



THE TREATMENT OF CHINA AS A NON-MARKET ECONOMY COUNTRY AFTER 2016

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Introduction

When China joined the World Trade Organization (WTO) in 2001, some WTO Members expressed strong concerns about how the trade remedy laws, including antidumping laws, would apply to China. The continuing role of the Chinese government in the economy in general, and its control over prices of key inputs to many manufactured products in particular, meant that Members investigating possible dumping of Chinese products could not rely upon prices or costs in China as the basis for determining whether dumping had occurred. To address this situation, China agreed to provisions that allow countries to base dumping comparisons on something other than Chinese prices or costs. One – but only one – of the relevant provisions is scheduled to expire on December 11, 2016. China’s accession to the WTO, and the Protocol that defined the terms of that accession, were the subject of extended negotiations and careful drafting, so that it is unreasonable to claim that the parties to that agreement meant anything other than what the Protocol actually says.

Some commentators have claimed that, with the expiration of that single provision, the United States and other countries are required to treat China as a market economy country in antidumping investigations, so that they must use Chinese prices or costs in antidumping comparisons.¹ This claim is simply incorrect. Analysis of the provisions in question, in light of both the language used elsewhere in the Protocol and the accepted rules of treaty interpretation establish-

¹ See, e.g., Rao, China’s Market Economy Status Under WTO Antidumping Law After 2016, 5 *Tsinghua China L. Rev.* 151, 165 (2013); Trommer, “Special Market Economy: Undermining the Principles of the WTO?”, 6 *Chinese Journal of International Law* 565, 588 (2007); Pierce and Nicely, Transitioning to China’s Market Economy Antidumping Treatment in 2016, available at <http://apps.americanbar.org/intlaw/spring09/materials/Transitioning%20to%20China's%20Market%20Economy%20Antidumping%20Treatment%20in%202016.pdf>. Of these, however, only Rao makes an argument based upon any sort of analysis of the language of China’s Protocol of Accession; the others simply reach a summary conclusion with no explanation. Other commentators have noted that this is the “conventional wisdom,” without fully subscribing to this conclusion. See Tietje and Nowrot, “Myth or Reality? China’s Market Economy Status under WTO Antidumping Law after 2016”, 34 *Policy Papers on Transnational Economic Law* (2011) at 7. Of course, under U.S. law WTO and other international agreements are not self-executing.

es that, after December 11, 2016, WTO Member countries can continue to treat China as a non-market economy country by basing dumping calculations in cases involving Chinese imports on something other than Chinese prices or costs. Consequently, no changes to U.S. law or practice will be necessary.

Treatment of Non-Market Economies Under the GATT

Article VI of the General Agreement on Tariffs and Trade 1947 (the GATT) authorizes countries to impose duties on imported products that have been dumped. The WTO Anti-Dumping Agreement, which implements this provision, defines dumping as occurring if the export price of a product is less than the comparable domestic price.² If the product is sold in the home market at prices below its cost of production, dumping is the difference between the export price and a constructed value.³ In a normal antidumping investigation, the investigating authority will simply compare the price in the export market, suitably adjusted for various factors, either to the price in the home market or to a value constructed using the cost of producing the article under investigation.

The use of home market prices or costs in dumping calculations assumes that those prices reflect market forces. The Parties to the General Agreement on Tariffs and Trade recognized at a very early stage that there are difficulties in making these comparisons where the exporting country does not have a market economy.⁴ Accordingly, the GATT Members adopted an interpretive note to GATT Article VI.⁵ This note explains that, where all domestic prices of a GATT

² World Trade Organization, Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (“WTO Anti-Dumping Agreement”), Art. 2.1

³ See WTO Anti-Dumping Agreement Art. 2.2.1

⁴ See Trommer, “Special Market Economy: Undermining the Principles of the WTO?”, 6 *Chinese Journal of International Law* 565, 568 (2007).

⁵ *Id.* at 568.

Member are set by the State, “a strict comparison with domestic prices in such a country may not always be appropriate.”⁶

In addition, the WTO Anti-Dumping Agreement permits Members to base dumping comparisons on exports from third countries if “the particular market situation ... in the domestic market of the exporting country” does not permit a proper comparison.⁷ This potentially allows WTO Members to apply alternative methodologies for determining whether dumping exists, methodologies that may use something other than domestic prices or costs in the exporting country as the basis for comparison.⁸

China’s Protocol of Accession

As China was negotiating its accession to the WTO, various WTO Members noted that, although China was transitioning towards a market economy, Chinese prices might not always be strictly comparable to export prices, and therefore could not serve as a suitable basis for anti-dumping calculations.⁹ In response to this concern, China and the other WTO Members agreed that, unless China or a given industry could demonstrate that market economy conditions prevailed in the industry producing the product under investigation, the importing Member could base its antidumping analysis on prices or costs of market economy countries at a level of economic development comparable to China’s.¹⁰ This agreement was embodied in Section 15 of China’s Protocol of Accession to the WTO. The Protocol of Accession is an integral part of the

⁶ General Agreement on Tariffs and Trade, Oct. 30, 1947, 55 U.N.T.S. 194, at Annex I, *Ad Article VI*, Paragraph 1(2) This exception is incorporated into the WTO Anti-Dumping Agreement as well; see WTO Anti-Dumping Agreement, Art. 2.7.

