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THREE VIEWPOINTS ON CHINA'S NON-MARKET ECONOMY STATUS

RITWIK BHATTACHARYA⁺

On December 15, 2016, China requested for consultations with the United States and the European Union, regarding their continued use of special methodologies in the calculation of normal value, based on the Non-Market Economy ["NME"] status of China.¹ Whether other countries are entitled to continue treating China as an NME depends on the interpretation of a sunset clause in China's Accession Protocol ["AP"]. As the WTO gears up for a long-drawn dispute about China's status, the author attempts to test the legal basis of China's claim. After providing a brief background of the conditions under which China acceded to the WTO, the author examines the three viewpoints that have been adopted by commentators towards the question of China's NME status. The "magic deadline viewpoint" argues that China will acquire a Market Economy Status ["MES"] automatically after 15 years of the AP coming into effect. The "business as usual viewpoint" posits that there is no change in China's NME status. The "shifting the burden of proof viewpoint" argues that China does not acquire a MES automatically, but the burden of proving its continued NME status shifts to the importing country. The author finally concludes that the third viewpoint i.e. shifting the burden of proof offers the most persuasive interpretation of China's AP, in consonance with the rules of treaty interpretation under the Vienna Convention on the Law of Treaties.²

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¹ Request for Consultations by China, United States-Measures Related to Price Comparison Methodologies, WTO Doc. WT/DS515 (Dec. 12, 2016); Request for Consultations by China, *European Union - Measures Related to Price Comparison Methodologies*, WTO Doc. WT/DS516 (Dec. 12, 2016).

² Vienna Convention on the Law of Treaties arts. 31-33, May 23, 1969, 1155 U.N.T.S. 33 [hereinafter VCLT].

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I. BACKGROUND

In 2001, when China acceded to the World Trade Organisation ["WTO"], it accepted certain obligations that differ from those imposed on regular WTO members. These include both WTO-plus and WTO-minus obligations. One such WTO-minus obligation pertains to special methodologies in the calculation of normal value.³ The difference between normal value and export value is instrumental to any anti-dumping investigation.⁴ The price calculation methodology for normal value includes those sales that take place in the "ordinary course of trade".⁵ As a general rule, prices in the exporting country are taken into account ["normal methodology"]. However, the second *Ad Note* to Article VI:1, GATT 1994 states that when sales take place in NME conditions, constructed value using surrogate prices in a market economy third-country can be used ["special methodology"].

II. THE CRUX OF THE PROBLEM

The crux of the problem is the less-than-clear drafting of ¶15 of China's AP. ¶15(a)(i) of China's AP states that WTO members *shall* use the normal methodology if Chinese producers can clearly show that market conditions exist in their domestic industry and, as per ¶15(a)(ii), China's AP WTO members *may* use the special methodology if Chinese producers cannot clearly show the same.⁶ Additionally, ¶15(d) provides that if China can establish that as per the national law

³ World Trade Organisation, Ministerial Declaration of 23 November 2001, ¶15, WTO Doc. WT/L/432 [hereinafter China's AP]. Normal value is the price of the product at issue when it is exported in the ordinary course of trade. Export value is the price at which the product is actually exported.

⁴ General Agreement on Tariffs and Trade art VI:1, April 15, 1994, 1867 U.N.T.S. 187 [hereinafter GATT 1994].

⁵ *Id.*, Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, April 15, 1994, 1868 U.N.T.S. 201 [hereinafter ADA].

⁶ China's AP, *supra* note 3, ¶15(a)(i)-(ii).

of the importing country, it is a market economy or market economy conditions prevail in a particular industry or sector, then the provisions of ¶15(a) shall be terminated or rendered inapplicable to that industry or sector, as the case may be.⁷ ¶15(d) also states that in any event, provisions of ¶15(a)(ii) shall expire 15 years from the date of accession *i.e.* December 11, 2001.⁸ Therefore, the provisions of ¶15(a)(ii) expired on December 11, 2016. The dispute among scholars pertains to the interpretation of ¶15 of China's AP and the effect of ¶15(a)(ii)'s expiration.

