AEGIS EUROPE

Market Economy Status for China:
The proper legal interpretation of China's WTO Accession Protocol

PART I: Introduction

Premise and Conclusions

The Commission Legal Service Opinion on the correct interpretation of Section 15 of China's Protocol of Accession to the WTO has not been made public.[1] Those arguing for a different interpretation have not been given the right to examine its arguments and to answer it.

It is said that the opinion concludes that, after 11 December 2016, the EU must use market economy methodologies for determining normal value. In other words, the Opinion is used to argue that China must, *de facto*, be considered a market economy.

The opinion is also used to deny the need for the usual Better Regulation[2] decision-making procedures within the Commission including a comprehensive assessment of the different options that may be available to the EU. This non-implementation of the Better Regulation procedures is particularly problematic considering the recent ruling of the Court of Justice in *Rusal Armenal* which found that the rules for the determination of normal value for non-market economies is a matter of EU policy only.

This note shows that the legal arguments that the Commission most probably used to reach its Opinion are flawed. If the Opinion is flawed then the Commission's regulatory approach is flawed and any legislative proposal it might make will be flawed.

Contrary to what is said to be in the Legal Service Opinion this note shows that:

- The expiry subparagraph (a)(ii) of Section 15 of China's Protocol of Access does not mean that the EU must *de jure* or *de facto* consider China as a market economy;
- After December 2016, Section 15 will still allow the EU to use non-market methodologies for determining normal value in investigations concerning goods originating in China.

The approach taken in this note

The number of legal arguments that can be applied to determine the proper interpretation of Section 15 of China's Protocol of Accession is not vast. Lawyers must address the text itself, the object and purpose of the text, is the text an exception to normal rules, the rules for interpreting complex texts and the interpretation of WTO law.

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[1] It appears the opinion has been made available to some commentators outside the institutions: see 'Denying China market economy status would be bad politics' The Parliament Magazine 29 September 2015.

[2] Including, most fundamentally, the consultation of stakeholders on whether there is a need for a change in the law, a core requirement in the Juncker Commission's policy.

The note looks at how the Legal Service of the Commission might have applied these general interpretative tools to reach the conclusions it is reported to have reached. The note also takes the opportunity to answer those arguments. In addition, the note looks at the apparent conclusion that no other interpretation than that reached by the Legal Service is possible.

The methods that can be used to interpret the Protocol

Articles 31 and 32 of the Vienna Convention on the Law of Treaties are used to interpret international treaties including the WTO Agreements. Those provisions read as follows:

"*Article 31 - General rule of interpretation*
1. 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.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32 - Supplementary means of interpretation
Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:
(a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable."

These rules of interpretation have been applied by the WTO Appellate Body in many cases. One example relevant to the interpretation of Section 15 is *Korea-Dairy Products* where the AB held "[i]*n light of the interpretative principle of effectiveness, it is the duty of any treaty interpreter to 'read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously.' An important corollary of this principle is that a treaty should be interpreted as a whole, and, in particular, its sections and parts should be read as a whole*."[3]

[3] WT/DS98/AB/R, AB-1999-8, *Korea-Definitive Safeguard Measure on Imports of Certain Dairy Products*, para. 80-81.

In essence the interpreter must not reach a conclusion with contradictory results and must use all of the text to reach a harmonious interpretation.

It is likely that the Commission Legal Service Opinion is based on these fundamental principles. Thus they can be the basis of the analysis in this note.

PART II: Analysis

The *EC-Fasteners* decision

The WTO Appellate Body (AB) concluded in *EC-Fasteners* that: "[p]*aragraph 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 (that is, 11 December 2016).(…) Since paragraph 15(d) provides for rules on the termination of paragraph 15(a), its scope of application cannot be wider than that of paragraph 15(a). (…) In other words, paragraph 15(a) contains special rules for the determination of normal value in antidumping investigations involving China. Paragraph 15(d) in turn establishes that these special rules will expire in 2016 and sets out certain conditions that may lead to the early termination of these special rules before 2016*".[4]

It is likely that this paragraph of *EC-Fasteners* forms an important part of the opinion as it is the main argument used by all parties to show that market methodologies must be used after December 2016. The argument is that the WTO AB has already ruled on the matter.

