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ARTICLE

Interpreting Paragraph 15 of China's Protocol of Accession

Jorge Miranda*

Although some commentators view paragraph 15 of China's World Trade Organization (WTO) Accession Protocol as conferring market economy status automatically by-year end 2016, no such commitment is discernable in the actual text of this provision, as examined based upon well-established rules of interpretation of WTO law. This paper also contends that, besides lacking textual support, a 'sudden death' approach to China's Non-Market Economy (NME) status would eviscerate the case-specific, facts-based approach that is the distinguishing characteristic of paragraph 15 vis-a-vis NME provisions in prior accessions.

1 Introduction

China acceded to the World Trade Organization ('WTO') on 11 December 2001. The chapeau of paragraph 15 of China's Protocol of Accession to the WTO[1] provides that Article VI of the General Agreement on Tariffs and Trade 1994 ('GATT 1994'), the Agreement on Implementation of Article VI of the GATT 1994 ('the AD Agreement'), and the Agreement on Subsidies and Countervailing Measures ('the SCM Agreement') are applicable in anti-dumping ('AD') and countervailing duty ('CVD') investigations involving Chinese-origin imports, according to certain rules enunciated in subparagraphs (a) through (d) of paragraph 15. The interpretation of the second sentence in subparagraph (d) of paragraph 15 is becoming increasingly contentious, however. Some argue that this provision requires granting automatically 'market economy' ('ME') status to China by year-end 2016 (i.e., fifteen years from accession).[2] Others strongly disagree, with one commentator describing such interpretation as 'a urban myth that seems to have gone global'.[3] This paper sheds light on this controversy by conducting a detailed examination of paragraph 15 as a whole, and of the second sentence in subparagraph (d) therein in particular, relying for the latter purpose on the well-established rules of interpretation of WTO law. By way of background, the paper begins with an extensive discussion of the language addressing 'non-market economy' ('NME') concerns under the AD Agreement, GATT 1994, and certain GATT accessions.

2 NME provisions in the AD agreement, GATT 1994 and certain accessions to the GATT

2.1 *NME Provisions in the AD Agreement and GATT 1994*

As is well known, according to the rules set out in the AD Agreement, the dumping margin is calculated by comparing 'normal value' to export price on the basis of the data provided by individual cooperating exporters (exception made of when the number of exporters is too

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* Principal International Trade Advisor, International Trade Group, King & Spalding LLP. The opinions expressed in this paper are mine alone and do not represent in any way official views of King & Spalding LLP or its clients. This paper grew from a presentation before the Consejo Consultivo de Prácticas Comerciales Internacionales of Mexico's Ministry of the Economy. Without implicating, I thank Joost Pauwelyn, Chris Cloutier and Martín Malvarez for valuable comments. All errors remain my own.

1 WTO document WT/L/432, circulated on 23 Nov. 2001.

2 See, for example, Christian Tietje & Karsten Nowrot, *Myth or Reality? China's Market Economy Status under WTO Anti-Dumping Law after 2016*, Policy Papers on Transnational Economic Law, No. 34, School of Law, Martin-Luther-University, Halle, December 2011, at page 2 (available at http://telc.jura.uni-halle.de/sites/default/files/telc/PolicyPaper34.pdf); & Joris Cornelis, *China's Quest for Market Economy Status and its Impact on the Use of Trade Remedies by the European Communities and the United States*, 2 Global Trade & Customs J. 105 (2007).

3 Bernard O'Connor, *Market-economy status for China is not automatic*, Vox Article, November 2011, at page 1 (available at http://www.voxeu.org/article/china-market-economy).

large, which allows recourse to sampling).[4] Normal value is, in the first instance, the price for the 'like product' (to the exported good) as sold, in the ordinary course of trade, in the domestic market of the exporting country. Where the 'like product' is not sold in the exporting country in the ordinary course of trade, or not in sufficient quantities, or in the event of a 'particular market situation',[5] normal value can be taken, instead, from a representative export price to a third country or arrived at via the calculation of a 'constructed value'. Interestingly, the term 'non-market economies' does not appear in the AD Agreement. Nevertheless, Article 2.7 of the AD notes that the rules set out in Article 2 of the AD Agreement (concerning the determination of normal value) are 'without prejudice' to the second Supplementary Provision to paragraph 1 of Article VI in Annex I to GATT 1994 (henceforth, the second footnote to paragraph 1 of Article VI).

