China's NME treatment after December 2016

F. Martín Malvarez*

Abstract

This paper answers some legal arguments of those who claim that the expiry of paragraph (a)(ii) of Article 15 of China's Protocol of Accession to the WTO requires that WTO members treat China as a market economy. The paper shows that there is no basis to challenge that the surviving parts of paragraph 15 a) include a NME presumption and that the legal basis for such presumption is represented by the national laws of the importing WTO members. The expiration of subparagraph 15 a) (ii) does not affect the alternative methodologies applied by the importing WTO Members nor the right to resort to this instrument. The explanations provided by those who oppose to the continued application of the presumption under the domestic laws of the importing WTO Members lack textual support and violate the principle of effective treaty interpretation.

* Lawyer graduated from the University of Buenos Aires (1977). Former legal clerk for the Argentine Supreme Court of Justice. Head of the International Legal Trade Department of the Techint Group. The author has participated in trade defense cases in Argentina, Brazil, Guatemala, Mexico, the United States, Canada, the European Union, China, Indonesia and India. The author has also participated as an advisor in some WTO disputes. The author would like to thank Bernard O'Connor, Terrence P. Stewart, Alan price, Laurent Ruessmann and Adam Teslik for comments on earlier drafts. The views expressed in this paper are entirely the author´s.

China's NME treatment after December 2016[2]

Different voices argue that China's Non-Market Economy (NME) treatment in antidumping investigations and reviews, as originally conceived in Paragraph 15 of its Protocol of Accession, terminates on December 11, 2016. This provision encompasses a rebuttable presumption and entitles investigating authorities to apply their national NME legislation in cases involving China. Though these experts[3] recognize that part of Paragraph 15 (the Chapeau and 15 a) (i)) will survive after that date, they consider the expiration of subparagraph 15 a)(ii) as amounting to a complete derogation of 15 a) and, therefore, granting China an automatic graduation to market economy status in antidumping investigations. Bernard O' Connor has called this proposed outcome "an urban Myth" in his first paper about this issue.[4]

On the opposite side of the debate, different authors support the continued application of the importing member's domestic law to govern market economy determinations in antidumping procedures against China. According to this position, there would be no significant change in the way the system works after December 2016.

The difference between these positions might not be minor in terms of their effects. On the one hand, national laws generally rely on a test that considers different economic factors that vary in leniency levels. On the other hand, the Second note ad Article VI could be understood as proposing a more demanding standard since the text -as written in 1955- requires a complete or substantially complete monopoly of trade and that all prices are fixed by the State.[5]

---

[2] This paper has been specifically prepared to complement the author´s presentation in the Seminar organized by the Committee to Support the US Trade Laws (CSUSTL) in Geneva, the 28 of October 2015.

[3] *See* Graafsma, Folkert & Kumashova, Elena, *In re China's Protocol of Accession and the Anti-Dumping Agreement: Temporary Derogation or Permanent Modification?* 9 GLOBAL TRADE CUSTOMS J 154, 154 (2014); Tietje, C. & Nowrot, K., *Myth or reality? China's Market Economy Status under WTO, Anti-Dumping Law after 2016*, 34 Policy Papers on Transnational Economic Law 1 (2011); Rao Weijia, *China's market Economy Status under WTO Antidumping Laws After 2016*, 5 TSINGHUA CHINA LAW REV 151, 158 (2013).

[4] O'Connor, Bernard, *Market Economy Status for China is not Automatic*, 27 November 2011, available at: http://www.voxeu.org/article/china-market-economy

[5] Though this paper does not agree with the Appellate Body's legal statement in EC - Fasteners footnote 460, it seems clear that those authors who consider that the Second Note constitutes the only legal source for NME treatment after December 2016, coincide with the AB´s view in that the Second Note requires the presence of a complete or substantially complete monopoly of trade and that all prices be fixed by the State excluding other forms of nonmarket economies. More debate is necessary regarding this point. For instance, THORTENSEN, MULLER and RAMOS propose a dynamic interpretation of this rule that could render the domestic legislations consistent with the Second Note standard. See Thortensen, Ramos, & Muller, *NME and Antidumping: Legal consequences of 2016* (2012) available at

The problems of interpretation that have arisen thus far stem from two different sources.