⁷ WTO Anti-Dumping Agreement, Art. 2.2.

⁸ See Trommer, “Special Market Economy: Undermining the Principles of the WTO?”, 6 *Chinese Journal of International Law* 565, 568 (2007), at 569.

⁹ WTO, Report of the Working Party on the Accession of China, 1 Oct. 2001, WTO Doc. WT/ACC/CHN/49, (“Working Party Report”) (2001), at para. 150.

¹⁰ Working Party Report, at para. 151.

WTO Agreement,¹¹ so that its terms fix the legal rights and obligations of all WTO Members, including China.

China's Protocol of Accession and Antidumping Investigations of Chinese Products

Because the precise wording of the relevant provisions of Section 15 – paragraphs 15(a) and 15(d) – are so important, it is worthwhile to consider them in full:

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

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

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

...

(d) Once China has established, under the national law of the importing WTO Member, that it is a market economy, the provisions of subparagraph (a) shall be terminated provided that the importing Member's national law contains market economy criteria as of the date of accession. In any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession. In addition, should China establish, pursuant to the national law of the importing WTO Member, that market economy conditions prevail in a particular industry or sector, the non-market economy provisions of subparagraph (a) shall no longer apply to that industry or sector.¹²

¹¹ World Trade Organization, Accession of the People's Republic of China, Decision of 10 November 2001, WTO Doc. WT/L/432, ("Protocol of Accession"), at paragraph 1.2 (2001).

¹² Protocol of Accession, Section 15 (2001).

As one WTO dispute settlement panel has stated, “Paragraph 15 of China's Accession Protocol permits different treatment with respect to the determination of normal value in anti-dumping investigations against Chinese imports, provided certain conditions are met.”¹³ In particular, paragraph 15(a) of China’s Protocol of Accession gives other WTO Members the right to base dumping calculations on something other than Chinese prices or costs. Paragraph 15(a)(i) sets down a rule that, if Chinese producers can show that market economy conditions prevail in a given industry, the importing WTO Member must base its dumping calculations for all producers of that industry on Chinese prices or costs. Paragraph 15(a)(ii) establishes a rule that, if that showing is not made, importing Members may directly use alternative methodologies for the entire industry under investigation.

However, the second sentence of paragraph 15(d) of the Protocol specifies that “{i}n any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession.”¹⁴ China joined the WTO on December 11, 2001. Therefore, paragraph 15(a)(ii) will expire as of December 11, 2016.¹⁵ The consequences of this sentence are the crux of the issue, and are the chief focus of this paper. In particular, after December 11, 2016, is an investigating party still permitted to base dumping comparisons on anything other than Chinese prices or costs?

¹³ Panel Report, *European Union – Anti-Dumping Measures on Certain Footwear from China*, WTO Doc. WT/DS405/R (adopted Oct. 28, 2011) at 76, fn. 306 (2011).

¹⁴ Protocol of Accession at para. 15(d).

¹⁵ “Myth or Reality? China’s Market Economy Status under WTO Anti-Dumping Law after 2016”, 34 *Policy Papers on Transnational Economic Law* at 3.

Background: The Expected Transition of China to a Market Economy

At the time China joined the WTO, the expectation – and commitment by China – was that China would move towards a full market economy.¹⁶ Of special relevance is the requirement in China’s Protocol of Accession that, with certain very limited exceptions, China “allow prices for traded goods and services in every sector to be determined by market forces.”¹⁷ The parties accordingly anticipated that, at some point in the future, Chinese prices and costs would be set by market forces, so that Members could use Chinese domestic prices and costs for antidumping purposes. Under those circumstances, a special methodology for China would no longer be necessary.

The Protocol of Accession addressed this expectation of reform in the Chinese economy in two ways. First, if China can show, under the importing Member’s national law, that market economy conditions prevail in the Chinese economy as a whole, the importing Member must use Chinese prices or costs in all investigations involving Chinese products.¹⁸ Similarly, if China makes such a showing with respect to a particular sector or industry, the importing Member must use Chinese prices or costs in all investigations involving that sector or industry.¹⁹ Absent such a showing, however, the Protocol explicitly allows Members to use dumping methodologies based on something other than Chinese prices or costs precisely because, so long as those prices or costs are not set by the market, they do not form an acceptable basis for dumping comparisons.

In fact, many prices in China remain subject to government control or influence. The World Bank has found that land prices in particular are subject to comprehensive government control, and that this causes fundamental distortions in land prices in China. “Because all local

¹⁶ See, .e.g., Working Party Report at 8.

¹⁷ Protocol of Accession at para. 9(1).

¹⁸ *Id.* at para. 15(d).