The second footnote to paragraph 1 of Article VI provides:

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

Thus, the second footnote to paragraph 1 of Article VI applies to imports originating in an economy where the government has (1) a complete or near complete monopoly of 'trade' and (2) controls all domestic prices. It is not clear in the footnote whether the term 'trade' refers to domestic trade or to foreign trade. In any event, the footnote reflects a rather extreme modality of the NME regime, centred on the control by the government of all prices and commercial activity, although this is understandable since it dates from 1955 (see below), when all NMEs were of the central planning variety. Importantly, where the characterization above holds, the footnote permits disallowing domestic prices in the country of exportation as the source of normal value (since a comparison of such prices with export prices may not be appropriate). The footnote is silent, however, as to what bases may be used used in such circumstances for determining normal value in lieu of domestic prices.

The second footnote to paragraph 1 of Article VI originated in the report of the Working Party in the GATT Review Session of 1954–1955.[6] It is based on a proposal by Czechoslovakia to amend GATT Article VI:1(b).[7] The Working Party recommended instead that Czechoslovakia's proposal be turned into an interpretative note incorporated into Annex I of Article VI.[8] In presenting its proposal, Czechoslovakia argued that 'no comparison of export prices with prices in the domestic market of the exporting country is possible when such domestic prices are not established as a result of fair competition in that market but are fixed by the State'.[9] Thus, it appears that Czechoslovakia's main concern in tabling its proposal was to avoid the possibility that dumping be perennially found in respect of its exports as a result of comparing an administratively-determined domestic price against an export price that (presumably) reflected market conditions.

In Czechoslovakia's proposal, this concern would have been taken care of by amending Article VI:1(b) so as to include price setting by the government as grounds for not using domestic prices as the basis for normal value.[10] By contrast, in the footnote drafted by the Working Party[11] (and adopted subsequently by the GATT Contracting Parties) disallowing domestic prices as the basis for normal value is possible where 'all domestic prices are set by the State' and where, in addition, the government has a complete or near complete monopoly of 'trade'. Interestingly, the Working Party Report is silent as to what were the reasons for adding to the footnote the requirement concerning a complete or near complete monopoly of 'trade'.

2.2 *NME Provisions in GATT Accessions*

The issue of the determination of normal value in the case of NMEs was revisited when Poland, Romania and

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4 See Arts 6.10 and 9.4 of the AD Agreement.

5 Interestingly, some WTO Members that have granted ME status have interpreted the term 'special market situation' as referring to regulated pricing for raw materials and proceeded to determine normal value in such circumstances through a constructed value, where the actual cost of production is adjusted upwards to (alleged) unregulated levels, based upon the language in Article 2.2.1.1 of the AD Agreement requiring cost data to 'reasonably reflect the costs associated with the production and sale of the product under consideration'. A discussion of the WTO-consistency, or not, of this practice is beyond the scope of this paper.

6 GATT document L/334, circulated on 1 Mar. 1955. From the 1940s to the 1950s, the Contracting Parties held several 'Review Sessions' to amend the text of the GATT, *inter-alia*. See, *Guide to GATT Law and Practice*, World Trade Organization, 1995, Vol. 1, at page 7.

7 GATT document W.9/86/Rev. 1, circulated on 21 Dec. 1954.

8 GATT document L/334, circulated on 1 Mar. 1955, at para. 6.

9 GATT document W.9/86/Rev.1, circulated on 21 Dec. 1954, p. 1.

10 GATT document W.9/86/Rev.1, circulated on 21 Dec. 1954, p. 1 ('… in the absence of such domestic price or when the price in the domestic market is fixed by the State …').

11 Transcribed in page 10 of GATT document L/334, circulated on 1 Mar. 1955.

Hungary joined the GATT in the period going from the mid-1960s to the early 1970s. In all three cases, the Report of the Working Party on Accession expressly recognized that special methodologies could be used for determining normal value in AD investigations concerning imports from these countries, and outlined two particular versions of such special methodologies. However, while the Working Party Reports on the Accessions of Poland and Romania pointed out that the use of special methodologies was on account that the situation foreseen in the second footnote to paragraph 1 of Article VI applied, the Working Party Report on the Accession of Hungary allowed the use of special methodologies without referring to such, or any other, justification.

In particular, the Working Party Report on the Accession on Poland stated that:

> *it was the understanding of the Working Party that the second Supplementary Provision in Annex I to paragraph 1 of Article VI of the General Agreement*, relating to imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic are fixed by the State, *would apply*. In this connection it was recognized that a contracting party may use as the normal value for a product imported from Poland the prices which prevail generally in its markets for the same or like products or a value for that product constructed on the basis of the price for a like product originating in another country, so long as the method use for determining normal value in any particular case is appropriate and not unreasonable (emphasis added).[12]

Similarly, the Working Party Report on the Accession of Romania noted that:

> *it was the understanding of the Working Party that the second Supplementary Provision in Annex I to paragraph 1 of Article VI of the General Agreement*, relating to imports from a country in which foreign trade operations were carried out by State and co-operative trading enterprises and where some domestic prices were fixed by the law, *would apply*. In this connection it was recognized that a contracting party may use as the normal value for a product imported from Romania the prices which prevail generally in its markets for the same or like products or a value for that product constructed on the basis of the price for a like product originating in another country, so long as the method used for determining normal value in any particular case is appropriate and not unreasonable (emphasis added).[13]