The first one is the methodology used to regulate the NME presumption contained in subparagraph 15 a) consisting of a chapeau and two sentences. The chapeau grants WTO Members the right to depart from the ordinary methodology set forth in article 2 of the Antidumping Agreement (ADA) for determining the subject merchandise's normal value. The following sentences, (i) and (ii), define the same rebuttable NME presumption positively and negatively, respectively, and set forth the same burden of proof to refute the presumption: evidence from Chinese producers that Market Economy conditions prevail in China or in the industries or sectors investigated.

The second problem arises from subparagraph 15 d), which describes different scenarios that trigger the expiration of all or part of subparagraph 15 a). Particular controversy arises from the expiration of the presumption written in the negative form in a)(ii) after a given period of time, and the survival of the rest of the clause (the chapeau and the positive form of the presumption).

Although authors maintaining this position do not object to the notion that the chapeau and subparagraph a)(i) do not expire, the replacement of importing Members national laws with the Second Note as the source of legal authority and the termination of the rebuttable presumption changes the substance of the surviving part of subparagraph 15 a). In practical terms, this replacement amounts to a complete derogation of the whole provision, at least as it was originally intended to work according to paragraphs 149 and 150 of the Working Party Report (WPR).[6]

Analyzing the text of the provision shows that this argument would imply a departure from a textual approach and would render the language of the second sentence of 15d) superfluous.

The second sentence of subparagraph 15d) of China's Protocol of Accession states that "*the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession*". Beyond that crucial date (December 11, 2016), the text of Subparagraph 15(a) will read as follows:

> *(a) In determining price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement, the importing WTO Member shall use either Chinese prices or*

www.cgci.fgv.br . Other alternatives could be also explored, like an industry specific approach, or whether indirect control of the economy via government intervention in key factors could amount as substantially complete monopoly.

[6] WTO Docs WT/ACC/CHN/49.

> *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;*

Focusing on a) (i), two key elements clearly appear in the text:

(a) The **non-market economy presumption**, to the extent that Paragraph 15 does not require investigating authorities to demonstrate any pre condition to disregard actual prices and costs in China should Chinese producers fail to clearly show that market economy conditions prevail with regard to the manufacture, production and sale of the product. This provision enshrines the characteristic structure of a legal presumption in which the law assumes the existence of something until is disproved by evidence.[7] GRAAFSMA and KUMASHOVA affirm that both 15 a) (i) and 15 (ii) set forth the same rebuttable presumption.[8]

(b) The second element is the **legal basis for NME treatment**. Though subparagraph 15 a) does not explicitly refer to the importing Members national laws, it is clear that the interaction between subparagraphs 15 a) and 15 d) does not authorize a different interpretation. The third sentence in subparagraph 15 d), which provides that "should China establish, **pursuant to the national law of the importing WTO Member**, that market economy conditions prevail in a particular industry or sector, **the non-market economy provisions of subparagraph (a)**[9] shall no longer apply to that industry or sector" sheds light on this matter.

This cross reference shows that the system works on a binary basis. China is either a market or a nonmarket economy according to the rules of the importing Member, and if the Chinese government or the producers/exporters cannot demonstrate that market economy conditions prevail in the country or the industry, NME treatment applies by default.

[7] Black´s Law Dictionary, Fifth Edition.
[8] *See* Graafsma et al at 156.
[9] Writer's emphasis.

The purpose of this paper is to address the arguments set forth by those who propose that after December 2016 the presumption expires and that the only remaining legal basis to deviate from the ordinary methodology would be article 2.7 of the ADA (Second note ad article VI), preventing WTO importing Members from applying their own national legislation.

For this analysis, three different aspects of the problem will be addressed: (I) The principle of effective treaty interpretation, (II) The legal texts, and (III) the justification.

