CHINA'S MARKET ECONOMY STATUS UNDER WTO ANTIDUMPING LAW AFTER 2016*

RAO Weijia**

Table of Contents

* This article received valuable comments from Prof. Jinyan LI of Osgoode Hall Law School, York University and considerable support from Mr. Bicheng SUO from the Ministry of Commerce of PRC.
** LLB Candidate, School of Law, Tsinghua University, Beijing, PRC. E-mail: rwj10@mails.tsinghua.edu.cn.

CHINA'S MARKET ECONOMY STATUS UNDER WTO ANTIDUMPING LAWS AFTER 2016

RAO Weijia

Abstract

Paragraph 15(d) of China's Accession Protocol provides that the provisions of subparagraph 15(a)(ii) shall expire in 2016. Subparagraph 15(a)(ii) permits the importing Member to derogate from a strict comparison with Chinese prices or costs when determining the normal value of the products if the producers under investigation cannot clearly show that Market Economy conditions prevail in the industry in question. While a respected commentator argues that, despite the stipulated expiration, the importing Member can still treat China as a Non-Market Economy and use alternative methodologies based on the remaining provisions in the chapeau, this paper takes a different view by analyzing the role and textual structure of paragraph 15(a) in light of the negotiation documents and relevant rulings of the Appellate Body in EC-Fasteners. It demonstrates that the expiry of subparagraph 15(a)(ii) in 2016 will have the same effect as the expiry of paragraph 15(a) as a whole. Thus, there will no longer be any legal basis in China's Accession Protocol for the importing Member to derogate from a strict comparison with Chinese prices or costs after 2016. In this sense, the expiration of subparagraph 15(a)(ii) in effect bestows Market Economy Status on China.

I. INTRODUCTION

China has long been categorized by many WTO Members as a Non-Market Economy (NME). China has thereby been subjected to methodologies that deviate from the strict comparison with domestic prices or costs required by the GATT 1994 and the Antidumping Agreement. This different treatment is based on paragraph 15(a) of China's Accession Protocol, which permits the importing Member to use an alternative methodology when Chinese producers cannot clearly show that market economy conditions prevail in the industry in question. Meanwhile, paragraph (d) of Article 15 contains an expiration clause stating that the provisions of subparagraph 15(a)(ii) shall expire 15 years after the date of China's accession. For many scholars and governments, this clause is the basis for the automatic shift of China's status from Non-Market Economy to Market Economy in 2016.[1]

On 15 July 2011, the Appellate Body, in its report in *EC-Fasteners*, interpreted Article 15 of China's Accession Protocol for the first time. The Appellate Body largely endorsed China's claim that Article 15 contains only a temporary and limited derogation

[1] *See, e.g.*, HENRIK ANDERSEN, EU DUMPING DETERMINATIONS AND WTO LAW 294 (2009); 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 and Customs Journal 105, 105-115 (2007); Helena Detlof & Hilda Fridh, *The EU Treatment of Non-Market Economy Countries in Antidumping Proceedings*, 2 Global Trade and Customs Journal 265, 265-281 (2007).

from the general rules for determining normal value in antidumping investigations. The Appellate Body also affirmed that these special rules would expire in 2016 as established by paragraph 15(d).[2]

Bernard O'Connor has challenged this consensus by arguing that paragraph 15(d) only provides for the expiry of subparagraph 15(a)(ii) in 2016. Thus, the chapeau of Section 15 and subparagraph 15(a)(i) remain, and the importing Member can still resort to the chapeau to justify its use of a methodology that is not based on a strict comparison with domestic prices or costs. O'Connor concludes that the expiry of subparagraph 15(a)(ii) will not automatically grant China Market Economy Status. Instead, China's status will still be left to the discretion of the importing Member according to its domestic laws.[3]

The Market Economy Status here refers to the eligibility of a country for the obligatory use of domestic prices or costs when determining the normal value of the products in antidumping investigations, which is generally provided for by Article VI of the GATT 1994 and the Antidumping Agreement. However, for WTO Members who are subject to either a determination of Non-Market Economy in the sense of the exception in the GATT 1994 itself[4] or a specific provision in this regard in a respective WTO Accession Protocol, the importing Member may adopt an alternative methodology instead, such as the use of surrogate prices in a third Market Economy country.

The Market Economy Status issue is extremely important to domestic enterprises, related industries and the overall environment for trade and investment in China. First, Chinese exporters have suffered significant financial losses due to the alternative methodologies used to calculate antidumping duties justified by the

---

[2] *See* Appellate Body Report, *European Communities—Definitive Anti-dumping Measures on Certain Iron or Steel Fasteners from China*, ¶283-291，WT/DS397/AB/R (Jul. 15, 2011).