In turn, the Working Party Report on the Accession of Hungary stated that:

> For the purpose of implementing Article VI of the General Agreement, a contracting party may use as the normal value for a product imported from Hungary the prices which prevail generally in its market for the same or like product, or a value for that product constructed on the basis of the price for a like product originating in another country, so long as the method for determining normal value in any particular case is appropriate and not unreasonable.[14]

The recognition that special methodologies could be used for determining normal value relieved petitioners seeking to launch AD proceedings against imports from these countries from demonstrating that the conditions described in the second footnote to paragraph 1 of Article VI did in fact exist with respect to each of the three countries. As explained above, in the case of Poland and Romania, this was because the Working Party Report conceded that the footnote applied. By contrast, in the case of Hungary, the Working Paper Report bypassed the footnote and adopted the special methodologies directly.

The Working Party Report for Romania took the view that the reference to a complete or near monopoly of 'trade' in the second footnote to paragraph 1 of Article VI was in respect of foreign, and not domestic, trade. Further, this Working Party Report appeared to imply that the footnote also applied in the event that only some (and not all) domestic prices were set by the State.

Interestingly, neither of the two versions of the special methodologies for determining normal value outlined in the three Working Party Reports corresponds to what has become established practice in this regard by WTO Members. The first version permitted using as normal value the domestic price in the country of importation itself. The second version allowed using as normal value a constructed value somehow related to the domestic price in a third country. Neither approach caught on, nor was it popularized in the context of AD action against other NMEs, and WTO Members opted instead for using as normal value in NME investigations either the actual domestic price in a surrogate ME or (as in the United States) a constructed value where, in the calculation of the cost of production, the quantities of raw materials consumed are taken from the NME producers themselves while the prices of the raw materials concerned are obtained from a surrogate ME.[15]

It is important to emphasize that, by contrast, the Report of the Working Party on the Accession of

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[12] GATT document L/2806, circulated on 23 Jun. 1967, at para. 13.

[13] GATT document L/3557, circulated on 5 Aug. 1971, at para. 13.

[14] GATT document L/3889, circulated on 20 Jul. 1973, at para. 18.

[15] This method is known as the 'factors of production'.

Yugoslavia did not enable the use of special methodologies for determining normal value in AD investigations against imports from this country. But this was not an arbitrary decision, because the Working Party Report was very emphatic in that, according to the information available at the time the accession process was being completed, Yugoslavia had taken key strides towards becoming a ME:

> The enterprises were independent entities, each of which alone determined the output, quality, variety, and prices of its products according to the demand and supply situation of the market; it alone decided on how profits and wages were to be distributed and bore sole responsibility for its gains and losses. Each enterprise engaged in free competition on the market.[16]

Thus, in retrospect it is clear that, once the possibility to use special methodologies in determining the normal value of NMEs was introduced in 1955 by the adoption of the second footnote to paragraph 1 of GATT, how to treat specific NMEs (with varying characteristics) joining the GATT subsequently was dealt with on a case-by-case basis. In particular, the Working Party Reports for acceding NMEs took one of the following three approaches: (a) conceded that the second footnote to paragraph 1 of Article VI applied (as in the Working Party Reports for Poland and Romania); or (b) adopted the special methodologies directly, obviating the need to refer to the footnote (as in the Working Party Report for Hungary); or (c) expressly acknowledged that, by the time of the accession process was being completed, the acceding NME had fully evolved into a ME (as in the Working Party Report for Yugoslavia). Importantly, in stating such recognition, the latter made reference to economic criteria that went beyond the two indicators in the footnote, which evidences that, as early as 1966, the GATT Contracting Parties were very conscious of the fact that NMEs came in many varieties and that, therefore, the defining characteristics of a NME were not limited anymore to controls over commerce and pricing.

3 NME PROVISIONS IN WTO ACCESSIONS

When China and Vietnam joined the WTO in 2001 and 2006, respectively, the relevant legal instruments addressed whether special methodologies could be used for determining normal value in AD investigations against imports these two countries. In contrast to the Working Party Reports for Poland, Romania and Hungary, the legal instruments concerning China's and Vietnam's accessions make the use of special methodologies contingent upon the facts at issue, subject to a rebuttable presumption that the individual industries or sectors still do *not* operate under ME conditions.[17] If this presumption is rebutted by the producers involved, the determination of normal value must revert to the general methodologies. If, by contrast, the presumption rests unrebutted, then special methodologies can be used. This much is undebated regarding the NME provisions in the legal instruments concerning China's and Vietnam's accessions. As will be explained below, what has become a proverbial bone of contention is whether, after a fifteen-year period in the case of China (and a twelve-year period in the case of Vietnam), the curtain is drawn on the special methodologies themselves or, more narrowly, on the above-described presumption.