(I) Effective Treaty Interpretation.

The text that survives after December 2016 -the chapeau and 15 a)(i)- interpreted in accordance with the rules set forth in articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT), is sufficiently clear as to allow investigating authorities to presume that China is an NME as defined in the importing Members national laws. The ordinary meaning of the words, the context and the object and purpose of the provision and the whole Protocol, do not experience any change at midnight on December 11, 2016 sufficient to conclude that there is a change in the substance of this provision. In the same vein, the sole expiration of 15a)(ii) does not add any element that can lead to a change in the ordinary meaning of the words used in a)(i) or to modify the context or the object and purpose of the clause.

Though the text is clear, those who oppose the continued application of the presumption and national legislation as the legal basis, claim that this interpretation would contradict the principle of effective treaty interpretation, quoting the Appellate Body precedent in US - Reformulated Gasoline. This argument has been analyzed by PRICE, BRIGHTBILL and NANCE in detail[10] , reminding us that when the language is clear enough in light of its context, purpose and object, there is no need for corollary rules of interpretation.

It is true that the International Court of Justice and different WTO Panel and Appellate Body decisions have consistently applied the principle of effective treaty interpretation, but the question arises regarding whether the interpreter should be forced to look for different results when the text itself is unambiguous. This could be particularly dangerous when the context, purpose, object of the treaty and the preparatory work do not contradict a textual approach. In such a case, the exercise could culminate in the opening of a Pandora's box, since absent any specific guidance from the general rule and supplementary means of interpretation, the interpreter will feel himself free to fill the gap with arbitrary considerations, leading to

[10] Price, Alan, Brightbill, Timothy C. & Nance, Scott, *The treatment of China as a Non-Market Economy country after 2016,* Wiley Rein LLP, unpublished (September 15, 2015).

a predetermined result or at least to an outcome that finds no support in the words of the agreement. In this respect, the ICJ in Interpretation of Peace Treaties has stated: "*the rule of effectiveness, cannot justify the Court in attributing to the provisions for the settlement of disputes in the peace Treaties a meaning which, as stated above, would be contrary to their letter and spirit*". [11]

(II) The Legal Texts:

II. 1. Legal basis.

As has been previously explained, Paragraph 15 a) (i) contains two key elements: The presumption that China is a NME country and the legal basis for this presumption.

Starting with the legal basis, there is no doubt that until midnight on December 11 2016, the NME treatment –and NME concept itself– is governed by the national legislation of WTO importing Members. That is why it can be considered that there are as many definitions of NME as there are different NME provisions amongst WTO members. According to the opinion of those who oppose the continued application of national law, with the first seconds of December 12, due to some unexplained alchemy, the expiration of 15 a) (ii) causes a change in the legal basis from the mentioned domestic laws to the Second note ad Article VI of the GATT of 1994. In their views, though the words in a)(i) remain untouched, the meaning of these words magically changes.

This paper uses the word alchemy because, for this argument to somewhat find legal support, any of the two following conditions must take place:

a) The conclusion that the drafters defined the legal basis only in 15 a) (ii); or
b) The intention of the drafters was to move from one legal basis to the other as of December 12 2016.

In the case of the first alternative, it is clear that the reference in subparagraph 15 d) to the importing Members' legislation clearly encompasses both 15 a)(i) and 15 a)(ii), and when a)(i) mandates that investigating authorities use prices and costs in China, should producers clearly show market economy

[11] ICJ, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Second Phase)* Advisory Opinion of July 18, 1950, p. 229.

conditions prevail in their industry, this determination about the prevailing conditions must be based on the national legislation of the importing country.[12]

