EU – Price Comparison Methodologies(DS516): Challenging The Non- Market Economy Methodology In Light Of The Negotiating History Of Article 15 Of China's WTO Accession Protocol

WEIHUAN ZHOU AND DELEI PENG

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UNSW Law
UNSW Sydney NSW 2052 Australia

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EU – Price Comparison Methodologies (DS516): Challenging the Non-Market Economy Methodology in Light of the Negotiating History of Article 15 of China's WTO Accession Protocol

Weihuan Zhou* & Delei Peng**

The EU's and the US' written submissions in *EU – Price Comparison Methodologies*, for the first time, elaborated their respective positions on how Article 15 of China's WTO Accession Protocol should be interpreted and applied after fifteen years of China's entry into the WTO on 11 December 2016. This article offers a detailed analysis of the weaknesses in the interpretation of Article 15 as proposed by the EU and the US, that is, the so-called "Shifting in Burden of Proof" approach. The article argues that the non-market economy antidumping rule contemplated in Article 15 must be terminated according to the 15-year deadline. Through a careful examination of the negotiating records of Article 15 and China's Accession Protocol under both the GATT/WTO multilateral negotiations and the US-China bilateral negotiations, the article submits that the bilateral records show convincingly that the compromise reached between the US and China on Article 15 was that while China accepted the application of the special antidumping rule, the US agreed that the rule would remain applicable for fifteen years only. There were no negotiating records to suggest that this compromise was not endorsed by the WTO membership. In conclusion, the article offers brief observations on the broader implications of this dispute.

1 INTRODUCTION

In 2017, debates over China's non-market economy ("NME") status intensified after China brought the United States ("US") and the European Union ("EU") to the dispute settlement system of the World Trade Organisation ("WTO") on 12 December 2016. The two separate disputes concern common issues relating to the application of the so-called NME Methodology in antidumping investigations against China under Article 15 of the *Protocol on the Accession of China to the WTO* ("Accession Protocol")[1]. While the China-US dispute is still under consultation, the China-EU dispute, officially short-titled *EU – Price Comparison Methodologies* (i.e. DS516), is currently before a WTO panel composed on 10 July 2017.[2] Due to the lack of capacity in the WTO Secretariat, the panel has requested more time to adjudicate the dispute and will not issue its final report until the second half of 2018.[3] Given

* Senior Lecturer and member of the China International Business and Economic Law ("CIBEL") Initiative, UNSW Sydney, Australia. Email: weihuan.zhou@unsw.edu.au.

** Associate Professor, School of Business, East China University of Science and Technology. Email: deleipeng@163.com.

All websites are current as of 20 January 2018.

1 *Protocol on the Accession of the People's Republic of China*, WT/L/432 (23 November 2001).

2 A summary of the two disputes and their current status can be found at: *United States — Measures Related to Price Comparison Methodologies* (DS515) www.wto.org/english/tratop_e/dispu_e/cases_e/ds515_e.htm and *European Union — Measures Related to Price Comparison Methodologies* (DS516) www.wto.org/english/tratop_e/dispu_e/cases_e/ds516_e.htm

3 *European Union – Measures Related to Price Comparison Methodologies*, WT/DS516/11, Communication from the Panel, 11 December 2017.

its significance, this case is expected to dominate the WTO dispute settlement debate in 2018.[4]

In preparation for the first substantive meeting of the panel in *EU – Price Comparison Methodologies* in early December 2017, China, the EU, and the US have lodged written submissions. As of this writing, while China has only released its opening statement at the panel's meeting ("China Opening Statement")[5], the EU's first written submission ("EU Submission")[6] and the US' third party submission ("US Submission")[7] have been made public. In the meantime, the EU amended its antidumping regulation – the subject of the dispute – by replacing the NME Methodology with a country-neutral methodology that is primarily aimed at addressing market distortions caused by state intervention ("Amended Regulation").[8] The EU Commission subsequently published a report providing a detailed analysis of market distortions in China according to the criteria contemplated in the Amended Regulation ("Market Distortion Report").[9] With respect to the US, the US Submission relies heavily on two documents, including a detailed legal interpretation of Article 15 of China's Accession Protocol and the relevant provisions of Article VI of the General Agreement on Tariffs and Trade ("GATT")[10] and the WTO Anti-Dumping Agreement ("AD Agreement")[11] ("US Interpretation")[12], and a report prepared by the US Department of Commerce which concludes that China remains an NME[13].

The China-EU dispute raised three major legal issues, including (1) whether Article 15 of China's Accession Protocol continues to justify the application of the NME Methodology in antidumping investigations against China; (2) to what extent GATT Article VI and Article

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4 Inside U.S. Trade, World Trade Online, "Appellate Body, China NME Fights to Dominate WTO Dispute Settlement Debate in 2018", 26 December 2017.