3.1 *NME Provisions in China's Protocol of Accession*

As noted by the AB in its report in *China-Export Restrictions*, according to paragraph 1.2 of China's Accession Protocol, the Protocol 'shall be an integral part' of the WTO Agreement'.[18] In particular, paragraph 15 of China's Accession Protocol (referring to 'Price Comparability in Determining Subsidies and Dumping') provides:

> Article VI of the GATT 1994, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ('Anti-Dumping Agreement') and the SCM Agreement shall apply in proceedings involving imports of Chinese origin into a WTO Member consistent with the following:
>
> (a) In determining price comparability under Article VI of the GATT 1994 and the Anti Dumping Agreement, the importing WTO Member shall use either Chinese prices or costs for the industry under investigation or a methodology that is not based on a strict comparison with domestic prices or costs in China based on the following rules:
>
> (i) If the producers under investigation can clearly show that market economy conditions prevail in the industry producing the like product with

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[16] GATT document L/2562, circulated on 24 Feb. 1966, at para. 9.

[17] There is a clear logic to this presumption because of China's long past as a NME. The WTO Appellate Body (the 'AB') itself concedes that China's Accession Protocol embodies a rebuttable presumption that China and the individual industries or sectors have not evolved yet into the ME regime in stating that 'China's Accession Protocol places the burden on the Chinese producers clearly to show that market economy conditions prevail in the industry producing the like product with respect to its manufacture, production, and sale'. See, AB Report, *European Communities – Definitive Anti-Dum ping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, adopted 28 Jul. 2011, at para. 28

[18] See, AB Report, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R, WT/DS395/AB/R, and WT/DS398/AB/R, adopted 22 Feb. 2012, at para. 278.

regard to the manufacture, production and saleof 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.

(b) In proceedings under Parts II, III and V of the SCM Agreement, when addressing subsidies described in Articles 14(a), 14(b), 14(c) and 14(d), relevant provisions of the SCM Agreement shall apply; however, if there are special difficulties in that application, the importing WTO Member may then use methodologies for identifying and measuring the subsidy benefit which take into account the possibility that prevailing terms and conditions in China may not always be available as appropriate benchmarks. In applying such methodologies, where practicable, the importing WTO Member should adjust such prevailing terms and conditions before considering the use of terms and conditions prevailing outside China.

(c) The importing WTO Member shall notify methodologies used in accordance with subparagraph (a) to the Committee on Anti-Dumping Practices and shall notify methodologies used in accordance with subparagraph (b) to the Committee on Subsidies and Countervailing Measures.

(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.

As can be seen, paragraph 15 consists of a *chapeau* and six subparagraphs. The chapeau states that GATT 1994, the AD Agreement and the SCM Agreement are applicable in investigations against imports of Chinese-origin, but that this should be in accordance with the rules set out in the ensuing subparagraphs. The rules set out in subparagraphs (a), (c) and (d) concern AD proceedings (subparagraph (a) including two subparagraphs) whereas those set out in subparagraph (b) relate to CVD proceedings.[19] Accordingly, in what follows we limit our discussion to subparagraphs (a), (c) and (d).

Subparagraph (a) allows the use of either the general methodologies or the special methodologies for determining normal value ('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') depending upon whether the Chinese producers involved satisfy their burden of proof. If they '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 general methodologies have to be used. See subparagraph (a)(i). Conversely, if they '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', then the special methodologies can be used. See subparagraph (a)(ii). Subparagraph (a)(ii) thus provides a fallback or remedy to failure on the part of the Chinese producers involved to demonstrate that the individual industries or sectors have transited to the ME regime.

Subparagraph (c) requires WTO Members to notify their special methodologies for determining normal value to the WTO Committee on Anti-Dumping Practices. There is a question as to whether this requirement encompassed the notification of the criteria under national law, referred to in subparagraph (d), for resolving whether China and individual industries and sectors had morphed into a ME or not. Some WTO Members interpreted such requirement in this manner.[20] In practice, however, many WTO Members did not undertake either notification because both their ME criteria and special methodologies

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[19] Notably, subparagraph (b) of paragraph 15 allows the use of external benchmarks for determining the existence of a benefit, and calculating the magnitude thereof, in CVD proceedings involving imports of Chinese origin. This approach is fully consistent with the AB's interpretation of Art. 14(d) of the SCM Agreement in *US-Softwood Lumber IV*. See, AB Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 Feb. 2004, at para. 103 ('an investigating authority may use a benchmark other than private prices of the goods in question in the country of provision, when it has been established that those private prices are distorted, because of the predominant role of the government in the market as a provider of the same or similar goods. When an investigating authority resorts, in such a situation, to a benchmark other than private prices in the country of provision, the benchmark chosen must, nevertheless, relate or refer to, or be connected with, the prevailing market conditions in that country, and must reflect price, quality, availability, marketability, transportation and other conditions of purchase or sale, as required by Article 14(d)').

