

China Can Still Be Treated As A Nonmarket Economy After 2016

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When China joined the World Trade Organization in 2001, many WTO members expressed strong concerns about how the trade remedy laws, including anti-dumping laws, would apply to China. The continuing role of the Chinese government in the economy meant that members could not rely upon prices or costs in China in anti-dumping investigations of Chinese product. In response, 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 Dec. 11, 2016.

Some commentators have claimed that, with the expiration of that single provision, the United States and other countries will be required to treat China as a market economy country in anti-dumping investigations.[1] Analysis of the provisions in question in light of the rules of treaty interpretation establishes that, after Dec. 11, 2016, WTO member countries can continue to treat China as a nonmarket economy country, so long as they follow certain procedures.

China and Anti-Dumping Investigations

The use of home market prices or costs in dumping calculations assumes that those prices reflect market forces. As China was negotiating its accession to the WTO, various WTO members noted that, because China was still in transition to becoming a market economy, Chinese prices did not necessarily provide a suitable basis for anti-dumping calculations.[2] To address this concern, China 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 anti-dumping analysis on prices or costs of market economy countries at a level of economic development comparable to China's.[3]

This agreement was embodied in Section 15 of China's Protocol of Accession to the WTO, paragraphs (a) and

(d). In general, paragraph 15(a) of China's Protocol of Accession gives 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 the converse: if that showing is not made, importing members may use alternative methodologies for the entire industry under investigation.

The second sentence of paragraph 15(d) of the protocol specifies that "the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession." [4] China joined the WTO on Dec. 11, 2001, so that paragraph 15(a)(ii) will expire as of Dec. 11, 2016. [5] The key question is whether, after Dec. 11, 2016, an investigating member is still permitted to base dumping comparisons on something other than Chinese prices or costs.

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

Foremost among the rules of treaty interpretation applied by the WTO is the principle 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 context and in the light of its object and purpose." [6] The starting point for treaty interpretation is "the words actually used" in the treaty. [7] 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. The "ordinary meaning" of these words, then, is that, while paragraph 15(a)(ii) will expire on Dec. 11, 2016, the remainder of paragraph 15(a) will remain in full force and effect. Because subparagraph 15(a)(i) remains in effect after Dec. 11, 2016, the investigating member is required to use Chinese prices and costs for an entire industry 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 to paragraph 15(a) still authorizes the importing member to apply a methodology that is not based on Chinese prices or costs, subject to the overall provisions of the WTO Anti-Dumping Agreement, as explained below.

The expiration of subparagraph 15(a)(ii) does not require market economy treatment for Chinese imports because the expiration of 15(a)(ii) does not terminate the rest of paragraph 15(a). This is evident from the final paragraph of the next section of the protocol, Section 16, which states that "[a]pplication of this section shall be terminated 12 years after the date of accession." [8] This demonstrates that the protocol's drafters knew exactly how to terminate an entire section if they so wished and sharply undercuts the assumption that the expiration of subparagraph 15(a)(ii) somehow terminates the remainder of paragraph 15(a) as well.

The interpretation of the expiration of subparagraph 15(a)(ii) as requiring market economy treatment of China has the effect of terminating *all* of paragraph 15(a) and not just subparagraph 15(a)(ii). [9] This is plainly improper. If the expiration of subparagraph 15(a)(ii) means that WTO members must treat China as a market economy in all instances going forward, then there is no need for the provisions of subparagraph 15(a)(i) or the first and third sentences of paragraph 15(d), which require members to treat China as a market economy if Chinese producers show that their industry operates under market economy conditions (15(a)(i)) or if China establishes that it is a market economy country or that individual industries or sectors operate under market economy conditions (paragraph (d), first and third sentences). This interpretation has the clear effect of reducing the remaining parts of paragraph 15(a), as well as the first and third sentences of paragraph 15(d), to "redundancy or inutility," a result that the rules of treaty interpretation plainly prohibit. [10]

Such a result is also contrary to the requirement that a treaty's interpretation must be consistent with the purpose of the provision in question. [11] The purpose of Section 15 was, among others, to enable WTO members to use non-Chinese prices or costs to make dumping comparisons in cases involving Chinese

producers until China had in fact allowed the market to set prices. There is a great deal of evidence showing that China is not a market economy; that the Chinese government continues to play the dominant role in the allocation of resources within the Chinese economy; and that prices for key inputs, including land, energy and credit, are not set by the market.[12] To require WTO members to apply market economy treatment for anti-dumping purposes to China, even though China has not fulfilled its obligation under the protocol to allow prices to be set by market forces,[13] would be contrary to the underlying purpose of Section 15.

Those claiming that the expiration of subparagraph 15(a)(ii) requires the extension of market economy treatment to all anti-dumping cases involving China 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.[14] However, even they admit that the issue of the effect of paragraph 15(d) was not before the Appellate Body in this proceeding.[15] Moreover, the Appellate Body's statement in *EC — Fasteners* 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"[16] is facially incorrect. The language of Section 15(d) provides that *only* subparagraph 15(a)(ii) expires as of that date (Dec. 11, 2016). The remaining provisions of paragraph 15(a) and paragraph 15(d) remain in place.