III. THE THREE VIEWPOINTS

There are broadly three viewpoints taken by scholars on this issue. According to the first viewpoint, China will acquire a market economy status ["MES"] automatically after the magic deadline of December 11, 2016, thereby rendering the special methodology impermissible ["magic deadline viewpoint"].⁹ The second viewpoint, on the other hand, argues that there is no deadline in China's AP after which it acquires MES and business continues as usual ["business-as-usual viewpoint"].¹⁰ As per the third viewpoint, China does not automatically obtain MES status. Rather, the burden of proof for permitting the use of the special methodology shifts from China to the importing country ["shifting burden of proof viewpoint"].¹¹

According to the customary rule of treaty interpretation,¹² as applicable to WTO disputes,¹³ the text should be interpreted in good faith, to give full effect to the intention of the parties. This is known as the principle of effectiveness or *effet*

⁷ China's AP, *supra* note 3, ¶15(d).

⁸ China's AP, *supra* note 3, ¶15(d).

⁹ W. Rao, *China's Market Economy Status Under WTO Anti-Dumping Law After 2016*, 5 TSINGHUA CHINA LAW REVIEW 151, (2013); J. 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 AND CUSTOMS JOURNAL 105 (2007).

¹⁰ B. Connor, *Market- Economy Status for China is not Automatic* (November 27, 2011), <http://voxeu.org/article/china-market-economy> [hereinafter Connor I]; B. Connor, *The Myth of China and Market Economy Status in 2016*, <http://worldtradelaw.typepad.com/files/oconnorresponse.pdf> [hereinafter Connor II].

¹¹ C. Tietje & K. Nowrot, *Myth or Reality? China's Market Economy Status under WTO Anti-Dumping Law after 2016*, 34 POLICY PAPERS ON TRANSNATIONAL ECONOMIC LAW, December, 2011, <http://telc.jura.uni-halle.de/sites/default/files/telc/PolicyPaper34.pdf>; J. Miranda, *Interpreting Paragraph 15 of China's Protocol of Accession*, 9(3) GLOBAL TRADE AND CUSTOMS JOURNAL 94 (2014).

¹² VCLT, *supra* note 2, at art.31.

¹³ Appellate Body Report, *US- Standards for Reformulated and Conventional Gasoline*, 23, WTO Doc. WT/DS2/AB/R (adopted May 20, 1996); Appellate Body Report, *Japan Taxes on Alcoholic Beverages-II*, 10, WTO Doc. WT/DS10/AB/R, (adopted Nov. 1, 1996).

utile.¹⁴ It is presumed that the drafters intended that each word and provision in a treaty must be given effect and “no word or provision may be treated as or rendered superfluous.”¹⁵ The author shall now evaluate these three viewpoints to identify which one arrives at the most effective interpretation of ¶15, China's AP.

A. *Magic Deadline Viewpoint*

The magic deadline viewpoint considers ¶15 of China's AP to be a conditional derogation clause, which permits the importing country to make use of the special methodology.¹⁶ Proponents of this viewpoint consider ¶15(a)(ii) to be the “exclusive and true legal basis for derogation”.¹⁷ Thus, when the condition in ¶15(a)(ii) expires, the derogation clause can no longer be resorted to. The mere fact that the chapeau of ¶15(a) along with ¶15(a)(i) continues to exist does not alter this conclusion. For this purpose, reliance is generally placed on the *travaux* of China's AP, where earlier drafts merely contained the two clauses without the existence of the chapeau.¹⁸ The chapeau was added much later by the United States. It is thus surmised that the chapeau was inserted merely “to reiterate the conditional options of the importing Member, instead of obligating it to use alternative methodologies”.¹⁹ Further, the chapeau states that it shall apply “based on” ¶15(a)(i) and (ii). Relying on the ordinary meaning of “based”, which means “an underlying fact or condition”,²⁰ it is argued that the chapeau cannot operate independently of ¶15(a)(ii).²¹ Reliance is also placed on the Appellate Body decision in *EC-Fasteners*, which stated that “the provisions of paragraph 15(a) expire 15 years after the date of China's accession”.²² It is argued that the only remaining basis for derogation is contained in the second *Ad Note* to Article VI:1, GATT 1994, which lays down an impossibly high threshold of having “complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State”.²³ Proponents of this viewpoint argue further that since this threshold cannot be met, “the expiry of subparagraph 15(a)(ii) actually has the effect of bestowing the Market Economy Status on China”.²⁴

¹⁴ U. LINDERFALK, ON THE INTERPRETATION OF TREATIES 108 (2007).

¹⁵ *Id.*

¹⁶ Rao, *supra* note 9, at 161.

¹⁷ Rao, *supra* note 9, at 164.

¹⁸ Rao, *supra* note 9, at 163.

¹⁹ Rao, *supra* note 9, at 164.

²⁰ BLACK'S LAW DICTIONARY 171 (9th ed. 2009).

²¹ Rao, *supra* note 9, at 161.