1. The problem with this argument, as is clear from the citation itself, is that the AB was wrong in *EC-Fasteners* when stating that the second sentence of Paragraph 15(d) mandates the expiry of Paragraph 15(a) in its totality in December 2016. Paragraph (a) does not expire. Subparagraph (a)(ii) does because the second sentence of paragraph 15 (d) limits the expiry to just that provision. The AB's mistake may be because the focus of its reasoning was on whether paragraph (a) applied to the export price. The AB found that it did not. In that sense, the AB set Section 15 aside in its core reasoning and took its eye off the ball.

Paragraph (a) must be read in the context of all of Section 15 (hereafter §15) and in particular paragraph (d). Both the first and the third sentences of §15(d) implicitly refer to the absence of market-economy conditions in China by providing the possibility for China to establish that market conditions prevail. In case China can do so, §15(d) indicates that §15(a) as a whole would be terminated. What expires after December 2016 as per the second sentence of §15 (d) is §15(a)(ii) only. Thus the Protocol makes a distinction between the expiry of §15(a) and §15(a)(ii). Interpreting the reference to §15(a)(ii) as if it was §15(a) would:

- simply nullify, illegitimately, the meaning of the second sentence of §15(d) literally transcribed by the AB in footnote 459, which refers to §15(a)(ii) only;
- violate the principle of effectiveness which requires giving meaning to every term of a provision, in this case to all of §15 which remains in vigour after December 2016;
- disregard the WTO requirement to interpret a provision holistically, i.e. that the Protocol, including Section 15, should be interpreted as a whole.

[4] WT/DS397/AB/R, AB-2011-2, *European Communities - Definitive Anti-Dumping Measures on Certain Steel Fasteners from China,* para. 289.

The Protocol was in part adopted because several WTO members considered that China was still in the process of transition towards a full market economy. This fact would have rendered it inappropriate to base normal value on prices and costs in China.[5] Given that it has not been established yet that China as a whole, or certain industry sectors in China, operates under market conditions, these concerns are still valid. As a result, the use of non-Chinese data is still justified as well as the presumption that market economy conditions do not prevail in China.

2. The AB statement was manifestly *obiter dicta*. The issue was raised to show that exceptional rules applied to anti-dumping cases with regard to goods originating in China. It was made in the context of whether special rules applied to the calculation of the export price. The statement had no relevance to the reasoning followed by the AB in *EC-Fasteners*. It was not needed and had no effect on the outcome of the case. The Parties and the third parties in that this dispute did not have an opportunity to exercise their procedural rights by submitting arguments and rebuttal arguments concerning the proper interpretation of the second sentence of §15 (d). In the same vein, the AB decision did not develop any argument or reason that could support its conclusion. Accordingly, the AB observations are not binding on prospective disputes dealing with the interpretation of §15 of the Protocol.

3. The WTO Legal Affairs Division and the AB Secretariat have summarised whether previous AB decisions have binding effect. They argue that a decision is adopted within the context of a particular dispute between WTO members that concerns specific matters. It does not constitute binding precedents for other disputes between (i) the same parties on other issues or (ii) different parties on the same matter. The WTO dispute settlement system is not based on a rule of *stare decisis* where previous rulings bind Panels and AB in subsequent cases. In short, the AB is not required to maintain the legal interpretation made in previous cases.[6]

In the *US-Zeroing* dispute, the Panel rejected the approach it had adopted in a previous case and took another interpretation based on the objective assessment of the facts at issue.[7] The non-binding approach was also confirmed by the AB in *Japan-Alcoholic Beverages II* holding that a previous interpretation is not binding on subsequent AB/Panel rulings, "*except with respect to resolving the particular dispute between the parties to that dispute*." [8]