¹⁹ *Id.* at para.15(d).

governments are the owners of urban land in their jurisdiction, they have strong incentives to supply cheap land for industrial use to generate economic growth.”²⁰ The World Bank has also noted that the government continues to exercise control over prices for transport, energy, and utilities, and that reforms would lessen the distortions this control causes.²¹ It appears, then, that China does not allow prices for such key inputs as land, transportation, energy, and utilities to be set by market forces, despite its commitment in the Protocol. Prices for another key input, credit, are also heavily distorted by government interference.²²

Interpretation of the Language of Section 15 of the Protocol of Accession

After considering the background of Section 15, it is now possible to move to a detailed analysis of that section, and in particular of the consequences of the termination of subparagraph 15(a)(ii) as of December 11, 2016, in light of the rules of the interpretation of WTO agreements. The WTO Dispute Settlement Understanding provides that agreements under the WTO are to be interpreted in accordance with “the customary rules of interpretation of public international law.”²³ Among such customary rules are those contained in Article 31 of the Vienna Convention on the Law of Treaties.²⁴ Foremost among these rules is that “{a} treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their

²⁰ World Bank, *China Economic Update – October 2014*, http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2014/10/29/000406484_20141029123728/Rend ered/PDF/918980WP0CEU0000Box385345B00PUBLIC0.pdf.

²¹ World Bank, *China Economic Update – June 2015* 21 (2015), available at http://www.worldbank.org/content/dam/Worldbank/document/EAP/China/ceu_06_15_en.pdf.

²² *Id.* at 28. As discussed below, the World Bank subsequently withdrew this section of its update, apparently under pressure from China.

²³ WTO Dispute Settlement Understanding, Art. 3.2; *see also* Panel Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WTO Doc. WT/DS79/R (adopted Aug. 24, 1998) at ¶ 47.

²⁴ *See* Panel Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WTO Doc. WT/DS79/R (adopted Aug. 24, 1998), at ¶ 45.

context and in the light of its object and purpose.”²⁵ “Interpretation must be based above all upon the text of the treaty.”²⁶

A starting point for resolving any issue of treaty interpretation, then, begins with “the words actually used” in the treaty.²⁷ Such words “are to be given their ordinary meaning.”²⁸ In this case, “the words actually used” are clear. The second sentence of paragraph 15(d) specifies that *only* paragraph 15(a)(ii) will expire after 15 years. It says nothing whatsoever about the expiration of the remainder of paragraph 15(a). The “ordinary meaning” of these words, then, is that, while paragraph 15(a)(ii) will expire on December 11, 2016, the remainder of paragraph 15(a) will remain in full force and effect.

This conclusion is reinforced by the fact that the first and last sentences of paragraph 15(d) refer to paragraph 15(a) as a whole. Only the second sentence refers to subparagraph 15(a)(ii) only. This demonstrates that the drafters of the Protocol were making a distinction between paragraph 15(a) in its entirety and the specific provisions of 15(a)(ii).²⁹ The next section of the Protocol, Section 16, reflects such a distinction as well. Section 16 created a transitional

²⁵ Vienna Convention on the Law of Treaties, Art. 31, May 23, 1969.

²⁶ See, e.g., International Court of Justice, Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment of 3 February 1994, *ICJ Reports* at 21, para. 41 (1994).

²⁷ Panel Report, *United States – Standards for Reformulated and Conventional Gasoline*, WTO Doc. WT/DS2/AB/R (adopted May 20, 1996) at 17.

²⁸ *Id.* at 17.

²⁹ See J. Miranda, “Interpreting Paragraph 15 of China’s Protocol of Accession,” 9 *Global Trade and Customs Journal* 94, 101 (2014). Miranda concludes that the termination of subparagraph 15(a)(ii) creates a rebuttable presumption that Chinese producers and industries operate under market economy conditions, so that investigating WTO members would be required to use Chinese prices and costs unless it could be shown that the individual industry or sector under consideration continues to operate under non-market economy conditions. *Id.* at 103. Stewart et al. agree. T. Stewart, W. Fennell, S. Bell and N. Birch, The Special Case of China: Why the Use of a Special Methodology Remains Applicable to China after 2016, 9 *Global Trade and Customs Journal* 272, 279 (2014). Tietje and Nowrot reach a similar conclusion, while opining that it will be difficult if not impossible to rebut the presumption. See Tietje and Nowrot at 11. As explained below, while this interpretation is plausible, it may go too far in automatically establishing the presumption that Chinese industries do operate under market economy conditions, and that Chinese costs and prices can be disregarded only if the investigating WTO member can establish that this is not the case.

product-specific safeguard mechanism for limiting imports of Chinese products. The final paragraph of that Section states simply that “[a]pplication of this Section shall be terminated 12 years after the date of accession,” leaving no doubt that the entire provision would end at that time.³⁰ In fact, various provisions of the Protocol explicitly distinguish between sections, paragraphs, and subparagraphs.³¹ The conclusion that the termination of subparagraph 15(a)(ii) was intended to implicitly revoke the entirety of paragraph 15(a) is contradicted by this clear example within the Protocol itself.

The final version of the Protocol was the result of no less than 15 years of negotiations over China’s accession to the WTO.³² Given this, there are no grounds to conclude that the language of the second sentence of paragraph 15(d) was intended to do anything other than precisely what it says: put a limit on the applicability of subparagraph 15(a)(ii) only, while leaving the provisions of the remainder of paragraph 15(a) in place.