²² Appellate Body Report, *European Communities—Definitive Anti-dumping Measures on Certain Iron or Steel Fasteners from China*, ¶289, WTO Doc. WT/DS397/AB/R (adopted Feb. 12, 2016).

²³ GATT 1994, *supra* note 4, at Interpretative Note 2, Ad Article VI:1.

²⁴ Rao, *supra* note 9, at 167.

The author has three objections to the magic deadline viewpoint. *First*, the reference to the *travaux* seems to go against this viewpoint. Merely because the chapeau was inserted at a later point in time does not mean that it is simply reiterating an earlier provision. Rather, the fact that the United States negotiated for its insertion makes it likely that it was intended to have some effect.²⁵ *Second*, the reliance on the Appellate Body decision in *EC-Fasteners* does not carry a lot of weight, because, apart from being an *obiter*, the decision failed to distinguish between the consequences of “expiry of ¶15(a)” and “expiry of ¶15(a)(ii).”²⁶ *Third*, the most serious shortcoming of this viewpoint is that it fails to satisfactorily explain why the chapeau to ¶15(a) as well as ¶15(a)(i) have been retained. The only explanation offered is that ¶15(a)(i) provides an alternate remedy to Chinese manufacturers, “in the case that the importing Member continues to apply alternative methodologies against Chinese products after 2016.”²⁷ Such an explanation goes against the principle of non-redundancy, a component of the effectiveness principle. According to this principle, one must avoid instances of logical tautology i.e., a norm must not prescribe the same state of affairs as another norm that exists independently of it.²⁸ As per this explanation, ¶15(d) would reiterate what is already stipulated in ¶15(1)(a) that an importing member country is not entitled to use special methodologies. If this explanation were to be accepted, every superfluous rule can be justified as having effect *if it is assumed* that a situation might arise where its identical rule has not been complied with. The magic deadline viewpoint would thus give ¶15(d) an interpretation that renders ¶15(a)(i) superfluous, in contravention of the effectiveness principle.

B. *Business-As-Usual Viewpoint*

This viewpoint is premised on overcoming the third objection to the magic deadline viewpoint – it tries to give full effect to the provisions of ¶15 that remain after December 11, 2016. The argument goes as follows – the chapeau of ¶15 states that the rules on anti-dumping shall apply “consistent with” the subsequent provisions. The chapeau to ¶15(a) prescribes an either/or methodology “based on” the two subparagraphs of ¶15(a). Contrary to the interpretation given by the magic deadline viewpoint to “based on”, it is argued that the expression “is not the same as applying the rule rigidly as set out in the subparagraph.”²⁹ Thus, even when ¶15(a)(ii) expires, the text of the remaining provisions permits the use of special methodologies, if the conditions for the application of ¶15(a)(i) have not been

²⁵ Connor II, *supra* note 10, at 4.

²⁶ Miranda, *supra* note 11, at 101.

²⁷ Rao, *supra* note 9, at 167.

²⁸ Linderfalk, *supra* note 14, at 110.

²⁹ Connor II, *supra* note 10, at 4.

satisfied.³⁰ Since this reasoning has made some logical leaps, the author shall try to provide the strongest justification for the same. To break down the provision like a syllogism, the chapeau to ¶15(a) states that a country shall use either of X or Y to determine P (“X” being normal methodology, “Y” being special methodology and “P” being normal price). Assuming that ¶15(a) is self-contained, ¶15(a)(i) prescribes a necessary and sufficient condition Z, in order to trigger the use of X (“Z” being a Chinese producer being able to clearly show that market conditions exist in its industry).³¹ Assuming that ¶15(a)(ii) has expired, ¶15(a)(i) is the only condition that determines the operation of the chapeau of ¶15(a). Thus, if condition Z has not been satisfied, it can be concluded that the use of X cannot be triggered. As a result, the use of Y can be triggered. To show the reasoning illustratively:

P = X or Y	(P can be X or Y)	(Proposition 1)
Z ⇔ X	(X if and only if Z)	(Proposition 2)
X ⇔ Z	(Z if and only if X)	(Proposition 3, converse of Proposition 2)
Z ⇒ X	(If no Z, then no X)	(Contrapositive of Proposition 3)
P = Y	(P can be Y)	(Conclusion)

Additionally, proponents of the business-as-usual viewpoint argue that the first and third sentences of ¶15(d) state that the burden is on China to establish that market conditions prevail, either in the whole economy or in certain sectors.³² Thus, it cannot be presumed that China has acquired MES, and there is no reversal of the burden of proof.³³ Accordingly, they conclude that the status quo shall continue and the magic deadline viewpoint is merely an “urban myth that seems to have gone global”.³⁴

