IF CHINA IS CONSIDERED A MARKET ECONOMY	-	THE EXPORT PRICE FOUND IN THE ORIGINAL INVESTIGATION

If X3, the new normal value found is positive when considering that China is a market economy, then the normal value would be higher than the export price and, therefore, there would still be a dumping margin and AD duties could still be applied, provided it is demonstrated that the dumped imports significantly contribute to losses affecting the domestic industry (Art. 32 of Decree n. 8.058/2013).

If X3 is negative, the normal value would be lower than the export price and, therefore, there would no longer be a dumping margin and no AD duties could be applied.

### 3.3. ANALYZING DATA

From the aforementioned calculation, it will be possible to determine, in a specific case, if AD duties should be applied and/or how the dumping margin would change if China was recognized as a market economy.

In order to get to this conclusion, the researchers used the comparison made above. In the example given, there was no longer a dumping margin. This means that, in that case, if China was considered a market economy, the AD duties would not exist.

On the contrary, if we found that there was still a dumping margin, AD duties could still exist, even if China was considered a market economy.

All of the AD duties in force were analyzed according to the tests described above. The research used those results to understand how many Brazilian AD duties in force would not exist if China was considered a market economy. In the cases where there would still be a dumping margin, our analysis focused on what happened with that margin (lower or higher).

From the 31 cases analyzed, 14 cases would no longer have AD duties. In those cases, the normal value if the sector under analysis was considered as operating under market economy conditions is higher than the export price practiced. In other words, there would be no dumping margin and, therefore, AD duties should not be applied.

However, cases that do not have AD duties are not the only cause for concern. This research analyzed the impact such recognition would have on cases that would still apply AD duties. In all those cases (apart from Brazil – China – Galvanized steel wire), the normal value found when China was considered a market economy was 40.63% lower than the normal value found in the investigation.

**TABLE 1 – IMPACT THAT A COUNTERFACTUAL AND UNRESTRICTED RECOGNITION OF CHINA AS A MARKET ECONOMY MIGHT HAVE ON AD DUTIES CURRENTLY ENFORCED BY BRAZIL**

<b>CASE (USD/UNIT OF MEASUREMENT)</b>	<b>EXPORT PRICE IN THE INVESTIGATION (Y1)</b>	<b>NORMAL VALUE IN THE INVESTIGATION</b>	<b>NORMAL VALUE IF CHINA WAS CONSIDERED A MARKET ECONOMY (X2)</b>	<b>ACTUAL DIFFERENCE BETWEEN THE NORMAL VALUE IN THE INVESTIGATION AND THE NORMAL VALUE IF CHINA WAS CONSIDERED A MARKET ECONOMY</b>	<b>PERCENTAGE DIFFERENCE BETWEEN THE NORMAL VALUE IN THE INVESTIGATION AND THE NORMAL VALUE IF CHINA WAS CONSIDERED A MARKET ECONOMY</b>	<b>DUMPING MARGIN FOUND IN THE ORIGINAL INVESTIGATION</b>	<b>DUMPING MARGIN FOUND IF CHINA WAS CONSIDERED A MARKET ECONOMY (X3) = X2 – Y1</b>
GLASSWARE FOR TABLE (USD/KG)	1.18	2.88	2.18	0.70	24.31%	1.7	1.00
LINE PIPE (UP TO 5 INCHES)	878.87	1,621.87	728.26	893.61	55.10%	743	-150.61
CITRIC ACID (USD/T)	884.33	1,733.52	768.23	965.29	55.68%	849.19	-116.10
GARLIC (USD/KG)	1.03	1.81	1.10	0.71	39.23%	0.78	0.07
NEW BICYCLE/ BIKE RUBBER TIRES (USD/KG)	1.81	5.66	3.22	2.44	43.11%	3.85	1.41
SAPP (USD/T)	1,142.56	3,676.36	1,386.42	2,289.94	62.29%	2534.07	243.86
CLEAR FLOAT FLAT GLASS (USD/T)	173.09	565.64	275.77	289.87	51.25%	392.55	102.68
PC STEEL WIRE (USD/T)	506.72	1,070.49	768.91	301.58	28.17%	563.77	262.19
REINFORCED PVC COATED FABRIC (USD/KG)	1.51	3.64	3.13	0.51	14.01%	2.13	1.62
COLD-ROLLED STAINLESS-STEEL SHEET (USD/T)	2,640.00	3,493.56	2,676.65	816.91	23.38%	853.56	36.65
HAIRBRUSH (USD/KG)	10.63	22.61	3.65	18.96	83.86%	11.98	-6.98
PET FILMS (USD/T)	2,141.66	3,088.02	2,487.43	600.59	19.45%	946.36	345.77