[3] *See* Bernard O'Connor, *The Myth of China and Market Economy Status in 2016*, http://worldtradelaw.typepad.com/files/oconnorresponse.pdf (last visited Jul. 24, 2013) [hereinafter O'Connor, *The Myth*]; *see also* Bernard O'Connor, *Market-economy Status for China Is Not Automatic*, http://www.voxeu.org/article/china-market-economy (last visited Jul. 24, 2013) [hereinafter O'Connor, *Not Automatic*]; *cf.* Bernard O'Connor, *China And Market Economy Status III*, http://worldtradelaw.typepad.com/ielpblog/2012/05/china-and-market-economy-status-iii.html (last visited Jul. 24, 2013). For comments on O'Connor's views, see Christian Tietje & Karsten Nowrot, Policy Paper on Transnational Economic Law No. 34: *Myth or Reality? China's Market Economy Status under WTO Anti-Dumping Law after 2016*, *available at* http://telc.jura.uni-halle.de/sites/default/files/telc/PolicyPaper34.pdf; see also Henry Gao, *If You Don't Believe In the 2012 Myth, Do You Believe In the 2016 Myth?* http://worldtradelaw.typepad.com/ielpblog/2011/11/if-you-dont-believe-in-the-2012-myth-do-you-believe-in-the-2016-myth.html (last visited Jul. 24, 2013).

[4] *See* General Agreement on Tariffs and Trade ad art. VI:I (2), Oct.30, 1947, 55 U.N.T.S. 194 (The threshold set for the invocation of this *Ad Note* is extremely high and can hardly be satisfied with regard to China).

Non-Market Economy provision in paragraph 15(a). A classic example is the parallel U.S. antidumping cases against color television receivers from China and from Malaysia from 2003 to 2004. The televisions manufactured in China and Malaysia were essentially identical and used the same internationally available parts and components.[5] However, although the U.S. Commerce Department found no dumping in the action against Malaysia, weighed-average dumping margins of up to 78% were found in the proceeding against Chinese producers. This discrepancy occurred because the U.S. Commerce Department treated China as a Non-Market Economy in the investigation and used India as a surrogate country when determining the normal value of color television receivers from China.[6] Consequently, Chinese enterprises had to pay extremely high antidumping duties and lost significant market share to foreign competitors. Second, the use of Non-Market Economy procedures also has devastating impacts on the related industries. The consequent burden of high antidumping duties drags domestic enterprises into business difficulties and cuts down their spending in research and development, thereby impedes the technological advancements of the entire industry. Moreover, the distress in the dumping industry could also negatively impact the upstream and downstream industries. For instance, the kinescope industry in China also shrank dramatically after the levy of antidumping duties on color television receivers of Chinese origin in the U.S. and the European Union.[7] Finally, the considerable discretion enjoyed during the course of adopting alternative methodologies makes it easier for importing Members to make an affirmative finding in an antidumping investigation for a Non-Market Economy than it is for them to make such a finding for a Market Economy. Unsurprisingly, the rate of affirmative findings in antidumping investigations for Non-Market Economy countries like China is relatively high, which deteriorates their overall environment for trade and investment. Therefore, whether other importing Members will still be justified to treat China as a Non-Market Economy in antidumping investigations after 2016 matters a lot to

[5] *See* David A. Gantz, *A Commentary on the Stewart and Dwyer 'Overview'* in LAW AND ECONOMICS OF CONTINGENT PROTECTION IN INTERNATIONAL TRADE 241, 249 (Kyle W. Bagwell, George A. Bermann & Petros C. Mavroidis, ed., 2010).

[6] *See* Color Television Receivers from PRC, USITA Pub. 69 FR 20594, Inv. No. A-570-884 (Apr. 2004), *available at* http://ia.ita.doc.gov/frn/2004/0404frn/04-8694.txt.

[7] Zhonghua Renmin Gonghe Guo Shangwu Bu (中华人民共和国商务部) [Ministry of Commerce of PRC], Guanyu Woguo "Fei Shichang Jingji Diwei" Youguan Qingkuang de Baogao (关于我国"非市场经济地位有关情况的报告") [Report on the Relevant Issues about the Non-Market Economy Status Concerning PRC] 7 (on file with the Ministry of Commerce of PRC).

domestic enterprises, related industries and the overall environment for trade and investment in China.