The author finds a lot of merit in the business-as-usual viewpoints’ interpretation of ¶15(a)(i) read with the chapeau of ¶15(a). It provides an effective interpretation to the chapeau of ¶15(a) as well as the provisions of ¶15(a)(i), both of which continue to exist after the deadline. However, there are two objections to this viewpoint. *First*, it cannot be argued that the first and third sentences of ¶15(d) are controlling provisions that affix the burden of proof on China. Since the second

³⁰ Connor II, *supra* note 10, at 4.

³¹ T. Posner, *A Comment on Interpreting Paragraph 15 of China's Protocol of Accession* by Jorge Miranda, 9(4) GLOBAL TRADE & CUSTOMS J. 146, 147 (2014); Jorge Miranda, *Interpreting Paragraph 15 of China's Protocol of Accession*, 9(4) GLOBAL TRADE & CUSTOMS J. 94–103 (2014).

³² Connor II, *supra* note 10, at 2.

³³ Connor II, *supra* note 10, at 2.

³⁴ Connor I, *supra* note 10.

sentence of ¶15(d), prescribing the expiry of ¶15(a)(ii), applies “in any event”,³⁵ it applies independently, notwithstanding the content of other sentences of ¶15(d). *Second*, while attempting to give an effective interpretation to the remaining provisions of ¶15, the business-as-usual viewpoint omits to consider the provision that started this controversy in the first place i.e. the second sentence of ¶15(d). If this interpretation is accepted, the provision prescribing the expiry of ¶15(a)(ii) will have virtually no effect and will be rendered superfluous. Therefore, the business-as-usual viewpoint should not be accepted.

C. *Shifting Burden of Proof Viewpoint*

The proponents of this viewpoint do not believe that ¶15(d) grants China MES status “from that magic date onwards.”³⁶ Nor do they believe that there is absolutely no change in the status quo upon expiration of ¶15(a)(ii). They start out with the analysis employed by the business-as-usual viewpoint, about ¶15(a) being a self-contained regime prescribing an either/or methodology. As argued above, this means that the chapeau of ¶15(a) read with ¶15(a)(i) is sufficient to employ the special methodology in certain circumstances.³⁷ ¶15(a)(ii) provides one such circumstance, which is when “producers... cannot clearly show that market economy conditions prevail in the industry.”³⁸ Therefore, it is argued that ¶15(a)(ii) deals only with the burden of proof, presuming the existence of NME conditions unless disproved by Chinese produces in an industry. Once ¶15(a)(ii) expires, this presumption is taken away. However, this does not mean that China becomes an MES in all circumstances, as ¶15(a)(i) does not expire. Since ¶15(a)(i) continues to exist, the logical corollary to the basis for a claim by Chinese producers to industry-wide market economy treatment, is the “theoretical possibility of China being considered as an NME by some other WTO members after this magic date.”³⁹ Thus, the true effect of the second sentence of ¶15(d) is to reverse the burden of proof by placing it on the importing country that seeks to treat China as an NME. Until December 11, 2016, the importing country could treat China as an NME “without any further justification.”⁴⁰ Under the first and third sentences of ¶15(d), the burden was on China to establish that market conditions prevailed in its economy or in individual sectors and industries. After December 11, 2016, “the burden of proof shifts and (the importing country is) ... tasked with demonstrating that the individual industries or sectors remain under NME conditions”.⁴¹

³⁵ China’s AP, *supra* note 3, ¶15(d).

³⁶ Tietje & Nowrot, *supra* note 11, at 7.

³⁷ China’s AP, *supra* note 3, chapeau of ¶15(a).

³⁸ China’s AP, *supra* note 3, ¶15(a)(ii).

³⁹ Tietje & Nowrot, *supra* note 11, at 8.

⁴⁰ Tietje & Nowrot, *supra* note 11, at 8.

⁴¹ Miranda, *supra* note 11, at 103.