5 *European Union – Measures Related to Price Comparison Methodologies* (DS516), Opening Statement by Ambassador Zhang Xiangchen as a part of the Oral Statement of China at the First Substantive Meeting of the Panel in the Dispute (China Opening Statement), 6 December 2017, available at: http://images.mofcom.gov.cn/wto2/201712/20171213174424357.pdf

6 *European Union – Measures Related to Price Comparison Methodologies* (DS516), First Written Submission by the European Union (EU Submission), 14 November 2017, available at: http://trade.ec.europa.eu/doclib/docs/2017/november/tradoc_156401.pdf

7 *European Union – Measures Related to Price Comparison Methodologies* (DS516), Third Party Submission of the United States of America (US Submission), 21 November 2017, available at: https://ustr.gov/sites/default/files/enforcement/DS/US.3d.Pty.Su.pdf

8 Regulation (EU) 2017/2321 of the European Parliament and of the Council of 12 December 2017 Amending Regulation (EU) 2016/1036 on Protection against Dumped Imports from Countries not Members of the European Union and Regulation (EU) 2016/1037 on Protection against Subsidised Imports from Countries not Members of the European Union, Official Journal of the European Union, L338, 19 December 2017.

9 European Commission, Commission Staff Working Document on Significant Distortions in the Economy of the People's Republic of China for the Purposes of Trade Defence Investigations, SWD(2017) 483 final/2, 20 December 2017.

10 *Agreement General Agreement on Tariffs and Trade* (GATT), 15 April 1994, 55 U.N.T.S. 194.

11 *Agreement on the Implementation of Article VI of GATT 1994*, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 201.

12 Office of the United States Trade Representative, *European Union – Measures Related to Price Comparison Methodologies*, Legal Interpretation – GATT 1994 Article VI:1; Second Note Ad Article VI:1; Practice of GATT Contracting Parties; Accessions to GATT; ADA Article 2; and Section 15 China WTO Accession Protocol (US Interpretation), 13 November 2017, available at: https://ustr.gov/sites/default/files/enforcement/WTO/US.Legal.Interp.Doc.fin.%28public%29.pdf

13 United States Department of Commerce, "China's Status as a Non-Market Economy", A-570-053, 26 October 2017.

2 of the AD Agreement provide the flexibility for the use of surrogate prices or costs to calculate normal values based on findings of price distortions associated with government intervention;[14] and (3) whether the EU's Amended Regulation, as implemented by the Market Distortion Report, is compatible with the relevant WTO antidumping rules.[15]

This article is dedicated to the first issue. Article 15 of China's Accession Protocol contains a rebuttable presumption that Chinese prices or costs are not market-based prices for antidumping purposes (i.e. the NME Assumption), and permits the use of non-Chinese or surrogate prices or costs in the calculation of normal values in antidumping actions against China (i.e. the NME Methodology) unless China satisfies certain market economy conditions set out in the domestic laws of WTO Members. However, paragraph (d) of Article 15 stipulates that certain part of Article 15 shall remain in force for fifteen years only until 11 December 2016. Accordingly, the critical question is whether the remaining elements of that article continue to provide the basis for the application of the special rule for the calculation of normal values. The special rule contrasts with the ordinary approaches to the determination of normal values contemplated in GATT Article VI:1 and Article 2 of the AD Agreement, where surrogate prices or costs may be applied only when the prescribed circumstances are proved to exist. In practice, the application of the NME Methodology almost invariably inflates normal values, and hence dumping margins and antidumping duties to be levied.[16] Therefore, interpreting Article 15 in a way that terminates the NME Methodology would significantly reduce the flexibility for the EU and the US, and constrain the discretion of their investigating authorities, in (ab)using the antidumping mechanism to deal with Chinese imports.

While Article 15 has been the subject of vigorous academic and policy debates in the past years,[17] the EU Submission and the US Submission, for the first time, elaborated their

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[14] One of the authors has discussed this issue in several publications. See Weihuan Zhou, "Appellate Body Report on *EU - Biodiesel*: The Future of China's State Capitalism under the WTO Anti-Dumping Agreement" (2018)17 *World Trade Review* published online (3 January 2018); Weihuan Zhou and Andrew Percival, "Debunking the Myth of 'Particular Market Situation' in WTO Antidumping Law" (2016)19(4) *Journal of International Economic Law* 863-892.

[15] The authors plan to write separately on this important issue.

[16] W. Watson, 'Will Nonmarket Economy Methodology Go Quietly into the Night?: US Antidumping Policy toward China after 2016', Cato Institute Policy Analysis Number 763 (28 October 2014); Chad Bown, "Should the United States Recognize China as a Market Economy?", Peterson Institute for International Economics, Policy Brief 16-24 (December 2016) 1-12 at 6-7; Cecilia Bellora & Sebastien Jean, "Granting Market Economy Status to China in the EU: An Economic Impact Assessment", CEPII Policy Brief No. 11 (September 2016) 1-16.