[20] Mexico, for instance, notified its criteria under national law for making such determination. See WTO document G/ADP/N/1/MEX/1/Suppl.1, circulated on 31 Jan. 2001.

long-predated China's accession and, therefore, had already been notified to the WTO as part of their national law.

Because the use of special methodologies to determine normal value is permitted contingent upon the facts at issue, the first and the third sentences in subparagraph (d) contemplate the possibility of the Chinese government taking the lead to demonstrate, by reference to the criteria set out in national law, that the Chinese economy as a whole has reached ME status or that, alternatively, individual industries or sectors have completed their transition to the ME regime. Since it would be illogical to allow the use of special methodologies even if the Chinese economy as a whole or the relevant individual industry or sector has transited to the ME regime, the first and the third sentences in subparagraph (d) provide that, once the existence of such circumstances has been established by the Chinese government, the special methodologies shall be discontinued. In particular, the first sentence in subparagraph (d) indicates that '[o]nce 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' whereas the third sentence in subparagraph (d) states that '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'. Importantly, the first and the third sentences in subparagraph (d) provide for the termination of the special methodologies by making express reference to the abrogation of subparagraph (a) should certain circumstances be met.[21]

By contrast, the second sentence in subparagraph (d) stipulates that '[i]n any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession'. On its face, all that this provision does is to disable, fifteen years after accession, the fallback or remedy set out in subparagraph (a)(ii) ('[t]he importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China') to failure on the part of the Chinese producers involved to discharge their burden of proof by demonstrating that the individual industries or sectors have transited to the ME regime ('if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product'). The practical effect of disabling such fallback or remedy would be to defuse, 15 years after accession, the presumption that individual industries and sectors still do not operate under ME conditions. In other words, 15 years after accession, there is no consequence to the Chinese producers involved failing to satisfy their burden of proof.

It is clear then that a literal reading of the second sentence in subparagraph (d) does *not* support the argument that WTO Members are required to dispose of the special methodologies, thus granting ME treatment to China, by year-end 2016. To conclude otherwise would require interpreting the second sentence in subparagraph (d) as referring to subparagraph (a) instead of subparagraph (a)(ii). [22] In section 4 of this paper, we discuss whether such approach would be permissible under the rules of interpretation of WTO law.

3.2 *NME Provisions in Viet Nam's Working Party Report*

The NME provisions in the Report of the Working Party on Viet Nam's Accession are a mirror image of the NME provisions in China's Protocol of Accession. In particular, paragraph 255 of the Working Party Report provides:

> The representative of Viet Nam confirmed that, upon accession, the following would apply – Article VI of the GATT 1994, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ('Anti-Dumping Agreement') and the SCM Agreement shall apply in proceedings involving exports from Viet Nam into a WTO Member consistent with the following:
>
> (a) In determining price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement, the importing WTO Member shall use either Vietnamese 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 Viet Nam 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 Vietnamese prices or costs for the industry under investigation in determining price comparability;

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[21] Importantly, the first and third sentences in subparagraph (d) provide for the termination of the special methodologies as per China's Accession Protocol, but not for the termination of the special methodologies as per the second footnote to paragraph 1 of Article VI. This would seem to be the case since the chapeau of paragraph 15 states unequivocally that the AD Agreement applies in proceedings involving imports of Chinese origin. The second footnote would come into play by virtue of being referenced in Article 2.7 of the AD Agreement.

[22] Again, subparagraph (a) has a far-reaching scope and opens the door to the use of special methodologies whereas subparagraph (a)(ii) has a far more limited ambit and embodies the presumption that individual industries and sectors still do not operate under ME conditions.

(ii) The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs inViet Nam 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.

(b) In proceedings under Parts II, III and V of the SCM Agreement, when addressing subsidies, the relevant provisions of the SCM Agreement shall apply; however, if there are special difficulties in that application, the importing WTO Member may then use alternative methodologies for identifying and measuring the subsidy benefit which take into account the possibility that prevailing terms and conditions in Viet Nam may not be available as appropriate benchmarks.

(c) The importing WTO Member shall notify methodologies used in accordance with subparagraph (a) to the Committee on Anti-Dumping Practices and shall notify methodologies used in accordance with subparagraph (b) to the Committee on Subsidies and Countervailing Measures.

(d) Once Viet Nam 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 on 31 December 2018. In addition, should Viet Nam 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.

The Working Party took note of these commitments.