Section 15 after Dec. 11, 2016

The literal effect of the second sentence of paragraph 15(d) is to remove subparagraph 15(a)(ii) from the paragraph as of Dec. 11, 2016. The Appellate Body in *EC — Fasteners* implicitly assumed that 15(a)(ii) is the only basis for applying nonmarket economy treatment to Chinese imports and that the chapeau of paragraph 15(a) could not provide an independent basis for such an action. This interpretation ignores the interplay between the Protocol of Accession and the WTO Anti-Dumping Agreement. It also conflicts with the WTO Appellate Body's statement that interpretation of a provision should not "empty the chapeau of its contents" and deprive the remaining paragraphs of a provision of their meaning.[17]

The Protocol of Accession states that the WTO Anti-Dumping Agreement shall apply to anti-dumping proceedings involving Chinese products.[18] 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.[19] A reasonable interpretation of paragraph 15(a), is that, after subparagraph 15(a)(ii) expires, the chapeau of paragraph 15(a) authorizes members to apply nonmarket economy treatment to Chinese producers in a manner consistent with the requirements of the WTO Anti-Dumping Agreement. This means that they can apply nonmarket economy treatment if individual Chinese producers do not operate under market economy conditions. This in turn suggests that WTO members should allow Chinese producers the opportunity to show that they, individually, operate under market economy conditions, something not currently required by Section 15. If a Chinese producer can make this showing, then the member must use its prices and costs. If it cannot, the member can continue to apply nonmarket economy treatment to those individual producers.

This interpretation gives meaning to subparagraph 15(a)(ii). It also gives full effect to the chapeau of paragraph 15(a), to subparagraph 15(a)(i) and to the first and third sentences of paragraph 15(d), all of which remain in effect after Dec. 11, 2016. Finally, it serves the underlying purpose of Section 15, which is to allow WTO members to base anti-dumping comparisons on something other than Chinese prices or costs until China, Chinese industries or individual Chinese producers can show that those prices and costs are the result of market economy conditions and can therefore serve as a reliable basis for anti-dumping comparisons.

Current U.S. practice allows both individual Chinese producers and entire industries to argue that the U.S. Commerce Department should use some or all of their prices or costs in its dumping comparisons.[20] U.S.

law also allows for the “graduation” of an entire country to market economy treatment.[21] As such, the expiration of subparagraph 15(a)(ii) will not require any changes in U.S. law.

Conclusion

The termination of subparagraph 15(a)(ii) on Dec. 11, 2016 does not automatically require WTO members to give China market economy country treatment in anti-dumping investigations. Any interpretation that has the effect of writing the other provisions of paragraphs 15(a) and (d) out of the protocol is unreasonable, as it conflicts with the plain language of Section 15 and the rules of treaty interpretation. Rather, consistent with the remaining provisions of Section 15, WTO members are still allowed to treat China as a nonmarket economy country *unless* China, a Chinese industry or individual Chinese producers can show that they operate under market economy conditions.

This article is based on a white paper published by Wiley Rein last month. To read the white paper, click [here](#).

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[1] See, e.g., Rao, China's Market Economy Status Under WTO Anti-Dumping 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 Anti-Dumping Treatment in 2016. 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 Anti-Dumping 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.

[2] 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.

[3] Working Party Report, at para. 151.

[4] Protocol of Accession at para. 15(d).

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

[6] Vienna Convention on the Law of Treaties, Art. 31, May 23, 1969.

[7] Panel Report, United States — Standards for Reformulated and Conventional Gasoline, WTO Doc. WT/DS2/AB/R (adopted May 20, 1996) at 17.

[8] Protocol of Accession at para. 16(9).

[9] See, e.g., Rao at 155 (2013).

[10] See Tietje and Nowrot at 8.

[11] Vienna Convention on the Law of Treaties, Art. 31.1.

[12] See, e.g., Lukas Gajdos & Roberto Bendini, Policy Briefing: Trade and economic relations with China 2013, European Parliament, Directorate-General for External Policies, 24 (April 2013). It should be noted that this report incorrectly assumes that China must be treated as a market economy after 2016. *Id.* at 23. See also Mark Magnier, World Bank Deletes Section on China from Report on Web, *The Wall Street Journal*, July 6, 2015, at C3.

[13] Protocol of Accession at Section 9.

[14] Rao at 152-53.

[15] Rao at 159; see also Tietje and Nowrot at 10.

[16] EC — Fasteners, 122, para. 289.

[17] Appellate Body Report, United States — Standards for Reformulated and Conventional Gasoline, 23, WTO Doc. WT/DS2/AB/R (April 29, 1996).

[18] Protocol of Accession at Section 15.

[19] 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.

[20] Anti-Dumping Manual, Chapter 10, at 20-22 (individual producers); at 30-31 (industries).

[21] 19 U.S.C. §1677(18)(c)(i).