That being said, AB decisions may be followed for reasons of legal certainty and predictability. In the *US-Oil Country Tubular Goods*, the AB stated that "*following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same*."[9] In addition, the AB stated in the *US-Stainless Steel* dispute that absent "*cogent reasons*", the panel should resolve "*the same legal question the same way in a subsequent case*."[10]

[5] WT/ACC/CHN/49, Working Party Report on the Accession of China, 1 October 2001, para. 150.
[6] See https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c7s2p1_e.htm.
[7] WT/DS294, *United States – laws, regulations and methodology for calculating dumping margins (zeroing),* 31 October 2005.
[8] WT/DS8//AB/R WT/DS/10/AB/R, WT/DS/AB/R, *Japan-Alcoholic Beverages II*, pp.12-15.
[9] WT/DS268/AB/R, para. 188.
[10] WT/DS344/AB/R, *US-Stainless Steel (Mexico),* para. 160.

The scope of the "*cogent reasons*" remains uncertain. In *US-CVD and AD measures (China)*, the Panel listed a series of reasons not to follow an AB interpretation, that is to say: (i) when a new multilateral interpretation of the relevant agreement exists, (ii) the previous interpretation has been demonstrated to be unworkable or (iii) it is in conflict with another agreement or (iv) it is based on a factually incorrect premise.[11]

Given that the statement made in *EC-Fasteners* is of relevance for a prospective China MES dispute, the Panel/AB will have to take it into account. However, the WTO is not legally bound by that interpretation and even more so given that the finding is based on a factually incorrect premise.

The basic interpretation of Section 15

Subparagraph (d) of §15, second sentence, provides that "[i]*n any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession.*"

The likely argument in relation to the proper interpretation of subparagraph (d) second sentence is that the *ordinary meaning* is clear. *Prima facie*, the possibility to use alternative methodologies to determine the normal value, based on subparagraph (a)(ii), will no longer be available after 11 December 2016. WTO members have no other option but to use Chinese costs and prices.

This interpretation is based on the idea that subparagraph (a)(ii) is the only provision which authorises WTO members to apply non-market methodologies with regard to imports from China. It is argued that this *ordinary meaning* is further confirmed by paragraph 151 of the WTO Working Party Report on the Accession of China to the WTO. The basic argument is that even if the expiry of subparagraph (a)(ii) does not give MES to China as such, it triggers the same effect.

But, to be complete, this argument must also address the chapeau of §15(a). It must argue that the chapeau cannot be read in isolation from §15(a)(ii). This in turn means that the chapeau cannot constitute, on its own and in the absence of (a)(ii), an authorisation to depart from the methodologies laid down in Article VI of the GATT and the ADA. Many who make this argument do not address the chapeau.

These arguments can be addressed in a number of ways.

1. The first observation is that the future absence of an autonomous legal basis argument cannot be based on the interpretation made by the AB in *EC-Fasteners*. It has been seen that the AB got it wrong and, in any event, future disputes are not bound by previous findings.

2. The next question is whether it is correct to argue that the chapeau of §15(a) can only be read together with §15(a)(i) and §15(a)(ii) as the chapeau of §15(a) is *based on* the rules contained in these two sub-paragraphs, one of which will expire in December 2016.

First, this argument does not address the fact that both of the special rules laid down in the sub-paragraphs of §15(a) do not expire in December 2016. Had the WTO members meant that the expiry of 15(a)(ii) equals the expiry of the whole of §15(a) leading to the *de facto* granting of MES to China, they would have presumably expressed this intention in a more explicit manner such as they did in

[11] WT/DS437/R, *US-CVD and AD measures (China),* para. 7.317.

relation to Section 16 of the Protocol.[12] Similarly, if the expiry of 15(a)(ii) equals the expiry of the whole of §15(a), there was no reason for the drafters to use different references in §15(d): they could have simply referred to the expiry of 15(a)(ii) throughout.