As paragraph 15 of China's Protocol of Accession, paragraph 255 of the Working Party Report on Viet Nam's Accession consists of a chapeau and six subparagraphs. The chapeau states that GATT 1994, the AD Agreement and the SCM Agreement are applicable in investigations against imports of Vietnamese-origin, but that this should be in accordance with the rules set out in the four subparagraphs. The rules set out in subparagraphs (a), (c) and (d) concern AD proceedings (subparagraph (a) including two subparagraphs) whereas those set out in subparagraph (b) relate to CVD proceedings.

Subparagraph (a) allows the use of either the general methodologies or the special methodologies for determining normal value ('the importing WTO Member shall use either Vietnamese 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 Viet Nam') depending upon whether the Vietnamese producers involved satisfy their burden of proof. If they '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 general methodologies have to be used. See subparagraph (a)(i). Conversely, if they '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', then the special methodologies can be used. See subparagraph (a)(ii). As in paragraph 15 of China's Protocol of Accession, subparagraph (a)(ii) is the fallback or remedy to failure on the part of the Vietnamese producers involved to demonstrate that the individual industries or sectors have transited to the ME regime.

Subparagraph (c) requires WTO Members to notify their special methodologies for determining normal value to the WTO Committee on Anti-Dumping Practices.

Because the use of special methodologies to determine normal value is permitted contingent upon the facts at issue, the first and the third sentences in subparagraph (d) foresee the possibility of the Vietnamese government taking the lead to demonstrate, by reference to the criteria set out in national law, that the Vietnamese economy as a whole has reached ME status or that, alternatively, individual industries or sectors have completed their transition to the ME regime. The first and the third sentences of subparagraph (d) provide that, once the existence of such circumstances has been established by the Vietnamese government, the special methodologies shall be discontinued. Again, the first and the third sentences in subparagraph (d) provide for the termination of the special methodologies by making express reference to the abrogation of subparagraph (a) should certain circumstances be met.

4 Does the second sentence in subparagraph (d) of paragraph 15 of China's protocol of accession say what it says?

According to Tietje and Nowrot, the conventional wisdom is that the second sentence in subparagraph (d) grants ME treatment to China 15 years after accession.[23] However, as noted above, reading the second sentence in subparagraph

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[23] See Tietje and Nowrot, *supra*, at para 7 ('The second sentence of paragraph 15(d) … has so far conventionally been interpreted as resulting in the … "automatic" shift of China from MNE to MES {market economy status} on 11 December 2016').

(d) of paragraph 15 of China's Accession Protocol as banning the use of special methodologies subsequently to 2016 (which would amount to conceding ME treatment to China) would require interpreting it as referring to subparagraph (a) instead of subparagraph (a)(ii).[24]

According to Article 3.2 of the WTO's Understanding on Rules and Procedures Governing the Settlement of Disputes ('DSU'), WTO dispute settlement must 'clarify existing provisions of [the WTO] agreements in accordance with customary rules of interpretation of public international law'. 'It is well settled in WTO case law that the principles codified in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* (the "*Vienna Convention*") are such customary rules'.[25] The AB has found that, consistent with Article 31 of the Vienna Convention, WTO provisions must be interpreted based upon the ordinary meaning of the terms used, their context, and the object and purpose of the provision at issue.[26] The AB has also found that the interpretation of the specific terms involved is the first step in this approach.[27] The AB has further found that, consistent with Article 32 of the Vienna Convention, where after applying the approach outlined in Article 31 of the Vienna Convention, the meaning of a WTO provision remains ambiguous or obscure, or leads to a result that is manifestly absurd or unreasonable, supplementary means of interpretation can be used including the 'preparatory work of the treaty and the circumstances of its conclusion'.[28]

The interpretation of the second sentence in subparagraph (d) of paragraph 15 must, therefore, begin with an examination of its specific terms. This sentence states that 'the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession'. Accordingly, the ordinary meaning of this sentence would be that subparagraph (a)(ii) -and not subparagraph (a)- lapses automatically fifteen years after accession.[29]

Importantly, the first and the third sentences in subparagraph (d), that is, the two adjacent sentences, make reference to subparagraph (a). This evidences that the drafters saw a clear distinction between referring to subparagraph (a) and referring to subparagraph (a)(ii). Crucially, both the first and the third sentences in subparagraph (d) provide for the termination of paragraph (a). This makes it obvious that, if the drafters had intended the second sentence in subparagraph (d) to similarly provide for the termination of subparagraph (a), they would have stated so.