This paper will refute O'Connor's position and evaluate China's status in future antidumping investigations after the expiration of subparagraph 15(a)(ii) in 2016. It first examines the text and context of Section 15 of the Accession Protocol, including the negotiation history of the Section and relevant provisions in the GATT 1994 and the Antidumping Agreement. It also briefly discusses the *EC-Fasteners* case and the Appellate Body's interpretation of Section 15 in its report. The paper devotes the next section to introducing and arguing against O'Connor's interpretation of the termination of subparagraph 15(a)(ii), based on an analysis of the role and textual structure of paragraph 15(a). This paper then demonstrates that the expiry of subparagraph 15(a)(ii) will have the same effects as the expiry of paragraph 15(a) as a whole. The paper also envisages possible reasons for the partial termination under the second sentence of paragraph 15(d) which refers to subparagraph 15(a)(ii) alone. Finally, it concludes that the expiry of subparagraph 15(a)(ii) *in effect* bestows Market Economy Status on China, since after 2016 there will be no legal basis in China's Accession Protocol for an importing Member to categorize China as a Non-Market Economy and thereby treat it differently from other Members with regards to the determination of the normal value of the products.

II. THE TEXT AND CONTEXT OF SECTION 15 OF THE ACCESSION PROTOCOL

Section 15 of China's Accession Protocol provides the rules that apply to China when determining price comparability under Article VI of the GATT 1994, which lays down the basic rules on dumping—when products of one country are introduced into the commerce of another country at less than the normal value of the products, where this causes or threats material injury to an established industry or materially retards the establishment of a domestic industry producing like products.[8] In such circumstances, the importing country is authorized to levy on the dumped product an antidumping duty up to the margin of dumping (the normal value minus the export price).[9] According to subparagraph 1 of Article VI, the normal value is either (a) the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or (b) in the absence of such domestic price, the highest comparable price for the like product for export to any

[8] General Agreement on Tariffs and Trade art. VI, Oct.30, 1947, 55 U.N.T.S. 194.
[9] *Id.*

third country in the ordinary course of trade, or the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit. However, the comparability in the "ordinary course of trade" requires that both countries be market economies.[10] For Non-Market Economy exporters, the general rule might be inappropriate because domestic prices are largely determined by the State, not the market. Accordingly, the second *Ad Note* to Article VI:1 of the GATT 1994 (hereinafter *Ad Note*) recognizes that, in the cases of imports from countries where the State has a complete or substantially complete monopoly of trade and where all domestic prices are fixed by the State, importing Members may determine that a comparison with domestic prices may not be appropriate due to special difficulties in determining price comparability.[11] This *Ad Note*, which has been incorporated into the Antidumping Agreement,[12] opens up the possibility for importing Members to derogate from the general rule when calculating the normal value of imports from Non-Market Economies. Nevertheless, the invocation of this *Ad Note* requires the investigating authority to demonstrate that the exporting State monopolizes trade and sets all domestic prices. This is an extremely high threshold that can hardly be proven with regard to China.

Before China joined the WTO, the United States and the European Union have treated China as a Non-Market Economy in antidumping investigations pursuant to domestic legislation for a long time. Section 771(18) of the Tariff Act of 1930 of the United States enumerates six factors to be considered in determining whether a country should be categorized as a Non-Market Economy.[13] The U.S. Department of Commerce used these factors to designate China as a Non-Market Economy.[14] Meanwhile, until 1998, the European Union directly listed China among twenty Non-Market Economies subject to a different methodology to determine the normal value of the dumped products.[15] Although this practice was modified by the Council Regulation (EC) No 905/98,

[10] *See* Tietje & Nowrot, *supra* note 3, at 3.

[11] General Agreement on Tariffs and Trade, *supra* note 3.

[12] *See* Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade art. 2.7, Apr. 15, 1994, 1868 U.N.T.S. 201.

[13] *See* Tariff Act of 1930 §771 (18), 19 U.S.C. §1677 (1994).

[14] *See, e.g.*, Final Determination of Sales at Less Than Fair Value and Critical Circumstances: Certain Malleable Iron Pipe Fittings From the People's Republic of China, USITA 68 FR 61395, 61396, Inv. No. A-570-881 (Oct. 2003).

[15] *See* Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community art. 2 (7), 1996 O.J. (L056).