Regarding the change of legal basis in a)(i) after December 11, 2016, we should analyze whether this interpretation is consistent with articles 31 and 32 of the VCLT. To start with, nothing in the text of subparagraph 15 d), which is the provision governing the different scenarios of termination, supports the argument of a change from national legislation to the Second Note. The latter is not mentioned anywhere in Paragraph 15 of the Protocol, and the WPR does not refer to this provision nor to article 2.7 of the ADA. The WPR, which could help us in shedding light on the object and purpose of the provision at stake, does not mention any change in legal basis after 2016. To the contrary, paragraph 150 of the WPR clarifies that the fact that China has not reached full market economy status is what renders the price comparability inappropriate, should the investigating authority decide to use actual prices and costs in this country.[13] Then, the question arises as to why, if the condition of not having reached full market economy status remains unchanged, prices and costs in China could become appropriate for price comparability after December 11, 2016. Thus, it does not seem reasonable to infer that to the extent that China is still in its transition to full market economy status, the drafters' intention was to concede a potentially significant change in the rules and undermine the effectiveness of antidumping measures.

Furthermore, one can think that considering article 31.4 of the VCLT, if the parties wanted a change in the meaning of the words used in 15 a) and d), they should have declared this intention in a clear and direct way.

In the same vein, keeping the chapeau alive after December 11, 2016, seems inconsistent with any supposed purpose to eliminate the presumption and modify the legal basis of the subparagraph in the surviving part of 15 a). Is the chapeau superfluous? If the drafters intended to terminate the presumption and the use of national legislation as legal basis for Non Market Economy treatment, there is no logical

[12] GRAAFSMA and KUMASHOVA particularly discard this scenario. They affirm that subparagraphs a)(i) and a)(ii) "explicitly place the burden of proving ME conditions on the Chinese exporters and producers" and that this presumption in a(i) survives after December 2016. In their opinion, "the expiry of subparagraph a)(ii) would not render an NME presumption ineffective …". *See* Graafsma & Kumashova at 156.

[13] Paragraph 150 reads: "*Several members of the Working Party noted that China was continuing the process of transition towards a full market economy. Those members noted that under those circumstances, in the case of imports of Chinese origin into a WTO Member, special difficulties could exist in determining cost and price comparability in the context of anti-dumping investigations and countervailing duty investigations. Those members stated that in such cases, the importing WTO Member might find it necessary to take into account the possibility that a strict comparison with domestic costs and prices in China might not always be appropriate*".

explanation as to why they decided to maintain the chapeau. As has been highlighted before, the chapeau entitles investigating authorities to apply an alternative methodology without considering prices and costs in China. The value of this provision is to support the continued application of the presumption and national legislation when subparagraph 15 a)(ii) expires. If the idea of the complete expiration of both the presumption and the use of national legislation is to maintain the Second note as the only legal basis for NME treatment, the power to resort to an alternative methodology is implicit in the same Second note and no other provision would be necessary to legitimate the authority to deviate from the normal methodology.

II .2 The presumption.

Among those who advocate the expiration of 15 a) as it was originally conceived in the Protocol, there is no unanimous position regarding the fate of the NME presumption after December 2016. A very peculiar position has been adopted in this regard by GRAAFSMA and KUMASHOVA while refuting the basis of Jorge MIRANDA´s shift of burden of proof stance.

In their article, GRAAFSMA and KUMASHOVA affirm that exactly the same NME presumption is enshrined in subparagraphs (a)(i) and (a)(ii) and consequently the expiration of the latter in December 2016 does not modify the NME presumption itself, which is not affected by the second sentence of subparagraph 15 d).

They specifically argue that "*the expiry of subparagraph (a)(ii) would not render an NME presumption ineffective, as the same NME presumption would still be found in subparagraph (a)(i)…*".[14] Then, in their own words, "*the reasoning that Chinese producers would not bear the burden of proving ME conditions after December 2016 by virtue of the expiration of subparagraph (a)(ii) runs squarely against the explicit language of subparagraph (a)(i)*".[15]

But immediately after, these authors deprive what appears to be the best argument to support the "Urban Myth" Bernard O´CONNOR referred to of any legal effect by contending that the expiration of 15 a)(ii) invalidates other rules pertaining to its implementation. The paper is not clear enough about the extent of this invalidation, but one could infer that these "other rules" include, at least, the ability to apply the national legislation of the importing WTO Member to assess whether China is or is not a Market Economy.