Sub-paragraph 15(a)(i) will still provide, after December 2016, that the obligatory use of Chinese prices or costs for an entire industry is subject to the requirement that the producers under investigation can show that market economy conditions prevail in their industry.

Second, the term "*based on*" is not a requirement that the competent authority acts only on the basis of the elements that follow that term in the text. *Based on* means that the competent authority needs to take into account the elements that follow without preventing it from doing something more. *Based on* does not have the same limiting meaning as "*in compliance with*". In other words, *based on* is not the same as *exclusively based on*.[13] Thus the competent authority can start from all of §15(a) and not just from subparagraph (a)(ii) in applying a methodology to determine normal value which does not use Chinese prices or costs.

The WTO AB has interpreted the words "*based on*" on two occasions. In *EC-Hormones*, the AB ruled that:

"[t]*he ordinary meaning of "based on" is quite different from the plain or natural imports of "conform to". A thing is commonly said to be "based on" another thing when the former "stands" or is "founded" or "built" upon or "is supported by" the latter. In contrast, much more is required before one thing may be regarded as "conform[ing] to" another: the former must "comply with", "yield or show compliance" with the latter. The reference of "conform to" is to "correspondence in form or manner", to "compliance with" or "acquiescence", to "follow[ing] in form or nature.*

A measure that "conforms to" and incorporates a Codex standard is, of course, "based on" that standard. A measure, however, based on the same standard might not conform to that standard, as where only some, not all, of the elements of the standard are incorporated into the measure." [14]

This approach was confirmed by the AB in *EC-Sardines. Based on* does not have the same meaning as *conform to*.[15]

Thus the expiry of §15(a)(ii) does not prevent a competent authority from applying the chapeau of §15(a) and §15(a)(i) in full compliance with §15 as a whole. §15(a)(i) remains mandatory. The expiry of §15(a)(ii) similarly does not limit the continuing effectiveness of the chapeau of §15(a).

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[12] Paragraph 16(9) of China's WTO Accession Protocol: "*Application of this Section shall be terminated 12 years after the date of accession*." Section 16 refers to Product-Specific Safeguards.

[13] In essence, the argument that the expiry of §15(a)(ii) removes any autonomous basis for applying alternative methodologies reads the word "exclusively" into the text before the term "based on". This is not permissible under WTO law: see, for example, the Appellate Body Report, *India - Patents*, WT/DS50/AB/R, paragraph 45 which provides: "*But these principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended*."

[14] WT/DS26/AB/R,WT/DS48/AB/R, *EC measures concerning meat and meat products (Hormones),* 16 January 1998, para. 163. The definition is based on L. Brown (ed.), *The New Shorter Oxford English Dictionary on Historical Principles* (Clarendon Press), Vol. I, p. 187.

[15] WT/DS/231/AB/R, *European Communities - Trade description of Sardines*, 26 September 2002, para. 242.

The chapeau sets out the principle according to which the competent authority has the possibility to use either Chinese costs or prices or another methodology. This alternative is *based on* certain specific rules. However, the principle enshrined in §15(a), i.e. the possibility of recourse to a methodology not strictly based on Chinese costs and prices remains as long as §15(a) remains (i.e. until China has demonstrated it meets the market economy criteria of the importing member, either for itself as a whole or for a particular sector or industry).

3. It is clear that §15(d), second sentence, does not refer to §15(a) in its entirety. However, any analysis that argues that the expiry of §15(a)(ii) means the expiry of the autonomous basis for using alternative methodologies is the same as arguing that the "expiry" referred to in §15(d) second sentence means the expiry of all of §15(a).

To argue that the expiry of §15(a)(ii) means the expiry of all of §15(a) contradicts the principle of effectiveness or "*effet utile*". This legal principle, recognised by the AB requires that meaning and effect be given to all provisions. In this case it means giving meaning and effect to the chapeau of §15(a) and to §15(a)(i).