As explained above, the chapeau of paragraph 15(a) describes (a)(i) and (a)(ii) as particular rules for determining whether the investigating country must use Chinese prices and costs, or can apply an alternative methodology, for an entire industry under investigation. While 15(a)(ii) will expire in 2016, the chapeau of 15(a) and the rule expressed in 15(a)(i) will not. The chapeau of paragraph 15(a) states that the investigating Member “shall use either Chinese prices or costs for the industry under investigation or a methodology that is not based on a strict comparison with domestic prices or costs in China based on the following rules.”³³ Because subparagraph 15(a)(i) remains in effect after December 11, 2016, the investigating Member is required to use

³⁰ Protocol of Accession at para. 16(9).

³¹ See, e.g., Protocol of Accession at Section 16(9); Section 9(1) (“China shall, subject to paragraph 2 below, allow prices for traded goods and services in every sector to be determined by market forces . . .”); Section 15(d) (“the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession.”)

³² European Union, *Overview of the Terms of China’s Accession to WTO* at 1 (2001).

³³ Protocol of Accession at para. 15(a).

Chinese prices and costs for an entire industry *only* if the Chinese producers can demonstrate that market economy conditions prevail in the industry. If the Chinese producers do not make such a showing, the chapeau still allows the importing Member to apply a methodology that is not based on a strict comparison with Chinese prices or costs. This is the only possible interpretation of the “words actually used” in paragraphs 15(a) and 15(d).

WTO panels have also stressed that, under Article 31 of the Vienna Convention, a provision must be interpreted in light of its object and purpose. Accordingly, “a treaty interpreter is required to have recourse to context and object and purpose to elucidate the relevant meaning of the word or term.”³⁴ Application of this principle yields exactly the same result as above. During the negotiations over China’s accession, several Members expressed concerns that, as China was still admittedly only transitioning towards a market economy, Chinese prices and costs did not form a reliable basis for making antidumping comparisons.³⁵ The inclusion of paragraph 15(a) in the Protocol, allowing as it does the use of prices or costs other than those of China in dumping comparisons for Chinese imports in antidumping investigations, reflects the response to those concerns. The interpretation of the plain language of Section 15 as allowing WTO Members to continue to apply alternative methodologies even after the rule expressed in subparagraph 15(a)(ii) expires accomplishes this purpose. Interpreting the second sentence of paragraph 15(d) as requiring the use of Chinese prices or costs in antidumping comparisons, without it having been first established that in fact those prices or costs represent a reasonable basis for comparison, would ignore and frustrate those concerns.

³⁴ Appellate Body Report, *United States: Continued Existence and Application of Zeroing Methodology*, 107, WTO Doc. WT/DS350/AB/R.

³⁵ See Working Party Report at 29.

Proponents of the argument that the expiration of subparagraph 15(a)(ii) requires the extension of non-market economy treatment to China argue that such an interpretation is necessary to give meaning and effect to that provision. They cite the WTO dispute settlement panel determination in *United States – Standards for Reformulated and Conventional Gasoline* as support for this proposition.³⁶ This principle is that “interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.”³⁷

However, this argument fails to note that the WTO panel explicitly described this principle of interpretation as a *corollary* to the principles enunciated in Article 32 of the Vienna Convention.³⁸ If the results of a review of the plain language of the provision, in light of its context and purpose, are clear, there is no need to turn to corollary rules of interpretation. In this case, the interpretation of the “plain language” of Section 15 following the expiration of subparagraph 15(a)(ii) is straightforward: WTO Members can continue to apply alternative dumping methodologies in Chinese cases. That result is also consistent with the context, object, and purpose of Section 15, and of the Protocol of Accession as a whole. Therefore, there is no need to consider the corollary principle.

In fact, however, application of this corollary principle of interpretation to Section 15 following the expiration of subparagraph 15(a)(ii) yields exactly the opposite result to that cited above in support of an obligation to grant China market economy treatment. Interpreting the 15-year deadline for 15(a)(ii) as requiring the use of Chinese domestic prices or costs in antidumping cases involving China results in the direct nullification of

³⁶ See Rao at 164-165; see also Miranda at 102.

³⁷ Panel Report, *United States – Standards for Reformulated and Conventional Gasoline*, WTO Doc. WT/DS2/AB/R (adopted May 20, 1996) at 23.

³⁸ *Id.*

- the chapeau of 15(a), which generally allows other Members to base dumping calculations on something other than Chinese prices or costs;
- the rule in 15(a)(i), which establishes that the use of Chinese prices and costs for an entire industry under investigation is required only if the Chinese producers have established that market economy conditions prevail in the industry in question; and
- the provisions of 15(d) specifying that WTO members must use Chinese prices or costs only if China establishes that market economy conditions prevail in a particular industry or in the Chinese economy as a whole.

