The Myth of China and Market Economy Status in 2016

There have been some comments on an earlier blog which highlighted the myth of automatic Chinese MES in December 2016. In particular, one respected commentator[1] suggests '*the 11 December 2016 is certainly not a myth - it is reality. From that date onwards, it will be almost impossible - at least from the perspective of WTO law - to make a determination of the normal value of products targeting by an anti dumping proceeding on the basis of analogous third party methodology*.'[2]

This Tietje and Nowrot analysis makes good points. And the points deserve substantive comment. However, the comment goes beyond what the 'myth' blog proposed. The myth blog sought to make the point a) that there is nothing in the China Accession Protocol granting MES automatically and b) China will have to show that it is a market economy under the domestic law of the importing WTO Member, even after 2016. The Tietje and Nowrot Policy Paper agrees with this proposition from a theoretical perspective. They state: Article 15 of the Accession Protocol of China to the WTO *'itself does not explicitly bestow NME-status on China*'.[3] And further on: *'Again, the second sentence of paragraph 15(d) of the accession protocol itself does not explicitly grant China MES from the "magic" date onwards*.'[4]

The question now raised by Tietje and Nowrot is: What anti-dumping instruments can a competent authority use after 11 December 2016 when the provisions of Article 15(a)(ii) have expired? The Teitje and Nowrot answer is: '*from 11 December 2016 onwards Chinese imports have to be treated with regard to a determination of normal value in the same way as imports from any other WTO member*.'[5] Thus they move from the theoretical possibility of the continuation of non market economy status to the practical conclusion that importing WTO Members will have to rely on normal WTO anti-dumping rules.

The authors base their conclusion on a detailed examination of GATT Article VI and the second Ad note to Article VI as well as the Anti-Dumping Agreement and Article 15 of the Accession Protocol. In this examination, the authors recognise that there is the 'theoretical' possibility that China will be considered a non market economy by some WTO Members. On page 9 of the paper, the authors then make three points to argue that this '*theoretical*' possibility has very little substantive consequence. They argue the expiry of Article 15(a)(ii)

[1] Policy Papers on Transnational Economic Law no 34: Myth or Reality? China's Market Economy Status under WTO Anti-Dumping Law after 2016 by Tiejte and Nowrot.
[2] Ibid page 11.
[3] Ibid page 6. I am presuming that the authors are referring to ME or market economy status rather than NME or non market economy status.
[4] Ibid page 7.
[5] Ibid page 11.

means: a) that considering China as a non market economy cannot be based on the accession protocol; b) China can be considered to have achieved MES *erga omnes* (at least for one second in December 2016) and thus, in this sense, there is automatism; and c) to continue to consider China a NME can only be based on the Ad note to GATT Article VI:1. On this last point they argue that the WTO Appellate Body would be unlikely to endorse the use of the Ad Note in relation to China and thus competent authorities can only fall back on 'particular market situation' in Article 2.2 of the Anti-Dumping Agreement.

The problem with this approach is that it reads out[6] of the law those parts of Article 15 of the Accession Protocol which survive 2016. And, as the authors themselves point out,[7] this is not allowed under well established rules for the interpretation of treaties.

The first and third sentences of Article 15(d) make clear that it is China which must establish that it has become a market economy (for the whole economy or for particular industries or sectors of the economy) and that the standard to be met in that evaluation is as set out in the law of the importing WTO Member. On this reading it is not clear that China can be '*presumed to have acquired MES*'[8] after 2016 and that this presumption (even for a second) must be applied *erga omnes.* There is no presumption and to imply an *erga omnes* interpretation reads out of the law China's burden of proof on the basis of the law of the importing country, and the importing Member's separate and individual right to evaluate on the basis of its own law.

If China can establish that it is entitled to market economy status according to the law of any one importing WTO Member, then the provisions of all of Article 15(a) shall no longer apply in the investigations opened by that Member. This means that the obligation ['*shall use*'] on the importing Member set out in the chapeau of paragraph (a) to use either Chinese prices or costs or a methodology not based on a strict comparison with domestics costs and prices in China drops. In this situation an importing Member's obligation is to apply GATT Article VI and the Anti-Dumping Agreement consistent with paragraphs (b) and (c). If China can establish that market economy conditions apply in an industry or sector then paragraph (a) drops and (b), (c) and parts of (d) continue to apply.[9]

If China, as a whole economy or in relation to specific sectors or industries, cannot establish that it is a market economy according to the standards of each importing Member and Article 15(a)(ii) has expired what then? Article 15(a) chapeau and 15(a)(i) remain. And treaty interpretation rules require that they be

[6] Renders the text '*inutile*'.
[7] Ibid page 8.
[8] Ibid page 9
[9] The first sentence and, until December 2016, the second sentence of paragraph (d).

examined, interpreted and applied. Thus Article 15 will still have a role in determining how to treat China in anti-dumping investigations after 2016.