In *Canada-Renewable Energy*, the AB stated:

"[w]*e consider that Article III:8(a) should be interpreted holistically. This requires consideration of the linkages between the different terms used in the provision and the contextual connections to other parts of Article III, as well as to other provisions of the GATT 1994. At the same time, the principle of effective treaty interpretation requires us to give meaning to every term of the provision*.[16]

The remaining provisions of §15(a) cannot be left without meaning and effect after December 2016. Coupled with §15(d), these provisions still provide the legal basis to use non-Chinese costs and prices when determining the normal value.

4. Various authors argue that there is a change in a presumption following the expiry of §15(a)(ii).[17] This approach argues that the removal of §15(a)(ii) leads to a rebuttable presumption that Chinese producers operate under market economy conditions. This, in turn, triggers a change in the burden of proof whereby complainants or the competent authorities are required to demonstrate that the exporters do not operate under market conditions if alternative methodologies are to be used.

The underlying argument being made is that §15(a) and 15(a)(i) create a presumption that market economy conditions prevail in China. However, the wording and the *ordinary meaning* of these provisions do not support that interpretation. In addition, such a presumption would also be inconsistent with the first and the third sentences of §15(d) which clearly require China to establish that market conditions prevail. §15(d) is clearly based on the assumption or presumption that market conditions do not prevail in China. The provisions of §15(d) first and third sentences remain valid after December 2016.

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[16] WT/DS412/AB/R, WT/DS426/AB/R, *Canada – Renewable Energy - Feed-in Tariff Program*, para. 5.57

[17] See among others Miranda, J, *Interpreting Paragraph 15 of China's Protocol of Accession*, in Global Trade and Customs Journal 94, 101, 2014; Tietje C, Nowrot K, *Myth or Reality? China's Market Economy Status under WTO Anti-Dumping Law after 2016*, in Policy Papers on Transnational Economic Law, No 34, December 2011.

5. A number of arguments are raised on the basis that §15(a)(i) is mandatory and §15(a)(ii) is permissive. This distinction however does not lead to the conclusion that alternative methodologies cannot be used after December 2016.

First, §15(a)(ii) is only one of the alternatives set out in the subparagraphs of §15(a). That alternative places the burden of proof on exporters in order to obtain the use of Chinese prices or costs for the entire industry. As §15(a)(i) remains, the implication is that the failure to meet that burden still has consequences, even if – with the removal of §15(a)(ii) – one particular consequence no longer applies.

Second, the chapeau of §15(a) *as such* directs competent authorities to use either of two possibilities. The permission to use non-Chinese costs and prices within §15(a)(ii) is, in law, already provided for in the chapeau of §15(a).

Is §15(a)(ii) a WTO-minus provision? Or better put, is §15(a)(ii) an exception to the normal rule? It is clear that it is an exception since the normal value of goods originating in China is not determined in the same general manner as imports from other WTO members. However, this does not mean that the transitional rule regarding imports from China cannot be maintained or used as long as China does not establish that it is a market economy and/or that market economy conditions prevail in a particular sector. These rules are specifically provided for by §15(d) and mandated by the chapeau of §15(a). They cannot be ignored.

This interpretation is further reinforced in light of the object of the Protocol. One of these objects was to provide a series of actions that China had to undertake as the *quid pro quo* for its WTO membership.[18] The possibility that China would not adopt and implement market economy rules, something which is being regularly shown to be the case by many international studies, and repeated in relation to China's Trade Policy Reviews within the WTO, underlies the distinction in §15(d) between:

i) those provisions (the first and third sentences) which take away all of §15(a) but which depend on China actually fulfilling its Protocol commitments to fully make the transition to a market economy; and
ii) the provision that removes one subparagraph of §15(a) regardless of whether or not China has honoured its obligations to fully transition to a market economy.