Even commentators who argue that the language of 15(d) effectively requires the treatment of China as a market economy after December 11, 2016, admit that this interpretation has the effect of writing *all* of paragraph 15(a), and not just subparagraph 15(a)(ii), out of the Protocol.³⁹ This interpretation has the clear effect of reducing the remaining parts of paragraph 15(a) to “redundancy or inutility”; indeed, it writes them out of the Protocol altogether, despite the absence of any mandate or requirement elsewhere to do so.⁴⁰

These commentators also ignore the fact that this interpretation would write the first and third sentences of paragraph 15(d) out of the Protocol as well. As explained above, the first sentence of paragraph 15(d) requires an importing Member to base dumping comparisons on Chinese prices or costs in all investigations of Chinese products if China can show that market economy conditions prevail in the Chinese economy as a whole. The third sentence imposes a similar requirement if China makes such a showing with respect to an individual sector or industry. If the second sentence of paragraph 15(d) is interpreted as requiring the use of Chinese prices or costs in all circumstances after December 11, 2016, then the first and third sentences of 15(d) are meaningless as well, as China would obtain such treatment in all investigations without needing to make any showing at all.

³⁹ Rao at 155 (2013);

⁴⁰ See Tietje and Nowrot at 8

WTO panels have also considered the application of Article 32 of the Vienna Convention, which states that “{r}ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty,” but only to confirm the interpretation arrived at from the application of the rules of interpretation under Article 31, or if, after the application of Article 31, the meaning of the provision remains ambiguous, or leads to an unreasonable result.⁴¹ The WTO has stated that “{t}he negotiating history of the agreement is merely a subsidiary tool of interpretation” to be used only if the meaning of a provision is unclear.⁴² If the interpretation of the provision under Article 31 does not yield irrational or absurd results, as is true here, there is no need to refer to supplementary means of interpretation under Article 32.⁴³

Proponents of the interpretation of the second sentence of paragraph 15(d) as terminating 15(a) in its entirety have cited the WTO Appellate Body’s ruling in *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China* as support for this conclusion.⁴⁴ Even those supporting this interpretation, however, have admitted that the issue of the effect of paragraph 15(d) *was not before the Appellate Body in this proceeding*.⁴⁵ Indeed, a review of the Appellate Body report reveals that neither China, the EU, nor any other party raised the issue of interpretation of 15(d) before the Appellate Body,⁴⁶ and the Appellate

⁴¹ Vienna Convention on the Law of Treaties, Art. 31, May 23, 1969.

⁴² World Trade Organization, Dispute Settlement System Training Module, Chapter 1.3, https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c1s3p2_e.htm.

⁴³ Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, AB-2002-4 at 33, WTO Doc. WT/DS213/AB/R (November 28, 2002). As statements by government officials of WTO Members would not constitute part of that “preparatory work,” such statements have no weight in interpretation.

⁴⁴ Rao at 152-53.

⁴⁵ Rao at 159; *see also* Tietje and Nowrot at 10.

⁴⁶ Appellate Body Report, World Trade Organization, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, 5-109, WTO Doc. WT/DS297/AB/R (July 15, 2011)[hereinafter EC-Fasteners].

Body does not list the issue as one raised in the proceeding.⁴⁷ As the issue was not briefed or argued, and as the Appellate Body had no reason to address the issue, its statement cannot be considered to have any weight at all.

Moreover, the Appellate Body's statement in *EC – Fasteners* failed to make a critical distinction between the various sentences of paragraph 15(d), simply and inaccurately making an overly broad statement that “Paragraph 15(d) of China's Accession Protocol establishes that the provisions of paragraph 15(a) expire 15 years after the date of China's accession (that is, 11 December 2016).”⁴⁸ Indeed, by its terms, only one sentence of paragraph 15(d) says that anything expires 15 years after the date of China's accession, and that sentence specifies that *only* subparagraph 15(a)(ii) expires as of that date (December 11, 2016). The remaining provisions of paragraph 15(a) (and paragraph 15(d)) necessarily remain in place.

In *United States – Standards for Reformulated and Conventional Gasoline*, the WTO Appellate Body cautioned specifically against interpretations that would “empty the chapeau of its contents” and deprive the remaining paragraphs of the provision of their meaning.⁴⁹ The interpretation of paragraph 15(d) offered in dicta in *EC – Fasteners* would have precisely this forbidden effect. Given these fundamental errors, the Appellate Body's decision in *EC – Fasteners* does not provide any authority for interpreting paragraphs 15(a) and 15(d).

Such an interpretation would violate another fundamental principle of treaty interpretation. “[T]he principles of interpretation neither require nor condone the imputation into a treaty

⁴⁷ *EC – Fasteners*, 110 – 114.

⁴⁸ *EC – Fasteners*, 122, para. 289.