The question then arises - what is the threshold of proof that the importing country should satisfy? One possible suggestion is to resort to the threshold laid down in the second *Ad Note* to Article VI:1, GATT 1994. However, this provision as interpreted by the Appellate Body in *EC-Fasteners*, lays down an impossibly high threshold, which is unlikely to be “proven with regard to any current and future WTO member.”⁴² On the face of it, this may seem no different than the magic-deadline viewpoint. However, the difference is this – as per the magic-deadline viewpoint, there is no feasible way for the importing country to show that China continues to be an NME. Under the shifting-burden-of-proof viewpoint, if the threshold of proof is met with reference to the standard under the second *Ad Note* to Article VI:1, GATT 1994 or another appropriate standard, it is possible for an importing country to continue treating China as an NME. The Appellate Body's determination of the standard under the second *Ad Note* to Article VI:1, GATT 1994 can potentially be challenged as it was an obiter dictum and mentioned only in a footnote. Alternatively, the same standard that is imposed on Chinese manufacturers in ¶15(a)(ii) can be used here.⁴³ This is a “clearly show” standard. While defining the exact contours of such a standard is beyond the scope of this paper, the existence of such a standard is indicative of its possible use in the present case as well.

The author believes that the shifting burden of proof viewpoint offers the most effective interpretation of ¶15 of China's AP. Unlike the business-as-usual viewpoint, the second sentence of ¶15(d) is not rendered superfluous, since there is a change in the status quo upon expiry of ¶15(a)(ii) with respect to the burden of proof. Further, unlike the magic-deadline-viewpoint, ¶15(a)(i) and the chapeau of ¶15(a) are also not without effect in the event that an importing country discharges its burden of proof to show that China remains under NME conditions. In such a scenario, Chinese manufacturers have the remedy under ¶15(a)(i) to seek industry-wide market economy treatment. However, ambiguity remains about the appropriate threshold of proof that must be satisfied by importing countries. Since this threshold of proof lacks a direct textual basis, this task would have to be taken up by a WTO Panel or Appellate Body under Article 17.6(ii) of the ADA.⁴⁴

Recently, the EU has issued a press release about a new anti-dumping methodology, which will sidestep the issue of NME and MES and instead use the metric of “significant market distortions”.⁴⁵ Instead of classifying countries as

⁴² Tietje & Nowrot, *supra* note 11, at 10.

⁴³ Miranda, *supra* note 11, at 103; Posner, *supra* note 31, at 150.

⁴⁴ Posner, *supra* note 31, at 151.

⁴⁵ Press Release, European Commission, Commission Welcomes Agreement on New Anti-Dumping Methodology (Oct. 3, 2017).

NME or MES, it proposes to create country reports about “significant market distortions” existing in markets in different countries, on the basis of which deviations from normal methodology will be permitted.⁴⁶ It seems that the EU is abandoning the business-as-usual viewpoint, as it no longer considers ¶15(a)(i) to be “the legal basis for treating China differently from other WTO members.”⁴⁷ However, the new anti-dumping methodology seeks to create an additional basis for deviation from normal methodology, which is not contemplated under the WTO rules. This has attracted criticism for not being in compliance with WTO obligations.⁴⁸ A better approach would be for the EU to adopt the shifting burden of proof viewpoint, and seek to prove that China continues to be an NME, using the same criteria that it contemplates in its country reports.

IV. CONCLUSION

The author concludes that the shifting burden of proof viewpoint offers the most persuasive interpretation of ¶15 of China’s AP when evaluated on the touchstone of effectiveness. Therefore, China’s claim that it has automatically acquired market economy status and use of the special methodology becomes impermissible, is not likely to succeed. At the same time, the US and the EU cannot continue as if the status quo remains unchanged after the expiry of ¶15(a)(i) of China’s AP. The EU has tried to sidestep the issue of China’s NME status by introducing the metric of “significant market distortions”. However, this has resulted instead in seriously jeopardising the EU’s compliance with WTO law. A more advisable approach for the EU would be to adopt the shifting burden of proof viewpoint and discharge its burden of showing that NME conditions continue to exist in China.

⁴⁶ *Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union and Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union*, 2016/0351 (COD), (Nov. 9, 2016), http://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2016/0721/COM_COM%282016%290721_EN.pdf.

⁴⁷ B. Connor, *A Short Primer on China, Anti-Dumping and the Commission’s Proposal on Significant Distortions*, IL SOLE 24 ORE, Apr. 13, 2017, <http://www.italy24.ilssole24ore.com/art/laws-and-taxes/2017-04-10/a-short-primer-on-china-anti-dumping-and-the-commission-s-proposal-on-significant-distortions--184706.php?uuiid=AEGnKy2>.

⁴⁸ Xiang Bo, *China Urges U.S., EU to Abide by WTO Rules in Anti-Dumping Investigations*, XINHUA NET, Oct. 12, 2017, http://news.xinhuanet.com/english/2017-10/12/c_136674719.htm.