China is still subject to a rigid antidumping regime that differs from other Market Economies.[16]

During the course of negotiating China's accession to the WTO, the Non-Market Economy clause in the Accession Protocol had become a key issue for both sides. The United States claimed the clause was an indispensable part of the package proposal and no agreement would be reached without it. Under the circumstances, China had to accept the clause but suggested that it would terminate after a period of time. In the end, both sides agreed that the Non-Market Economy clause would expire fifteen years after the date of accession, as reflected in Section 15 of the Accession Protocol.[17]

While subparagraphs (b) and (c) of Section 15 respectively concern subsidization and procedural issues, subparagraphs (a) and (d) provide for the rules on price comparability in determining dumping, which read as follows:

> (a) In determining price comparability under Article VI of the GATT 1994 and the Antidumping Agreement, the importing WTO Member shall use either Chinese prices or costs for the industry under investigation or a methodology that is not based on a strict comparison with domestic prices or costs in China based on the following rules:
>
> (i) If the producers under investigation can clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product, the importing WTO Member shall use Chinese prices or costs for the industry under investigation in determining price comparability;
>
> (ii) The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product.
>
> ….

[16] This regime will be explained in detail in section III.

[17] *See supra* note 7.

> (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.

III. THE APPELLATE BODY'S INTERPRETATION OF SECTION 15 IN EC-FASTENERS

The *EC-Fasteners* case is the first one where the Appellate Body provides its interpretation of Section 15. This dispute mainly concerned provisions of the Basic AD Regulation on the treatment of Non-Market Economies and the imposition of definitive antidumping duties on certain iron or steel fasteners from China.[18] Article 2(7) of the Basic AD Regulation sets out the Market Economy Treatment (MET) test. If a Chinese exporter satisfies the MET test, its normal value will be determined on the same basis of its domestic prices or costs as for exporters from Market Economies. Accordingly, an individual duty rate will be specified for that supplier under Article 9(5). However, if the Chinese exporter fails to meet the MET test, then its normal value will be determined by an alternative methodology, usually based on prices in a third Market Economy country. Whether an individual or country-wide duty rate will be specified for a supplier depends on whether the exporter requests and obtains Individual Treatment (IT), pursuant to the IT test provided by Article 9(5).[19] This provision was challenged by China for violating the Articles of the Antidumping Agreement and the GATT 1994 both "as such" and "as applied" in the fasteners investigation. The Panel largely upheld China's positions.

In the appeal, the European Union claimed that section 15 of the Accession Protocol allows it to treat China as a Non-Market Economy for the purpose of applying antidumping rules, particularly Article 9(5) of the Basic AD Regulation.[20] The European Union argued that the Accession Protocol contains an understanding that

[18] *See* Michelle Q. Zang, *EC-Fasteners: Opening the Pandora's Box of Non-Market Economy Treatment*, 14 (4) J. Int'l Econ. L. 869, 871 (2012).

[19] *Id.* at 875.

[20] *Id.* at 876.

China is not yet a Market Economy and does not limit the situations where the Antidumping Agreement permits a flexible application of the rules. China responded that Section 15 is not official recognition that China is a Non-Market Economy, but only a temporary and limited derogation from the rules on determination of normal value in the Antidumping Agreement.[21]

In this regard, the Appellate Body largely endorsed the arguments of China. It holds that paragraph 15(a) of the Accession Protocol is similar to the *Ad Note* to the extent that both permit importing Members to derogate from a strict comparison with domestic prices or costs, but it does not authorize WTO Members to treat China differently for other purposes, such as determining export prices or individual versus country-wide margins and duties. Since paragraph 15(d) provides for rules on the termination of paragraph 15(a), its scope of application also concerns exclusively the determination of normal value.[22] It is worth noticing that here the Appellate Body extends the termination to the entire paragraph of 15(a), instead of subparagraph (ii) alone. Although the Appellate Body does not directly adjudicate China's Market Economy Status after 2016, its ruling still casts light on this issue.

IV. O'CONNOR'S INTERPRETATION OF SECTION 15 AND COUNTERARGUMENTS TO IT

Bernard O'Connor has written two articles arguing that the expiry of subparagraph 15(a)(ii) in 2016 will not automatically grant China Market Economy Status.[23] According to him, the chapeau of paragraph 15(a), which provides for the general obligation to "use either Chinese prices or costs for the industry under investigation or a methodology not based on a strict comparison with domestic prices or costs in China", will remain effective after 2016. Thus, the obligation of adopting an alternative methodology not based on a strict comparison with Chinese prices or costs will still exist after the expiry of subparagraph 15(a)(ii). Unless this is the case, the remaining parts in the chapeau of paragraph 15(a) would become inutile, which would go against well-established rules of treaty interpretation.[24] O'Connor also suggests that the chapeau obligation should only be applied "based on" the subparagraph. He believes that being "based on" differs from applying the rule rigidly as set out in the subparagraph. O'Connor argues that it allows another application