⁴⁹ Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, 23, WTO Doc. WT/DS2/AB/R (April 29, 1996).

of words that are not there or the importation into a treaty of concepts that were not intended.”⁵⁰ In particular, interpretation of treaty language “cannot add to or diminish the rights and obligations provided” under the treaty.⁵¹ Interpreting (the second sentence of) paragraph 15(d) as terminating all of paragraph 15(a) would have the effect of requiring that, after December 11, 2016, all WTO Members must treat China as a market economy for antidumping purposes. This would clearly constitute the insertion into China’s Protocol of Accession of an obligation – that, after December 11, 2016, other WTO Members must use Chinese prices or costs in all antidumping comparisons – that is nowhere made explicit in the Protocol. In fact, the provision in question was carefully negotiated. If such a result had been intended, it is reasonable to assume that the second sentence of paragraph 15(d) would have required the expiration of all of paragraph 15(a), and not of subparagraph 15(a)(ii) only (and that the second sentence would appear last in the paragraph rather than second).⁵²

Such a result is contrary to the requirements of the rules of treaty interpretation that an interpretation of a treaty must be consistent with the object and purpose of the provision in question.⁵³ One of the objects of the Protocol of Accession was to identify the actions China was required to take to obtain the benefits of WTO membership. One such requirement was that it allow prices in general to be set by market forces. A second object of the Protocol was to allow

⁵⁰ Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, ¶ 45, WTO Doc. WT/DS79/AB/R (August 24, 1998)[hereinafter *India-Patent Protection*]

⁵¹ WTO Dispute Settlement Understanding at 19,2; *see also India – Patent Protection*, ¶ 46.

⁵² Indeed, proponents of the interpretation of the second sentence of paragraph 15(d) as terminating all of 15(a) in 2016 are effectively reading paragraph 15(d) as follows:

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

⁵³ Vienna Convention on the Law of Treaties, Art. 31.1.

other WTO Members to take appropriate countermeasures, including the use of non-Chinese prices or costs to make meaningful dumping comparisons in cases involving Chinese producers, until such time as China had in fact allowed the market to set prices, rendering them a valid basis for dumping comparisons. By requiring WTO Members to base all dumping comparisons on Chinese prices or costs after December 11, 2016, without requiring any showing that prices in China are in fact set by market forces, this interpretation would defeat two primary objects of the protocol.

There is a great deal of evidence showing that China is not a market economy, and that the Chinese government continues to play the dominant role in the allocation of resources within the Chinese economy. In a 2013 report, the European Commission observed that China had fulfilled only one of the five criteria required under EU law for China to obtain market economy status in antidumping investigations.⁵⁴ A recent comprehensive study commissioned by Eurofer, the European steel producers' association, concludes emphatically that China is not a market economy. This report identifies a number of features of the Chinese economy that reveal continued government control or influence over prices and costs, including:

- the continued and central role of the Chinese Communist Party in directing and managing the Chinese economy;
- the continued imposition of five-year plans;
- national plans for 22 major industrial sectors;
- provincial and local plans implementing national industry plans;
- the role of industry associations as arms of the state;
- the limited role of markets for consumer goods only;

⁵⁴ Lukas Gajdos & Roberto Bendini, *Policy Briefing: Trade and economic relations with China 2013*, European Parliament, Directorate-General for External Policies, 24 (April 2013), [http://www.europarl.europa.eu/RegData/etudes/briefing_note/join/2013/491492/EXPO-INTA_SP\(2013\)491492_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/briefing_note/join/2013/491492/EXPO-INTA_SP(2013)491492_EN.pdf). It should be noted that this report incorrectly assumes that China must be treated as a market economy after 2016. *Id.* at 23.

- the absence of markets for capital, labor, land, energy and other factors of production;
- the absence of effective competition rules, bankruptcy laws and market exit mechanisms;
- restrictions on imports;
- government measures used to manage and direct exports;
- state control and direction of outward foreign direct investment; and
- direction and control of inward investment and ownership.⁵⁵

Recent events highlight China's lack of progress towards market economy status. The World Bank recently released its semiannual China Economic Update, in which it noted that the Chinese government's "direct and extensive involvement in allocating resources has "no parallel in modern market economies."⁵⁶ A section of the report especially critical of the Chinese government's continuing control over and interference in the Chinese economy was subsequently deleted, allegedly because it had not gone through the World Bank's normal clearance procedures.⁵⁷

Nonetheless, the degree of continuing government control over the Chinese economy became clear following a sharp drop in Chinese stock markets in June 2015, when it was noted that the government body regulating securities markets is responsible for maintaining the level of stock prices, as opposed to simply guaranteeing the integrity of markets.⁵⁸ Because the Chinese state owns shares in many large companies, and those companies have used stock sales to fund

⁵⁵Dr. Markus Taube & Dr. Christian Schmidknoz, *Assessment of the normative and policy framework governing the Chinese economy and its impact on international competition*, Think!Desk China Research and Consulting, (June 25, 2015), http://www.eurofer.org/Issues&Positions/Market%20Economy%20Status%20-%20China/articles/MES%20China%20Study_Taube_Executive%20summary-25June15_F.pdf.

⁵⁶ Mark Magnier, *World Bank Deletes Section on China from Report on Web*, The Wall Street Journal, July 6, 2015, at C3.

⁵⁷ *Id.*

⁵⁸ Lingling Wei, *The Man Tasked With Stopping China's Stock Selloff*, The Wall Street Journal (July 8, 2015), <http://www.wsj.com/articles/the-man-tasked-with-stopping-chinas-stock-selloff-1436349694>.

the repayment of debts, the Chinese government has a direct financial interest in maintaining share prices; otherwise, the government could be required to provide funds to state-owned enterprises directly to avoid default on debt payments.⁵⁹ The Chinese government protected this interest by directing the country's biggest state-owned banks to provide an estimated \$200 billion in loans to the China Securities Finance Corp., which in turn loaned the funds to brokerages or used the funds to purchase shares in mutual funds directly, both in an attempt to boost the value of Chinese stocks.⁶⁰ Such comprehensive government intervention in capital markets is the antithesis of market economy conditions.