*(it continues)*

SYRINGES, WITH OR WITHOUT NEEDLES (USD/KG)	4.59	9.14	8.68	0.46	5.03%	4.55	4.09
BALL-POINT PENS (USD/UNIT)	0.04	0.23	0.11	0.12	52.17%	0.19	0.07
UNFRAMED GLASS MIRRORS (USD/T)	694.83	1,122.26	706.60	415.66	37.04%	427.43	11.77
SEAMLESS CARBON-STEEL TUBES NON-ALLOY (USD/T)	728.16	2,085.06	1,026.31	1,058.75	50.78%	1,356.9	298.15
FLAT BARS OF ALLOY STEEL (USD/T)	649.08	1,144.81	421.11	723.70	63.22%	495.73	-227.97
PET RESINS (USD/T)	1,383.86	2,066.24	1,256.37	809.87	39.20%	682.38	-127.49
SAFETY GLASS LAMINATED AND TEMPERED FOR VEHICLES (USD/T)	1,755.14	4,516.49	2,961.65	1,554.84	34.43%	2,761.35	1,206.51
PC STRAND (USD/T)	524.93	1,151.97	1,301.91	-149.94	-13.02%	627.04	77698
AUTOMOTIVE TIRES (USD/KG)	2.58	4.35	2.67	1.68	38.62%	1.77	0.09
SEAMED TUBES OF AUSTENITIC STAINLESS STEEL (USD/T)	2,880.81	3,286.27	2,288.59	997.68	30.36%	405.46	-592.22
LINE PIPE FOR OIL AND GAS PIPELINES, OF SEAMLESS IRON (OTHER THAN CAST IRON) OR STEEL (USD/T)	979.39	1,814.86	1,007.47	807.39	44.49%	835.47	28.08
MOTORCYCLE RUBBER TIRES (USD/KG)	2.34	4.52	2.28	2.24	49.56%	2.18	-0.06
NYLON YARNS (USD/T)	4,587.13	6,996.24	3,414.30	3,581.94	51.20%	2,409.11	-1,172.83
TABLEWARE AND KITCHENWARE OF PORCELAIN AND CERAMIC (USD/KG)	1.03	6.17	3.04	3.13	50.73%	5.14	2.01

*(it continues)*

CERAMIC FOAM FILTER (USD/KG)	5.76	11.82	3.40	8.42	71.24%	6.06	-2.36
PENCILS (USD/T)	7.18	12.73	4.89	7.84	61.59%	5.55	-2.29
ADIPIC ACID (USD/T)	1,818.37	2,139.42	1,702.14	437.28	20.44%	321.05	-116.23
PRESENSITIZED OFFSET ALUMINIUM PRINTING PLATES (USD/KG)	5.98	8.33	5.67	2.66	31.93%	2.35	-0.31

Source: Calculations prepared by the authors.

The last column in Table 1 is the exercise mentioned in item 3.1. The dumping margin when the sector under analysis is considered as operating under market economy conditions (X3) is the difference between the normal value if the sector is considered as operating under market economy conditions (X2) and the export price found in the original investigation (Y1). If X3 is positive, the export price is higher than the normal value and, therefore, there would still be a dumping margin and AD duties could still be applied, provided it is demonstrated that the dumped imports significantly contribute to losses affecting the domestic industry (Art. 32 of Decree n. 8.058/2013). If X3 is negative, the normal value would be lower than the export price and, therefore, there would no longer be a dumping margin and no AD duties could be applied.

It is possible to conclude that the normal value when China is considered a market economy is significantly lower than the normal value when China is not considered as such.

For this reason, if China is fully and unrestrictedly recognized as a market economy, several cases would no longer have AD duties. For the cases that would still have AD duties, the scenario is that the dumping margin would be lower in all cases except one: Brazil – China – PC Steel Wire.

## CONCLUSION

After the expiration of the APC sunset clause, WTO members discussed the interpretation and consequences of the various provisions and how each country would apply them.

Brazil initially had no clear response. Only in January 2019 did Brazilian authorities provide their APC interpretation. Although this interpretation is considered correct, the inappropriate application of this interpretation impairs both domestic producers and Chinese exporters.

The analysis as to whether a sector under investigation is a market economy or not starts with the domestic industry filling out a questionnaire. In cases where Chinese producers/



exporters do not participate in the investigation, SDCOM should analyze the evidence brought by interested parties to investigate whether, in the sector under analysis, market economy conditions prevail or not and, only after that, should they decide to disregard Chinese prices or not.

Finally, there should be legal certainty as to the basic elements which would indicate that market economy conditions do not prevail in a sector under analysis. This would provide legal certainty both for the petitioner, which would know which information it should provide, and the Chinese producer/exporter, which would know which information would be assessed.