For this reason, the most reasonable way to interpret the expiry of §15(a)(ii) is to still allow the application of alternative methodologies on the basis of the text of §15(a). This is a distinct provision

[18] WT/ACC/CHN/49, Working Party Report on the Accession of China, 1 October 2001, paragraph 11. See also Wiley Rein LLP, *The treatment of China as a non-market economy country after 2016,* 15 September 2015, p.13 and 17. To interpret the Protocol in light of the circumstances of its conclusions, see WT/DS62/AB/R, WT/DS67/AB/R*, EC-Computer equipment, para. 86. The application of these rules in Article 31 of the Vienna Convention will usually allow a treaty interpreter to establish the meaning of a term. However, if after applying Article 31 the meaning of the term remains ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable, Article 32 allows a treaty interpreter to have recourse to:*
… supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion. With regard to "the circumstances of [the] conclusion" of a treaty, this permits, in appropriate cases, the examination of the historical background against which the treaty was negotiated.

which remains available to Members until China is able to demonstrate that market economy conditions prevail in its economy or parts thereof.

6. Is the autonomous legal basis for the use of alternative methodologies only contained in §15(a)(ii) and not in §15(a), §15(d) or otherwise in §15 as some maintain?

That analysis would be in contradiction with the analysis of the meaning of the terms *based on* which has been addressed in detail above. It also avoids the fact that it is the chapeau of §15(a) which establishes the principle that non-Chinese costs and prices can be used. It also disregards the fact that §15(a)(i) imposes the use of Chinese data for an entire industry only if exporters can show that that market conditions prevail in their industry. Finally, it does not take into account the first and third sentences of §15(d) which also – to the extent they leave the remainder of §15(a) in place after December 2016 – constitute part of the legal basis for the use of Chinese costs and prices.

Is an alternative interpretation possible?

It has been said in many fora that the Commission Legal Service Opinion does not admit of any other interpretation than the interpretation the Legal Service itself reaches. In other words, some maintain that Section 15 of China's WTO Accession Protocol must be interpreted to mean that after December 2016, the EU is not entitled to use methodologies for the determination of normal value in anti-dumping investigations concerning goods originating in China other than a methodology based on Chinese costs and prices.

The first and obvious observation is that it appears from a report on the publication Trade Insights that the European Parliament's legal service considers that other interpretations are possible.[19]

That being said, an argument can be made on the basis of Article 3(5) of the Treaty of the European Union and Article 216(2) of the Treaty on the Functioning of the European Union that the EU must contribute to the strict observance and development of international law and that agreements concluded by the EU are binding on the EU institutions, and therefore the interpretation of the Commission's legal service must be followed.

This is a circular argument and therefore not valid. For the EU Treaty provisions to apply the international agreement must be clear and precise. If the Commission's Legal Service asserts that there is a clear and precise legal obligation to grant China MES in 2016, it is contradicted not only by the Parliament's apparent opinion that §15 can be interpreted in a number of ways, but also by opposing interpretations that have been raised by many experts in legal journals. It simply cannot be said that the interpretation of §15 after December 2016 is clear and precise. Thus, it is not clear what might, or might not, be binding on the EU, and no argument can be founded in that context on Article 3(5) TEU.

It can even be argued that Article 3(5) TEU precludes the EU from acting unilaterally to interpret §15. As the EU must contribute to the development of international law, it can be argued that the EU must work with its trading partners within the WTO to come to a common understanding of the proper interpretation of §15.

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[19] EU Trade Insights, "*Exclusive: The EU has to modify its anti-dumping rules, says EP legal opinion on MES for China*", October 23, 2015.

Section 15 in WTO dispute settlement

It is also argued that if the EU were not to change the basic Anti-Dumping Regulation so as to use market economy methodologies in the determination of normal value for goods originating in China, China might initiate WTO dispute settlement claiming breach of WTO law by the EU.