[21] *See* Appellate Body Report, *supra* note 2, ¶284.
[22] *See id.* ¶287-289.
[23] *See* O'Connor, *The Myth*, *supra* note 3; O'Connor, *Not Automatic*, *supra* note 3.
[24] *See* O'Connor, *The Myth*, *supra* note 3, at 2-3.

different from the rule in the subparagraph, but provides nothing further to support his view.[25] O'Connor concludes that whether China is a Market Economy or not is a question for the domestic laws of the importer, and other WTO Members may still treat China as a Non-Market Economy after 2016 unless China satisfies the Market Economy criteria stipulated in their domestic laws.[26]

To disprove O'Connor's arguments, this paper will analyze the role of paragraph 15(a) and its textual structure, in light of relevant rulings of the Appellate Body in *EC-Fasteners* and the negotiation documents.

1. The role of paragraph 15(a) of the Accession Protocol

Unlike the *Ad Note*, which requires the importing Member to fulfill the prerequisites it contains, paragraph 15(a) places the burden of proof on Chinese producers. If the producers under investigation cannot clearly show that market economy conditions prevail in the industry in question, the investigating authority is allowed to use a methodology that is not based on a strict comparison with domestic prices or costs in China. In this sense, paragraph 15(a) is a derogation clause that is subject to a condition—the producers cannot clearly show the prevailing market economy conditions—and specially applies to China. This provides the legal basis for investigating authorities to not use domestic prices or costs when that condition is satisfied.

The Appellate Body confirms the exceptional nature of paragraph 15(a) in *EC-Fasteners*. When interpreting this paragraph, the Appellate Body states that "like the second *Ad Note* to Article VI:1 of the GATT 1994, paragraph 15(a) permits importing Members to derogate from a strict comparison with domestic prices or costs in China".[27] This illustrates that paragraph 15(a) and the *Ad Note* both serve as a basis for derogation. But paragraph 15(a) is special because it places the burden of proof on Chinese producers. This makes it much more likely that the importing Member will successfully apply alternative methodologies to calculate the normal value of the products.

Paragraph 15(a)'s role as a special derogation clause reveals the real effects of the expiry of subparagraph 15(a)(ii). Due to its status as a conditional derogation clause, when the stipulated condition that such derogation is premised on ends and the paragraph thereby loses its derogative effects as a whole,[28] the importing Member will be

[25] *See id.* at 3.

[26] *See* O'Connor, *Not Automatic*, *supra* note 3; *see also* O'Connor, *The Myth*, *supra* note 3, at 2.

[27] *See* Appellate Body Report, *supra* note 2, ¶287.

[28] This will be demonstrated in the following sections.

obliged to treat China the same as other Members, since there is no longer any legal basis in the Accession Protocol to treat China as a Non-Market Economy.

2. The role of subparagraph 15(a)(ii) and its relationship with the rest of paragraph 15(a)

Since the second sentence of paragraph 15(d) only stipulates the expiry of "the provisions of subparagraph (a)(ii)", subparagraph 15(a)(i) and the chapeau remain applicable after 2016. To reveal the effects of the expiry of subparagraph 15(a)(ii) on the remaining parts of paragraph 15(a), it is worthwhile to clarify the role of subparagraph (ii) in the paragraph.

The chapeau of this paragraph includes a general provision on the alternatives the importing Member shall choose to use "based on" the specific conditions stipulated in the following two subparagraphs. The phrase "based on" has the meaning "to serve as a base or basis for",[29] and the term "basis" can be defined as "an *underlying* fact or condition"[30] or the "general principles on which something is *decided*".[31] Thus the wording and structure of paragraph 15(a) indicates that subparagraph (i) and (ii), each of which specifies the respective condition for the use of either Chinese prices or costs or alternative methodologies, are the basis for the application of the general provision in the chapeau. In other words, the invocation of either of the alternatives in the chapeau is contingent upon whether the condition provided by the corresponding subparagraph has been satisfied. Thus, a methodology not based on a strict comparison with domestic prices or costs in China can only be used if the condition stipulated in subparagraph (ii) is met.