Given these facts, it is plain that the expectation of the parties, expressed in the Working Party Report, that China would move decisively towards a market economy, has not been fulfilled. Under these circumstances, to require WTO Members to apply market economy treatment for antidumping purposes to China, even though China is not a market economy, would be directly contrary to the underlying purpose of Section 15 and of the Protocol of Accession as a whole. Rather, the automatic graduation of China to market economy status despite continuing government interference in markets and prices would effectively reward China for failing to implement the reforms required of it by the Protocol.

The automatic graduation of China to market economy status for antidumping purposes would have been a significant concession on the part of other WTO Members. It is reasonable to presume that such an intention would have been made explicit in China's Protocol of Accession. Indeed, as discussed above, Section 16 of the Protocol provides a perfect example of such an explicit intention to terminate a section in its entirety. The interpretation of the second sentence of

⁵⁹ Id.

⁶⁰ G. Wildau, *China's biggest state banks recruited into stock market rescue*, Financial Times (July 17, 2015), <http://www.ft.com/cms/s/0/c30b6f3a-2c3d-11e5-8613-e7aedbb7bdb7.html#axzz3kPzUx7iX>.

paragraph 15(d) as requiring market economy treatment after December 11, 2016, on the other hand, assumes that the parties decided to achieve a straightforward result – the imposition of an absolute requirement of market economy treatment for Chinese imports in antidumping investigations – through language that requires a tortured reading of paragraph 15(d), a reading under which the explicit termination of one provision – subparagraph 15(a)(ii) – implicitly extinguishes every other provision of that paragraph as well as of paragraph 15(d).

Proponents of the interpretation of the second sentence of paragraph 15(d) as eliminating all of paragraph 15(a), and so requiring WTO Members to use Chinese prices or costs in dumping calculations, have stressed the fact that such an interpretation would be of great benefit to Chinese exports.⁶¹ Accordingly, there is an expectation that, after 15 years, imports from China would be treated like all other imports for antidumping purposes. However, other WTO Members had their own expectations, including that China would take meaningful steps towards establishing a full market economy, and that until it did so, they could continue to use prices or costs other than those in China as the basis for dumping comparisons. As the WTO Appellate Body has emphasized, “{t}he legitimate expectations of the parties to a treaty are reflected in the language of the treaty itself.”⁶² In this case, the language of the treaty makes clear that, after December 11, 2016, WTO Members are required to use Chinese prices or costs only to the extent Chinese producers or the Chinese government can show that market economy conditions prevail. This reflects the legitimate expectations of all the parties.

Section 15 after December 11, 2016

If the language of the second sentence of paragraph 15(d) applies only to subparagraph 15(a)(ii), then, what is the effect of Section 15 after December 11, 2016? Does anything change,

⁶¹ Rao, 153-55.

⁶² *India – Patent Protection*, ¶ 45.

or can importing Members continue to treat Chinese products in dumping investigations exactly as before?

As discussed above, the starting point for determining the effect of Section 15 is the plain language of Section 15 itself. The literal effect of the second sentence of paragraph 15(d) is to remove subparagraph 15(a)(ii) from the paragraph as of December 11, 2016. What is left is what applies after that date. What remains of Section 15 provides that WTO Members can use alternative methodologies in antidumping cases involving China unless the Chinese producers or the government of China have shown that market economy conditions prevail in an industry, or the government of China has established that China as a whole is a market economy. Under the language of Section 15 that remains after December 11, 2016, WTO members can base calculations on something other than Chinese prices or costs, so long as none of the above have occurred.

U.S. law currently captures both of these possibilities.⁶³ The United States currently treats China as a non-market economy country. It accordingly applies a methodology for anti-dumping comparisons based on factors of production, rather than on Chinese prices and costs.⁶⁴ However, U.S. practice allows both individual producers and entire industries to argue that the Department should use some or all of their prices or costs in its dumping comparisons.⁶⁵ U.S. law also allows for the “graduation” of an entire country to market economy treatment.⁶⁶ Therefore the expiration of subparagraph 15(a)(ii) will not require any changes in U.S. law or regulation.

⁶³ 19 U.S.C. §1677(18); §1677b(c); 19 C.F.R. §351.408.

⁶⁴ U.S. Department of Commerce, *Antidumping Manual*, Chapter 10, at 11 (2009)[hereinafter *Anti-dumping Manual*].

⁶⁵ *Antidumping Manual*, Chapter 10, at 20-22 (individual producers); at 30-31 (industries).

⁶⁶ 19 U.S.C. §1677(18)(c)(i).