Article 15(a)(i) provides that where an individual producer can clearly show that market economy conditions prevail in the industry producing the like product then Chinese prices and costs for the industry under investigation shall be used. Sub paragraph (i) places the burden on the individual producer to show market economy conditions in the industry concerned. The Article does not state what standard must be applied. However, given the clear indications in paragraph (d) that the standard for MES as a whole is that of the importing Member it can be argued that the standard to be applied in subparagraph (i) is the standard set out in the law of the importing Member. Thus, contrary to the situation of producers in market economies, an individual producer in China will a) have to show market conditions prevail and that b) these conditions prevail in relation to the whole industry in which it is active.

The second element of subparagraph (i) is that the costs and prices to be used are those of the industry as a whole and not those of the individual producer. This obligation could cause problems for an investigating authority and/or the producer where there is little or no cooperation from other producers in the industry concerned. Would it trigger the use of facts available and, if no facts were available for China, could facts from other markets be used? However, leaving that practical and legal difficulty aside (for the purposes of this blog), this subparagraph is a deviation from the 'normal' price comparison rules which are normally based on the costs and prices of the individual producer. In this sense it cannot be said, absent the application of the Ad note to GATT Article VI, that '*the only remaining possibility to treat imports from China different than those from other WTO Members*' is the 'particular market situation' test in Article 2.2 of the Anti-Dumping Agreement. The Protocol clearly provides that a different set of rules will continue to apply.

The rule in (i) is conditional on the producer showing that market economy conditions prevail in the industry concerned. If the producer cannot show market economy conditions, and subparagraph (ii) has expired, does the general obligation in the chapeau of paragraph (a) to use either one or the other method remain? And if so, how is the obligation to be interpreted if one of the rules (set out in subparagraph (ii)), to which its application might be considered to be (but not necessarily is) subject, has expired?

The chapeau of Article 15 provides that 'normal' anti-dumping rules shall apply '*consistent with*' the provisions of paragraph (a). The chapeau of subparagraph (a) provides the '*shall use*' the either/or test '*based on*' the rules in subparagraphs (i) and (ii). Does the obligation to use a methodology not based on a strict comparison of prices remain even if the rule in subparagraph (ii) expires? To argue that it does not remain is to read out of the law the obligation

to apply normal anti-dumping rules consistently with those parts of paragraph (a) which do remain and the fact that the obligation in the chapeau of paragraph (a) is only to be applied 'based on' the subparagraph. 'Based on' is not the same as applying the rule rigidly as set out in the subparagraph. It allows for another application different from the rule in the subparagraph.

How does the investigating authority interpret the '*consistent with*' provision in the chapeau of Article 15 if the individual producer cannot show that market economy conditions apply in his industry? Subparagraph (i) clearly cannot be used. Subparagraph (ii) will have expired. But the obligation in the chapeau of paragraph (a) remains and thus the obligation to apply normal rules consistently with that either/or provision. The text in the chapeau remains and that text obliges the use of a methodology not based on a strict comparison.

The negotiating history of the Protocol shows that the insertion of '(ii)' into the text of the second sentence of paragraph (d) was done intentionally and late on in the negotiations. There do not appear to be other documents indicating why this was done. Thus we are stuck with a document which is open to interpretation and will require investigating authorities to make a judgment call subject to subsequent evaluation by the Dispute Settlement Body.

In the recent EC-Fastners[10] case, the Appellate Body made a start on the interpretation of Article 15. The AB recognises that Article 15 does not pronounce generally on the market status of China but then states that the special rules in (all of) paragraph (a) will no longer apply. As this blog shows, that interpretation is not correct. Competent investigating authorities will still be left with the need to apply the provisions of Article 15(a) as adjusted after 2016. There is no easy path forward.

Tietje and Nowrot seem to adopt a somewhat teleological approach to the interpretation of Article 15. This blog questions that approach given the extent of the text that remains in paragraph (a) even after the expiry of subparagraph (ii). The Tietje and Nowrot approach requires that no utility be given to this text so that full utility can be given to the text of the second sentence of paragraph (d). Given the highly textual approach taken by the Appellate Body in the past it is not clear that the authors' approach would find support either in the AB or among competent authorities implementing trade defence law.

The Accession Protocol raises some tricky interpretative issues and will require careful consideration. The problems raised are not just theoretical. And they cannot be dismissed lightly.

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[10] EC-Fastners WT/DS397/AB/R