In contrast with subparagraph (i) which uses the word "shall"—a word that carries a sense of obligation, subparagraph (ii) uses the word "may". Therefore, subparagraph 15(a)(ii) is the true legal basis for derogation from the general obligation to use domestic prices or costs. It *permits* the importing Member to use an alternative methodology *provided that* the condition it sets up is satisfied, namely, that the producers under investigation cannot clearly show market economy conditions prevail in the industry in question. Consequently, if subparagraph 15(a)(ii) ceases to be effective, the alternative remaining in the chapeau becomes meaningless because the condition it depends on to be invoked no longer exists. In this regard, the argument made by O'Connor fails to recognize that

[29] MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 101 (11th ed. 2003).
[30] BLACK'S LAW DICTIONARY 171 (Bryan A. Garner et al. eds., 9th ed. 2009).
[31] P.H. COLLIN, ENGLISH LAW DICTIONARY 25 (1986).

subparagraph 15(a)(ii) is the true legal basis for derogation, while the chapeau only reiterates the permitted use of alternative methodologies *given that* the condition stipulated in (ii) is satisfied. In the absence of the conditional provision that its application is based on, even though the alternative methodology in the chapeau remains *prima facie* applicable, in effect it can no longer be applied under China's Accession Protocol.

Such an interpretation is also supported by the documents that recorded the negotiation progress of China's Accession Protocol.[32] The origin of this Section could be traced back to the proposal on price comparability in determining dumping and subsidization submitted by the United States Trade Representative (USTR) on March 18, 1999. The proposed draft of this Section allows the importing Member to use methodologies not based on a strict comparison with domestic prices or costs in China as a matter of general practice.[33]

On March 26, 1999, China submitted its draft version of this Section:

> (1) The Provisions of the Agreement on Antidumping will apply to the trade between China and other WTO members, i.e. in the antidumping investigations which involve imports of Chinese origin into a WTO Member, the importing WTO Member *shall* use the Chinese domestic prices or costs in determining the normal price.
>
> (2) However, in a particular case, with respect to those products subject to state pricing listed in Annex 4 to the Protocol, if there are difficulties in using the Chinese domestic prices or costs, the importing WTO Member *may*, for the purpose of determining fair price comparability, use the constructed value methodology in which the prices or costs of a third economy which has equivalent level of economic development or production of the same product could be selected and used. In applying such methodology, however, if some components of the product are produced and priced under market conditions, the importing Member should use the prices

[32] *See* Protocol Issues, *in* 3 Zhongguo Jiaru Shijie Maoyi Zuzhi Tanpan Wenjian Ziliao Xuanbian Duobian Juan (中国加入世界贸易组织谈判文件资料选编多边卷) [Basic Instruments and Selected Documents on the Multilateral Negotiations for China's Accession to the World Trade Organization] 829, 845-869 (Shangwu Bu Shijie Maoyi Zuzhi Si (商务部世界贸易组织司) [Department of WTO Affairs of Ministry of Commerce of PRC] eds., 2013).

[33] *See id.* at 845.

> or costs of such components in the calculation of the normal value for the relevant parts.
>
> ….
>
> (5) This Paragraph shall be terminated on the first day of the 5th years upon entry into force of the Protocol on China.[34]

On April 7, 1999, the United States proposed another draft with significant revisions from the previous one and is very similar to the present version of Section 15. Paragraph (1), which relates to the price comparability in determining dumping, states:

> In determining price comparability under Article VI of GATT 1994 and the Antidumping Agreement, the importing WTO Member *may* 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:
>
> If the producers under investigation can clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product, the importing WTO Member *shall* use Chinese prices or costs for the industry under investigation in determining price comparability.
>
> If the producers under investigation cannot 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 *may* use a methodology that is not based on a strict comparison with domestic prices or costs in China.[35]

The changes in the wording of the drafts further reveal that subparagraph 15(a)(ii) is the true legal basis for derogation from the general obligation to use domestic prices or costs. First, in terms of the use of Chinese prices or costs, United States has shifted its use of word from "may" to "shall",[36] which affirms the obligatory nature of using domestic prices or costs when determining the normal value of the products. Second, the version of subparagraph 15(a)(ii) in the

[34] *Id.* at 848 (emphasis added).
[35] *Id.* at 869 (emphasis added).
[36] *See id.* at 845, 869.

drafts of the United States and China both indicate that the justifiable basis for allowing the importing Member to derogate from the obligation is the lack of *fair* price comparability in certain circumstances when using Chinese prices or costs.[37] Only in the existence of such circumstances can the importing Member use a methodology that is not based on a strict comparison with domestic prices or costs, which is only reflected in the condition provided in the final version of subparagraph 15(a)(ii). Lastly, the documentary records reveal that the chapeau of paragraph (a) was inserted in the second draft from United States, while the earlier drafts only contain versions of the two subparagraphs that stipulate the application of the two alternatives. Even in the United States' second draft which newly incorporates the chapeau, the negotiators adopted the word "may". Although it is difficult to know why the final version of the Protocol changed to "shall", a review of the drafts still indicates that the addition of the chapeau could be largely intended to reiterate the conditional options of the importing Member, instead of obligating it to use alternative methodologies. Therefore, subparagraph 15(a)(ii) is the exclusive and true legal basis for derogation from the obligation to use domestic prices or costs in the Accession Protocol.