Since China is Brazil's most relevant trading partner, changes in procedures for trade remedies might have a substantial impact on the Brazilian economy. This is better understood when estimating the impact that full and unrestricted recognition of China as a market economy could have on the AD duties currently applied by Brazil. This research showed that in the 31 cases analyzed, 14 AD duties would no longer apply, if China was unrestrictedly considered a market economy.

As explained above, current practices by the Brazilian authority when analyzing China in AD investigations/sunset reviews may be contradictory or need further adjustments. The present research presented alternatives to such practices which we hope can be used as an initial spark to trigger discussions on the issue, which, for now, only take place in proceedings and not on the academic scenario.

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## CASE LAW

The Brazilian authority applies AD duties using the product's name in Portuguese. To use the correct name of these products in English, the present research used the same name provided by Brazil, in English, on the semi-annual report under art. 16.4 of the AD Agreement submitted to the Committee on Anti-dumping Practices on 15 March 2019 (G/ADP/N/322/BRA).

SHORT TITLE	FULL CASE TITLE AND CITATION
BRAZIL – CHINA – AGRICULTURAL TIRES	CAMEX ORDINANCE 3/2017, PUBLISHED IN THE FEDERAL OFFICIAL GAZETTE ON 17 FEBRUARY 2017.
BRAZIL – CHINA – BICYCLE TIRES	CAMEX ORDINANCE 13/2020, PUBLISHED IN THE FEDERAL OFFICIAL GAZETTE ON 17 FEBRUARY 2020.
BRAZIL – CHINA – CITRIC ACID	CAMEX ORDINANCE 82/2017, PUBLISHED IN THE FEDERAL OFFICIAL GAZETTE ON 18 OCTOBER 2017.
BRAZIL – CHINA – COLD-ROLLED STAINLESS-STEEL SHEET	SECINT ORDINANCE 4.353/2019, PUBLISHED IN THE FEDERAL OFFICIAL GAZETTE ON 2 OCTOBER 2019.
BRAZIL – CHINA – FLOAT GLASS	CAMEX ORDINANCE 160/2021, PUBLISHED IN THE FEDERAL OFFICIAL GAZETTE ON 18 FEBRUARY 2021.
BRAZIL – CHINA – FOOTWEAR	CAMEX ORDINANCE 20/2016, PUBLISHED IN THE FEDERAL OFFICIAL GAZETTE ON 2 MARCH 2016.
BRAZIL – CHINA – GALVANIZED STEEL WIRE	CAMEX ORDINANCE 47/2017, PUBLISHED IN THE FEDERAL OFFICIAL GAZETTE ON 7 JULY 2017.
BRAZIL – CHINA – HEAVY PLATES	SECINT ORDINANCE 4.434/2019, PUBLISHED IN THE FEDERAL OFFICIAL GAZETTE ON 2 OCTOBER 2019
BRAZIL – CHINA – GARLIC	SECINT ORDINANCE 4.593/2019, PUBLISHED IN THE FEDERAL OFFICIAL GAZETTE ON 3 OCTOBER 2019.
BRAZIL – CHINA – GLASSWARE FOR TABLE	CAMEX ORDINANCE 126/2016, PUBLISHED IN THE FEDERAL OFFICIAL GAZETTE ON 23 DECEMBER 2016.
BRAZIL – CHINA – HAIRBRUSH	CAMEX ORDINANCE 12/2019, PUBLISHED IN THE FEDERAL OFFICIAL GAZETTE ON 22 NOVEMBER 2019.

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BRAZIL – CHINA – HOT-ROLLED STEEL	CAMEX ORDINANCE 2/2018, PUBLISHED IN THE FEDERAL OFFICIAL GAZETTE ON 19 JANUARY 2018.
BRAZIL – CHINA – HOT-ROLLED STEEL (COUNTERVAILING MEASURES)	CAMEX ORDINANCE 34/2018, PUBLISHED IN THE FEDERAL OFFICIAL GAZETTE ON 21 MAY 2018.
BRAZIL – CHINA – IRON PIPES	CAMEX ORDINANCE 8/2019, PUBLISHED IN THE FEDERAL OFFICIAL GAZETTE ON 8 NOVEMBER 2019.
BRAZIL – CHINA – KNITTED VISCOSE	CAMEX ORDINANCE 7/2017, PUBLISHED IN THE FEDERAL OFFICIAL GAZETTE ON 17 FEBRUARY 2017.
BRAZIL – CHINA – LINE PIPE (ABOVE 5 INCHES)	SECINT ORDINANCE 543/2019, PUBLISHED IN THE FEDERAL OFFICIAL GAZETTE ON 30 AUGUST 2019.
BRAZIL – CHINA – LINE PIPE (UP TO 5 INCHES)	CAMEX ORDINANCE 66/2017, PUBLISHED IN THE FEDERAL OFFICIAL GAZETTE ON 22 AUGUST 2017.
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*(it continues)*

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