[14] Graafsma et al at 156.
[15] *Id*.

In order to arrive at this conclusion GRAAFSMA and KUMASHOVA state that "*the wording of the Working Party Report provides useful context for the assessment of the function and meaning of subparagraph (a)(ii)*".[16] According to them, paragraph 151 provides an adequate context to understand the purpose and meaning of subparagraph 15 a)(ii).

Whether this invalidation encompasses the presumption is hard to confirm. They do not explicitly address this question, and the way they depict what kind of process takes place during the night of December 11, 2016 is somehow confusing. They argue that the Second Note will be the only legal tool available to deviate from the normal methodology set forth in article 2.1 of the ADA. This conclusion lacks a logical explanation on how the presumption will work with the new legal basis and the manner in which the transformation process will take place beyond that date.

The change from the ME criteria in the National legislation to the alleged more demanding standard in the Second Note, could imply a significant alteration in the presumption itself. Thus, it is clear that some tension lies then between the ideas that the presumption remains unchanged, and the proposition that by virtue of the expiration of subparagraph (a)(ii), as of 12 December 2016, WTO Members may no longer invoke section 15 as a justification for resorting to a NME methodology.

Do they mean that after December 11, 2016 China is presumed to fulfill the requirements of the Second Note and that the burden of proof to refute this presumption remains on the individual Chinese producers? If this were the interpretation these experts proposed, the presumption would not be consistent with the burden a) (i) puts on Chinese Producers. Returning for a moment to the assertion made by the WTO Appellate Body in Fasteners, footnote 460, the AB recognized that there could be different degrees of non-market economies, but only the extreme situation where there is a complete or substantially complete monopoly of trade and all prices are fixed by the State qualifies for the application of the Second Note. Allow me to describe these other NME scenarios as a "gray area".

In the view of the AB, not only would ME status release Chinese producers from the effects the alternative methodology, the "gray area" would also provide them with the same relief. But, if we accepted that the only way to have the real prices and costs in China considered for price comparability is showing that market economy conditions prevail in an industry or sector, in the words of these authors, this country would be in the same position after December 11, 2016 as before that date.

[16] *Id*. The issues of this argument related to the applicable methodology will be further discussed later in this paper.

If the idea is that the NME presumption ends up invalidated by a sort of domino effect caused by the expiration of 15 a) (ii), then unlike what GRAAFSMA and KUMASHOVA maintain, no presumption will survive after December 2016.

II. 3 Do the methodology and/or the right to use an alternative methodology expire by virtue of the termination of subparagraph 15 a)(ii)?

The basic premise posed by GRAAFSMA and KUMASHOVA to support the invalidation of subparagraph 15 a) in its totality, rests on a controversial difference between (a)(i) and a)(ii). In their views, subparagraph 15 a)(ii) contains an exclusive feature: the right to apply an NME methodology.

The reasoning behind this argument relies on the text of Paragraph 151 of the WPR. These authors assert that the "Wording of the Working Party Report provides useful context for the assessment of the function and meaning of subparagraph (a)(ii)". This passage of the WPR, would ratify an interpretation that places in the latter provision the right of investigating authorities to deviate from the normal rules set forth in article 2.1 of the ADA, and to resort to an alternative methodology that does not take into account the actual prices and costs in China. The fact that Paragraph 151 of the WPR includes recommendations "as to the substance of the alternative methodology" that importing WTO Members would comply with when implementing subparagraph (a)(ii), would confirm in their opinions that the NME methodology—not the presumption—rests exclusively in subparagraph 15 a)(ii).

This argument deserves different observations.

To start with, the use of the word "context" in the argument might suggest that the authors intend to resort to Paragraph 151 of the WPR as a general rule of interpretation in the sense of article 31 of the VCLT, to help in assessing the ordinary meaning to be given to the terms of the treaty.