O'Connor argues that the provisions in the chapeau have to be applied because failing to do so would render them inutile.[38] But actually it is only the applicability uniquely provided by China's Accession Protocol that is to terminate as a result of the expiry of subparagraph 15(a)(ii). A methodology not based on a strict comparison with domestic prices or costs in China is still applicable according to the *Ad Note*. Thus the remaining provisions on the use of alternative methodologies in the chapeau will not become inutile even though they can no longer be invoked under subparagraph 15(a)(ii). However, if the importing Member can still rely on the chapeau to use alternative methodologies without resorting to the *Ad Note*,[39] then the second sentence of paragraph 15(d) has no use, since it makes no difference whether provisions in subparagraph 15(a)(ii) have expired or not. This violates the well-recognized rule that the interpretation of a treaty must give meaning and effect to all

[37] Paragraph (1) of the first draft from United States reads: "In applying such methodology, the importing WTO Member should consider whether China operates on market principles of cost and pricing structures, so that sales of merchandise in China reflect the *fair value* of the merchandise." (emphasis added); Paragraph (2) of the draft from China reads: "…if there are difficulties in using the Chinese domestic prices or costs, the importing WTO Member may, for the purpose of determining *fair price comparability*, use the constructed value methodology in which the prices or costs of a third economy which has equivalent level of economic development or production of the same product could be selected and used…." (emphasis added).

[38] *See* O'Connor, *The Myth*, *supra* note 3, at 2.

[39] As O'Connor has suggested, see id.

of its clauses and is, thus, not free to reduce individual provisions to inutility.[40] To give the second sentence of paragraph 15(d) full meaning, we must clarify that the importing Member may not derogate from a strict comparison with domestic prices or costs in China unless it demonstrates the existence of conditions under the *Ad Note*, after the expiry of subparagraph (ii).

V. THE ACTUAL EFFECTS OF THE EXPIRY OF SUBPARAGRAPH 15(A)(II) IN 2016

According to the second sentence of paragraph 15(d) of China's Accession Protocol, the provisions of subparagraph 15(a)(ii) shall expire 15 years after the date of accession (i.e. after 11 December 2016). Theoretically, the chapeau of paragraph 15(a) and subparagraph 15(a)(i) will remain in effect. This section will examine its implication in circumstances when the Chinese producers clearly show that market economy conditions prevail in their industry and when they do not.

Because of the expiry of subparagraph 15(a)(ii), the Chinese producers no longer bear the burden of proving prevailing market economy conditions. Even if they have provided no evidence, the importing WTO Member still may not apply alternative methodologies against them without meeting its own burden of proof under the *Ad Note*. Nevertheless, if domestic producers voluntarily provide enough evidence, subparagraph 15(a)(i) will come into play. Recalling that subparagraph 15(a)(i) uses the word "shall", the importing Member under such circumstances has the *obligation* to use domestic prices or costs. Hence, this remaining subparagraph will not be reduced to inutility after 2016. On the other hand, if domestic producers do not provide such evidence, there will be no obligation to use Chinese prices or costs arising under subparagraph 15(a)(i).[41] But still, the importing Member can find no legal basis for derogation in China's Accession Protocol anymore, due to the expiry of subparagraph 15(a)(ii).

In *EC-Fasteners*, the Appellate Body held 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".[42] O'Connor argued that the Appellate Body erred since

[40] *See, e.g.*, Appellate Body Report, *United States—Standards of Reformulated and Conventional Gasoline*, ¶23, WT/DS2/AB/R (Apr. 29, 1996); Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, ¶12, WT/DS8/AB/R, WT/DS10/AB/R (Oct. 4, 1996).

[41] This obligation still exists under the general provisions in Article VI:1 of the GATT 1994 and Article 2.1 of the Antidumping Agreement, unless the importing Member manages to demonstrate the existence of circumstances provided by the *Ad Note*.

[42] Appellate Body Report, *supra* note 2, at ¶289.

the second sentence of paragraph 15(d) only provides for the expiry of subparagraph 15(a)(ii).[43] However, as shown above, the expiry of subparagraph 15(a)(ii) actually has the same impact as the expiry of paragraph 15(a) as a whole. Either with or without the provisions in the chapeau and subparagraph 15(a)(i), the importing Member can no longer deviate from the general provisions in the GATT 1994 and the Antidumping Agreement. The only remaining legal basis for derogation would be the *Ad Note*, which establishes an extremely high threshold that could hardly be proven with regard to any current or future WTO Member.[44] Therefore, in effect, the importing Member cannot legitimately apply methodologies that are not based on a strict comparison with domestic prices or costs in China anymore after 2016. If it continues to do so, China can resort to the dispute settlement system of WTO to request the importing Member to modify its acts. In light of the Appellate Body's ruling in *EC-Fasteners*, it is very likely that such a claim would be upheld. In this sense, the expiry of subparagraph 15(a)(ii) actually has the effect of bestowing the Market Economy Status on China.