Some have argued that this interpretation reduces the second sentence of paragraph 15(d) to inutility, as under this interpretation, WTO Members can still continue to treat China as a non-market economy after December 11, 2016. This argument, however, fails to consider exactly what Section 15 does in the context of the “the overarching systematic conception of WTO anti-dumping law as a whole,⁶⁷ and in particular of the WTO Anti-Dumping Agreement and the Protocol of Accession as a whole..

Under the WTO Anti-Dumping Agreement, importing Members must base dumping comparisons on prices or costs *for individual producers* within the exporting country, and calculate a dumping margin for each producer.⁶⁸ Section 15 creates exceptions to this general rule by providing two specific rules with regard to the application of alternative methodologies *to an entire industry*. If Chinese producers can show that market economy conditions prevail in the industry under investigation, then the importing Member must use Chinese prices or costs for comparisons for all producers in that industry.⁶⁹ On the other hand, if the Chinese producers cannot make such a showing, the importing Member can (but is not required to) apply a methodology not relying on Chinese prices or costs to the entire industry.⁷⁰ Significantly, in such a case, subparagraph 15(a)(ii) does not require that the importing WTO Member give individual Chinese producers the opportunity to establish that they are subject to market economy conditions. Subparagraph 15(a)(ii) allows (just as subparagraph 15(a)(i) requires) WTO Members to make decisions on methodology in Chinese antidumping investigations at the level of the entire industry,

⁶⁷ See Tietje and Nowrot at 7.

⁶⁸ WTO Anti-Dumping Agreement at Art. 6.10 (“{t}he authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation”); see also WTO Anti-Dumping Agreement at Art. 2.2.1.1.

⁶⁹ Protocol of Accession at 15(a)(i).

⁷⁰ Protocol of Accession at 15(a)(ii).

rather than with respect to individual producers, as would otherwise be required by the WTO Anti-Dumping Agreement.

The termination of subparagraph 15(a)(ii) means that, if Chinese producers do not show that market economy conditions prevail in the entire industry under investigation, the investigating Member can continue to apply an alternative methodology with respect to producers in the industry, but not automatically to the industry as a whole. In other words, after subparagraph 15(a)(ii) terminates, there must be the possibility for individual producers to be able to demonstrate that market economy conditions prevail with respect to them individually. This interpretation gives every provision of Section 15 – including subparagraph 15(a)(ii) – meaning. It preserves the utility of the chapeau of paragraph 15(a), of subparagraph 15(a)(i), and of paragraph 15(d), all of which would become meaningless if in fact the termination of only subparagraph 15(a)(ii) was sufficient to require the unconditional application of market economy treatment in all antidumping investigations involving China. At the same time, this interpretation gives effect to the termination of subparagraph 15(a)(ii) as required by paragraph 15(d) by eliminating the possibility that, after December 16, 2016, other WTO Members can automatically apply non-market economy treatment to an entire Chinese industry under investigation with no possibility for individual producers to establish that market economy conditions apply to them. It is also consistent with the underlying purpose of Section 15, and of the Protocol of Accession in general, by not requiring WTO Members to use Chinese prices or costs when the Chinese producers in question have not established that they are subject to market economy conditions. Finally, this interpretation is consistent with the focus in the WTO Anti-Dumping Agreement on individual producers.

This interpretation satisfies the principle of treaty interpretation that, if possible, a treaty should be interpreted so as to give effect to every provision of the treaty. At the same time, it avoids the interpretation that would effectively insert a provision (in this case, the automatic treatment of China as a market economy after December 11, 2016) into the treaty. Most importantly, it is consistent with the plain language of the treaty and with the underlying purposes of both the Protocol of Accession and the WTO Anti-Dumping Agreement.

The interpretation of the second sentence of paragraph 15(d) as requiring full and automatic market economy treatment of all Chinese imports after December 11, 2016, on the other hand, violates all of the international rules of statutory construction. It ignores the plain language of Section 15, which leaves the chapeau of paragraph 15(a), as well as subparagraph 15(a)(i) and the other sentences of paragraph 15(d), in place. In so doing, it violates the secondary rule of treaty interpretation that provisions should not be reduced to inutility. By imposing a requirement of automatic market economy treatment, it inserts into Section 15 an obligation that the plain language of that paragraph nowhere requires. Finally, it is in direct conflict with the underlying purpose of Section 15 and of the intent of the Parties as expressed by the Protocol of Accession as a whole.

Conclusion

China's Protocol of Accession requires other WTO Members to base antidumping comparisons involving Chinese imports on Chinese prices and costs if China has demonstrated that market economy conditions prevail, either in the industry under investigation, in a given sector, or in China as a whole. Even after subparagraph 15(a)(ii) expires, the investigating Member is still allowed to treat China as a non-market economy country by using something other than Chinese prices or costs in antidumping analyses unless China or Chinese producers can show

that they operate under market economy conditions. This interpretation gives meaning to every provision of Section 15. It is reasonable and should be accepted.

The termination of subparagraph 15(a)(ii) on December 11, 2016 does not automatically require WTO members to treat Chinese imports as if they were from a market economy country. Such an interpretation would nullify all of Section 15. This conflicts with the plain language of that provision and the rules of treaty interpretation. It also ignores the underlying purpose of Section 15. It is *not* reasonable, and should be rejected.

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