Such conclusion is bolstered by the fact that in subparagraph (d) in paragraph 255 in the Working Party Report on Viet Nam's Accession, concluded five years after China's Accession, there is the same distinction between the termination of subparagraph (a) and the termination of subparagraph (a)(ii). If there had been any concerns on the part of the drafters about the termination of subparagraph (a)(ii) being mistaken for the termination of subparagraph (a), surely this concern would have been addressed in Viet Nam's Working Party Report.[30]

To sum up, neither the text of the second sentence of subparagraph (d), nor its context, including not only the first and the third sentences of subparagraph (d) but also the mirror provisions in Viet Nam's Working Party Report, support the proposition that it mandates the abrogation of the special methodologies, and the granting of ME treatment to China, fifteen years after accession.

Thus, those reading the second sentence in subparagraph (d) as requiring the derogation of the special methodologies fifteen years after accession are reading into such provision terms that are nowhere found in it. This

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[24] In its report on *EC-Fasteners*, the AB did as much. See, AB Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, adopted 28 Jul. 2011, at para. 289 ('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)'. However, as is well known, this statement was not only cursory and conclusory, but also the quintessential obiter dictum because whether the special methodologies for determining normal value remain in place after December 2016 was not one of the issues litigated in *EC-Fasteners*. In this dispute, the parties asked the panel and the AB to address whether para. 15 of China's Accession Protocol has implications as well for the determination of export price. One of the drawbacks of having spoken gratuitously on the issue of the lifespan of the special methodologies was that the AB did not benefit from representations in this regard by the parties and the third parties involved.

[25] AB Report, *United States - Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr. 1, adopted 1 Dec. 2002, at para. 61 (emphasis in the original).

[26] See, for example, AB Report, *Argentina - Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 Jan. 2000, at para. 91 ('we must examine these words in their ordinary meaning, in their context and in light of the object and purpose of Article XIX').

[27] See, for example, AB Report, *United States - Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr. 1, adopted 1 Dec. 2002, at para. 62 ('the task of interpreting a treaty provision must begin with its specific terms'), and AB Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 Feb. 2004, at para. 58 ('[t]he meaning of a treaty provision, properly construed, is rooted in the ordinary meaning of the terms used').

[28] See, for example, AB Report, *European Communities - Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 Jun. 1998, at para. 86.

[29] Tietje and Nowrot concede that '[w]hat is frequently overlooked or disregarded . . . is the important fact that the second sentence of paragraph 15(d) only stipulates the expiring of "the provisions of subparagraph (a)(ii)", thus retaining the applicability of subparagraph (a)(i) even after 11 December 2016'. See, Tietje & Nowrot, *supra* n. 2, at 8).

[30] For a good illustration of the AB practice regarding the examination of 'context' in similar circumstances, see AB Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R and WT/DS286/AB/R, adopted 27 Sep. 2005, at para. 193 ('[i]t is clear from these provisions that the context of the term "salted" in heading 02.10 consists of the immediate, as well as the broader, context of that term. The immediate context is the other terms of the product description contained in heading 02.10 of the EC Schedule. The broader context includes the other headings in Chapter 2 of the EC Schedule, as well as other WTO Member Schedules').

approach runs squarely against the admonition by the AB that '[t]he fundamental rule of treaty interpretation requires a treaty interpreter to read and interpret the words actually used by the agreement under examination, not the words the interpreter feels should have been used'.[31] The AB has similarly cautioned that the WTO principles of interpretation do not 'condone the imputation into a treaty of words that are not there'.[32]

If the second sentence in subparagraph (d) of paragraph 15 does not terminate the use of special methodologies, what role does it play then? Arguing that it is of no consequence would also be inconsistent against the rules of interpretation of WTO law, because the AB has stated 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 (footnote omitted)'.[33]

As noted above, the second sentence in subparagraph (d) provides for the abrogation of subparagraph (a)(ii) fifteen years after accession. Subparagraph (a)(ii) allows the use of special methodologies if the Chinese producers involved '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'. Accordingly, by terminating subparagraph (a)(ii) 15 years after accession, the second sentence in subparagraph (d) abrogates the remedy (i.e., the use of special methodologies) to the failure on the part of the Chinese producers involved to demonstrate that the relevant industry or sector has transitioned to the ME regime. Absent such remedy, the presumption of China and the individual industries and sectors not having evolved yet into a ME regime becomes inoperative (because special methodologies cannot be applied on the grounds that the Chinese producers involved failed to discharge their burden of proof). The effect of the second sentence in subparagraph (d) is, therefore, to terminate such presumption fifteen years after accession.

Interestingly, the argument could be made that the second sentence in subparagraph (d) abrogates the special methodologies not because it refers to subparagraph (a) but because it abrogates subparagraph (a)(ii), which allegedly would constitute the only trigger to the use of the special methodologies under subparagraph (a). This approach, however, is unavailing because it would erroneously assume that paragraph 15 of China's Accession Protocol limited the right to make representations to investigating authorities concerning China's status (NME or not) to the Chinese producers themselves and to the Chinese government. This is not only plainly illogical but also manifestly contrary to the chapeau of paragraph 15 which, by stating that the AD Agreement applies in proceedings involving imports of Chinese-origin, envisions domestic producers making representations in such proceedings, including in respect of China's status.[34] Indeed, if in the second sentence in subparagraph (d) the drafters had intended to dispose of the special methodologies provided for under subparagraph (a), they would have done so explicitly, as happened in the two contiguous sentences.