VI. POSSIBLE REASONS FOR THE SPECIFIC REFERENCE TO SUBPARAGRAPH 15(A)(II) IN THE SECOND SENTENCE OF PARAGRAPH 15(D)

Compared to the first and the third sentence of paragraph 15(d), which both provide for the termination of paragraph 15(a) as a whole, the second sentence only stipulates the expiry of "the provisions of subparagraph 15(a)(ii)". It is questionable as to why the negotiators limited the scope of expiration to subparagraph 15(a)(ii) alone. This section envisions two possible reasons.

First, unlike the second sentence of paragraph 15(d), the first and the third sentence are based on the prerequisite that China has demonstrated its status as a market economy or the prevailing market economy conditions in a particular industry or sector. This renders the retention of subparagraph 15(a)(i) redundant and pointless, since it is also conditional on the fact that the producers can clearly show prevailing market economy conditions in the industry. Once the prerequisite in the first or third sentence of paragraph (d) is satisfied, there is no need to retain such a repetitive conditional provision that has already been demonstrated. By contrast, the second sentence is an automatic expiration clause that encompasses no such

[43] *See* O'Connor, *The Myth*, *supra* note 3, at 4.

[44] *See* LUO YAN, ANTIDUMPING IN THE WTO, THE EU AND CHINA 162 (2010); JAN HOOGMARTENS, EC TRADE LAW FOLLOWING CHINA'S ACCESSION TO THE WTO 145 (2004).

prerequisite. Thus textually retaining the provisions of subparagraph 15(a)(i) is not repetitive or redundant in this scenario.

Second, subparagraph 15(a)(i) might have been intentionally retained in order to create a more favorable status for Chinese producers in the case that the importing Member continues to apply alternative methodologies against Chinese products after 2016. In such circumstances, Chinese producers would have two options to argue for the use of domestic prices or costs. One is to request the Chinese government to bring claims against the importing Member before the Dispute Settlement Body. The other is to provide evidence to clearly show that the market economy conditions prevail in the industry concerned pursuant to the remaining subparagraph 15(a)(i). The choice between them largely depends on the estimated cost and efficiency of each option. There might be occasions where demonstrating prevailing market economy conditions in that particular industry is relatively easy and cost-effective compared with the WTO dispute settlement process. Therefore, retaining subparagraph 15(a)(i) is to the advantage of Chinese producers in practice, since it enlarges their range of options for remedies and could be preferable to the WTO dispute settlement system.

VII. CONCLUSION

As revealed by the negotiation documents of China's Accession Protocol and affirmed implicitly by the Appellate Body's ruling in *EC-Fasteners*, the expiry of subparagraph 15(a)(ii) of the Protocol in 2016 in effect bestows Market Economy Status on China. The Market Economy Status refers to the eligibility of a country for the obligatory use of domestic prices or costs when determining the normal value in antidumping investigations. Paragraph 15(a) allows the importing Members to treat China as a Non-Market Economy in the sense that they can derogate from a strict comparison with Chinese prices or costs without invoking the *Ad Note*, if the producers cannot clearly show that market economy conditions prevail in the industry. Subparagraph 15(a)(ii), which stipulates the condition that the application of alternative methodologies is premised on, is the true legal basis for the derogation from Chinese prices or costs permitted for Chinese exporters. When subparagraph 15(a)(ii), which provides for the limited conditions where such derogation is permitted, expires in 2016, there will no longer be any legal basis in paragraph 15(a) to derogate from a strict comparison with Chinese prices or costs. Thus the expiry of subparagraph 15(a)(ii) has the same effects as the expiry of paragraph 15(a) as a whole. If the importing Member continues to apply alternative methodologies post-2016 based on the previous categorization of

China as a Non-Market Economy pursuant to its domestic laws, the affected producers may either resort to the WTO dispute settlement system or directly invoke subparagraph 15(a)(i) by providing the required evidence, both of which can lead to the restoration of their rights to the use of domestic prices or costs. In this sense, along with the expiry of subparagraph 15(a)(ii) in 2016, China will start to enjoy Market Economy Status for the purpose of antidumping investigations.