Article 31.2 limits the scope of the term "context" to the treaty itself, including its preamble and annexes, and different kinds of agreements, subsequent agreements and practices that establish a common understanding among the parties as to the interpretation of the treaty. The WPR encompasses several commitments undertaken by China that are listed in Paragraph 342 thereof and incorporated into the Protocol by virtue of paragraph 1.2 of this document.

Given that none of the paragraphs of the WPR that addresses the treatment of China in antidumping investigations (149, 150 and 151) is included in paragraph 342 of the WPR, the wording invoked by

GRAAFSMA and KUMASHOVA does not qualify as "context". It rather seems to fit as one of the supplementary means of interpretation as per article 32 of the VCLT, namely "preparatory work".

This is not a minor issue, because the idea that the alternative methodology and the authority to apply it, are an exclusive feature of subparagraph 15 a) (ii) of the Protocol, is consistently refuted by the unambiguous language contained in subparagraph 15 c) of the same document. The latter clause identifies the entire 15 a) and not 15 a) (ii) as the provision where the methodology and the right to apply the alternative methodology lie. This is consistent with the fact that the same terms related to the methodology are embedded in the chapeau of 15 a) and in 15 a) (ii)17. Further, the reference to the right to apply an alternative methodology in the WPR is not found in Paragraph 151 of that document, but in paragraph 150. Paragraph 150 contains the same reference to an alternative methodology as in the chapeau of 15 a) and in 15 a) (ii), when it states that taking into account that China´s economy is still in transition towards a full market economy status "*the importing WTO Member might find it necessary to take into account the possibility that a strict comparison with domestic costs and prices in China might not always be appropriate*". Furthermore, Paragraph 150 of the WPR replicates the wording inserted in the Second Note, which logically contains the right to deviate from the normal methodology set forth in Article 2.1 of the ADA and to apply an alternative methodology that does not consider actual prices and costs in the country where the exported merchandise was produced.

The term "might find it necessary" is without any doubt, the seed of the authority to depart from the ordinary methodology under article 2 of the GATT in the chapeau and in a) (ii) represented in the text of the Protocol[18]. This invalidates the argument that Paragraph 151 of the WPR allows the interpreter to consider that the right to resort to an alternative methodology resides exclusively in a) (ii) and that the effect of the expiration of this provision deprives investigating authorities of any power to ignore prices and costs in China for price comparability.

[17] Both provision refer to a "methodology that is not based on a strict comparison with domestic prices and cost in China"

[18] It can also be argued that the right to apply an alternative methodology lies implicitly in (a) (i), since the use of the normal methodology is mandated only if Chinese producers can clearly show that ME conditions prevail in their industry.

Subparagraph 15 c) not only contains the only binding condition as to methodology, but also it does not expire like 15 a) (ii), consequently there are no valid arguments that after December 2016 the system will be deprived of the alternative methodology or the right to apply such methodology.

Additionally, the text of paragraph 151 of the WPR stems from a concern raised by China regarding mainly procedural matters related to the right of defense, transparency, NME tests and price comparability methodology. In response to these concerns, the WPR enunciates different principles that Members would comply with when implementing subparagraph a)(ii) of section 15 of the Protocol. These principles are qualified not only by the word "would" in the chapeau, but also by the terms used in this paragraph itself. Language like "should", "to the extent possible," "make best efforts", etc. clarifies that no obligation on importing members arises in relation to such actions to the extent that such obligations were not included in the text of the Protocol. With regard to the rights afforded to China in the Protocol, it is also undisputed that China gained no right to a specific methodology in price comparability or NME tests, except for what 15 c) mandates in terms of notifications.

To be more precise, if there is no obligation on the negotiating Members to apply a specific methodology or to follow or depart from the "suggestions" contained in paragraph 151 of the WPR when implementing a)(ii), the consequence is that the word methodology in the chapeau of 15 a) and in 15 a)(ii), does not refer to the methodology suggested in the WPR, to the extent that Members are free to adopt these suggestions or to ignore them. Consequently, like in the concept of market economy, we can affirm that there are as many methodologies as different price comparability schemes set forth in national legislation.