Importantly, the proposition that the second sentence in paragraph (d) mandates the termination of the special methodologies (and the granting of ME status to China) fifteen years after accession not only lacks textual and contextual support but also clashes with the overall approach embodied in paragraph 15 of China's Accession Protocol. As explained earlier, in their Working Party Reports, Poland, Romania and Hungary were all treated as NMEs whereas its Working Party Report treated Yugoslavia as a ME. Russia's Protocol of Accession also treats it as a ME. Thus, in the accessions of Poland, Romania, Hungary, Yugoslavia and Russia there was sort of an 'all or nothing' approach to NME status and the application of special methodologies. By contrast, China's Accession Protocol made the use of special methodologies (and the concession of ME status) contingent upon the facts at issue in the relevant investigations. Accordingly, if the second sentence in paragraph (d) did mandate the termination of the special methodologies 15 years after accession, in a 'sudden death' fashion, then the case-specific, facts-based approach that is the distinguishing characteristic of paragraph 15 vis-a-vis NME provisions in prior accessions would be eviscerated.

That the second sentence in subparagraph (d) mandates the termination of the special methodologies fifteen years after accession is also unconvincing on the ground that there is not much logic in having a rebuttable presumption that China and the individual industries or sectors still operate under NME conditions be replaced, fifteen years after accession, by an irrebuttable presumption that China and the individual industries or sectors have transited to the ME regime. This would imply that, on the night of 11 December 2016, China and the individual industries or sectors are going to go to bed under the NME regime and wake up having fully completed their transition to ME status, in a miracle reminiscent of Santa Claus' apparitions. Conversely, it is

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[31] AB Report, *EC Measures Concerning Meat and Meat Products (Hormones),* WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 Feb. 1998, at para. 181.

[32] AB Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 Jan. 1988, at para. 45.

[33] AB Report, *United States – Standards in Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1966, at page 21.

[34] For instance, Art. 6.2 of the AD Agreement provides that '[t]hroughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests'.

far more sensible to expect the rebuttable presumption that China and the individual industry or sectors still operate under NME conditions to be discontinued fifteen years after accession in recognition that, by that point in time, the NME baggage that was so pervasive upon accession is likely to have degraded and that, accordingly, any determination about continuing NME conditions in China and the individual industries or sectors needs to rooted in current facts, without any intervening presumptions.

5 Conclusions and policy implications

The GATT Contracting Parties addressed NME concerns as regards the determination of normal value by adding the second footnote to paragraph 1 of Article VI, which provides for the use of special methodologies for such purposes. Subsequently, these concerns were dealt with by means of the Working Party Reports of acceding NMEs. In particular, in the case of Poland and Romania, the Working Party Reports conceded that the footnote was applicable (thus relieving domestic producers from demonstrating that the rather taxing conditions described in the footnote were present) whereas the special methodologies were part and parcel of the Working Party Report for Hungary (which obviated having recourse to the footnote). In turn, the Working Party Report for Yugoslavia gave this contracting party a clean bill of health regarding its transition to ME status, disallowing implicitly the use of special methodologies. Russia's Protocol of Accession took the same approach. Hence, in the accessions of Poland, Romania, Hungary, Yugoslavia and Russia there was sort of an 'all or nothing' approach to NME status and the application of special methodologies. By contrast, the distinguishing characteristic of paragraph 15 of China's Accession Protocol (and its mirror provision in Viet Nam's Working Party Report) is that it makes NME status and the use of special methodologies contingent upon the facts at issue, subject to a rebuttable presumption that the individual industries or sectors still do not operate under ME conditions. The rules of interpretation of WTO law do not support the proposition that the second sentence in subparagraph (d) of paragraph 15 bans the use of special methodologies fifteen years after accession. Instead, the second sentence in subparagraph (d) has the effect of disabling, fifteen years after accession, the presumption that China and the individual industries or sectors remain under the NME regime.

It follows that special methodologies can remain in use as regards AD proceedings involving imports of Chinese-origin to the extent that, after 11 December 2016, the facts on record (including the facts underpinning a petition presented by a domestic industry) demonstrate that the relevant industry or sector continues to operate under NME conditions. Put another way, through 11 December 2016, Chinese respondents bear the burden of proof to demonstrate that the individual industries or sectors have reached the stage where they operate under ME conditions. Conversely, after 11 December 2016 the burden of proof shifts and petitioners are tasked with demonstrating that the individual industries or sectors remain under NME conditions.

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