It must be observed, first that WTO Dispute Settlement Body (DSB) findings have prospective effects rather than retroactive effect. Thus any AB decision leading to a DSB finding would impact the period after the ruling and not the period prior to the ruling.

In addition and in relation to anti-dumping measures in place when a possible negative finding is made, the approach taken by the Commission in *EC-Fasteners* is instructive. Seven months after the AB published its findings in *EC-Fasteners*, the Commission invited parties subject to anti-dumping measures to request a review of the investigations that led to the measures affecting them. There were 55 cases in all.[20] A review of the investigation was undertaken and measures were amended. The application of the amended measures concerned the future only.[21] Accordingly, the EU institutions are in a position to manage and review the measures in case of negative findings.

In *Rusal Armenal*, the Court of Justice confirmed, in July of this year, that the EU is entitled to take *its own, very particular approach* to the determination of normal value with regard to imports from non-market economies, and to follow an approach that is *specific to the EU legal order*. Thus, while the EU is generally obliged to comply with international law, the Court of Justice has recognised that in relation to the determination of normal value in anti-dumping investigations involving imports from non-market economies, the EU enjoys extensive policy discretion.

Changes to basic EU anti-dumping law

It is argued that the proper interpretation of Section 15 of China's WTO Protocol of Accession requires the EU to remove China from Article 2(7)(a) of Regulation 1225/2009, the basic anti-dumping Regulation.

The removal of China from Article 2(7)(a) is *de facto* to recognise China as a market economy as normal value would then – absent any new provisions specifically dealing with imports from China – have to be determined on the basis of normal market economy methodologies.

One obvious problem with this approach would be that it would ignore the provisions of §15(d) which do not entirely remove the provisions of §15(a) until China is able to demonstrate that its whole economy, or a sector of its economy, is market based.

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[20] Notice regarding the ruling of the Dispute Settlement Body of the World Trade Organisation adopted on 28 July 2011, OJ L 86/5, 23.3.2012.

[21] See Council Implementing Regulation (EU) No 924/2012 of 4 October 2012 amending Regulation (EC) No 91/2009 imposing a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in the People's Republic of China, OJ L 275/1, 10.10.2012.

PART III:

Conclusion

This note is based on the likely arguments that would be used by the Commission Legal Service to interpret Section 15 of China's WTO Accession Protocol and the conclusions reached.

It shows that, at the very minimum, the interpretation of Section 15 is not clear. It also shows that the likely legal arguments on which the Opinion's conclusion is based are flawed.

If the Opinion is flawed then the Commission's regulatory approach is flawed and any legislative proposal it might make will be flawed.

Contrary to what is said to be in the Legal Service Opinion this note shows that:

- The expiry subparagraph (a)(ii) of Section 15 of China's Protocol of Access does not mean that the EU must *de jure* or *de facto* consider China as a market economy;
- After December 2016, Section 15 will still allow the EU to use non-market methodologies for determining normal value in investigations concerning goods originating in China.

15. Price Comparability in Determining Subsidies and Dumping

Article VI of the GATT 1994, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement") and the SCM Agreement shall apply in proceedings involving imports of Chinese origin into a WTO Member consistent with the following:

(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 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.~~

(b) In proceedings under Parts II, III and V of the SCM Agreement, when addressing subsidies described in Articles 14(a), 14(b), 14(c) and 14(d), relevant provisions of the SCM Agreement shall apply; however, if there are special difficulties in that application, the importing WTO Member may then use methodologies for identifying and measuring the subsidy benefit which take into account the possibility that prevailing terms and conditions in China may not always be available as appropriate benchmarks. In applying such methodologies, where practicable, the importing WTO Member should adjust such prevailing terms and conditions before considering the use of terms and conditions prevailing outside China.

(c) The importing WTO Member shall notify methodologies used in accordance with subparagraph (a) to the Committee on Anti-Dumping Practices and shall notify methodologies used in accordance with subparagraph (b) to the Committee on Subsidies and Countervailing Measures.

(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.