Then, if Members are not bound to adopt a specific methodology, the argument proposed by GRAAFSMA and KUMASHOVA – that a Member´s decision to continue treating China as a NME after 2016 would imply that it would do so without observing any of the recommendations contained in paragraph 151 of the WPR – is without merit because members have been entitled to do so, and the expiration of 15 a)(ii) would not modify this situation.

As has already been explained, the only obligation concerning the methodology in paragraph 15 is contained in subparagraph c), which requires members to notify the "methodologies used in accordance to Paragraph a)" to the Committee on Anti-Dumping practices. Nevertheless, subparagraph 15 c) contains no deadline to comply with this mandate, nor does it establish any adverse consequence in case of failure to do so. Furthermore, subparagraph 15 c) is not subject to any expiration according to the other provision of Paragraph 15.

(III) The justification:

The justification for the survival of subparagraph 15 a)(i) poses an important challenge for those who support the expiration of national law as the legal basis for NME treatment after 2016.

If, as RAO WEIJIA asserts, "it is questionable as to why the negotiators limited the scope of expiration to subparagraph 15 a)(ii) alone," some reasonable explanation must be provided to justify the survival of the "same presumption" in a)(i).

They propose a common argument based on the idea that this provision "might have 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".

First, this argument assumes that the drafters intended to provide Chinese (and Vietnamese)[19] producers with a special and differentiated treatment that producers from the rest of the WTO countries (including least developed countries) do not enjoy. If the position of these authors were correct, all WTO countries would be subject to the application of article 2.7 of the ADA with the exception of producers located in China and Vietnam. Nothing in the text of the Protocol nor in the WPR supports this assumption. Further, basic logic runs against it.

Second, if the intention of the drafters was to provide such beneficial treatment, why did they decide to do so when the termination of the use of national legislation stems from the mere passage of time, and China has not undertaken the necessary reforms to be considered a market economy, and not if the graduation as a ME is the consequence of having carried out the necessary economic reforms under first and third sentences of 15 d)?

This sounds like an undeserved reward.

RAO adds another reason: "*Once the prerequisite in the first and third sentence of subparagraph 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 clause that encompasses no such*

[19] This statement includes Vietnamese producers because Viet Nam's Protocol of Accession contains a mirror provision to paragraph 15. *See* "Report of the Working Party on the Accession of Viet Nam," ¶255, WT/ACC/VNM/38 (October 27, 2006).

prerequisite. Thus textually retaining the provisions of subparagrpah15 a)(i) is not repetitive or redundant in this scenario".[20]

This justification is not consistent with the substance of the argument about the expiration of the presumption and the legal basis, because this implies that the result in the different scenarios contemplated in 15 d) would be the same. No matter whether the importing Member´s right to apply the presumption and the national legislation expires because China demonstrates that the country or a specific industry operates under market economy rules (first and third sentences of subparagraph 15 d), or just for the mere passage of time, as allegedly in the second sentence, the only legal tool to treat China as a NME after December 2016 would be the Second note. To the contrary, if the prerequisites in the first and the third sentences have been demonstrated, and an importing Member intends to resort to the Second note, it would make no sense to deprive Chinese producers of the use of this defensive tool and limit its value to the cases where the alternative methodology is applied after the "automatic expiration" as per the second sentence of 15 d).

RAO's argument could have an alternative reading. The survival of the chapeau and a)(i) is justified in case investigating authorities "illegally" decided to apply a national standard different from the Second note. If this were the point, to the extent that the author does not identify any national legislation setting forth a non-rebuttable presumption, this justification seems baseless.

Conclusions

There is no basis to challenge that the surviving parts of paragraph 15 a) include a NME presumption and that the legal basis for such presumption is represented by the national laws of the importing WTO members.

The expiration of subparagraph 15 a) (ii) does not affect the alternative methodologies applied by the importing WTO Members nor the right to resort to this instrument.

The explanations provided by those who oppose to the continued application of the presumption under the domestic laws of the importing WTO Members lack textual support and violate the principle of effective treaty interpretation.

[20] Rao at 167.