[17] See, eg, Weijia Rao, "China's Market Economy Status under WTO Antidumping Laws After 2016" (2013)5 *Tsinghua China Law Review* 151-168; Christian Tietje and Karsten Nowrot, "Myth or Reality? China's Market Economy Status under WTO Anti-Dumping Law after 2016", Transnational Economic Law Research Center Policy Papers No. 34 (December 2011) 1-12; Miranda, J., "Interpreting Paragraph 15 of China's Protocol of Accession" (2014)9(3) *Global Trade and Customs Journal* 94-103; Theodore R Posner, "A Comment on Interpreting Paragraph 15 of China's Protocol of Accession by Jorge Miranda" (2014)9(4) *Global Trade & Customs Journal* 146-153; Folkert Graafsma and Elena Kumashova, "*In re* China's Protocol of Accession and the Anti-Dumping Agreement: Temporary Derogation or Permanent Modification?" (2014)9(4) *Global Trade and Customs Journal* 154-159; Brian Gatta, "Between 'Automatic Market Economy Status' and 'Status Quo': A Commentary on 'Interpreting Paragraph 15 of China's Protocol of Accession'" (2014)9(4) *Global Trade and Customs Journal* 165-172; Stewart, T.P., Fennell, W.A, Bell, S.M. and Birch, N.J., "The Special Case of China: Why the Use of a Special Methodology Remains Applicable to China after 2016" (2014)9(6) *Global Trade and Customs Journal* 272-279; Bernard

respective positions on how Article 15 should be interpreted and applied after the 15-year deadline. In essence, the EU and the US argued that the expired part of Article 15 concerns the NME Assumption or China's "burden of proof" only and hence does not terminate the NME Methodology. Section 2 of this article will offer a detailed critique of this argument and discuss a number of its weaknesses.

More importantly, while the existing debate has revealed the difficulties in resolving the issues under interpretation based on the primary means of treaty interpretation codified in the *Vienna Convention on the Law of Treaties*[18] ("Vienna Convention"), no work has analysed the supplementary materials for treaty interpretation in an adequate manner. Only a few authors have attempted to do so, but have not discussed the drafting records of Article 15 in detail.[19] Section 3 of this article will fill the gap by providing a comprehensive and detailed analysis of the accessible negotiating records of Article 15 and China's Accession Protocol in general. Importantly, it will show how Article 15 evolved in the US-China bilateral negotiations and the compromise reached in the negotiations. Given the ambiguities in the text of Article 15, the supplementary materials may well be decisive in resolving the current dispute.

Section 4 concludes and offers brief observations on the broader issues raised by the dispute. It submits that the WTO dispute settlement system is not the right forum to discuss or determine whether China is a market economy, and that the termination of the NME Methodology under Article 15 would not unduly constrain the capacity of the WTO in addressing issues relating to state intervention and market distortions in China.

O'Connor, "Much Ado About 'Nothing': 2016, China and Market Economy Status" (2015)10(5) *Global Trade and Customs Journal* 176-180; Jorge Miranda, "More on Why Granting China Market Economy Status after December 2016 Is Contingent upon Whether China Has in Fact Transitioned into a Market Economy" (2016)11(5) *Global Trade and Customs Journal* 244-250; Edwin Vermulst, Juhi Dion Sud and Simon Evenett, "Normal Value in Anti-Dumping Proceedings against China Post-2016: Are Some Animals Less Equal Than Others?" (2016)11(5) *Global Trade and Customs Journal* 212-228; Zhenghao Li, "Interpreting Paragraph 15 of China's Accession Protocol in Light of the Working Party Report", (2016)11(5) *Global Trade and Customs Journal* 229-237; David Kleimann, "The Vulnerability of EU Anti-Dumping Measures against China after December 11, 2016", EUI Working Papers RSCAS 2016/37, July 2016, 1-10; Jochem de Kok, "The Future of EU Trade Defence Investigations against Imports from China" (2016)19(2) *Journal of International Economic Law* 515-547; European Institute for Asian Studies, "China: NME at the Gates? Article 15 of China's WTO Accession Protocol: A Multi-Perspective Analysis", Research Paper (November 2016) 1-48; Andrei Suse, "Old Wine in A New Bottle: The EU's Response to the Expiry of Section 15(A)(II) of China's WTO Protocol of Accession", Leuven Centre for Global Governance Studies Working Paper No. 186, May 2017, 1-31; Minyou Yu and Jian Guan, "The Non-Market Economy Methodology Shall Be Terminated after 2016" (2017)12(1) *Global Trade and Customs Journal* 16-24; Fernando Gonzalez-Rojas, "All Parts Should Have Meaning: A Proposal on the Correct Interpretation of Section 15(a) & (d) of China's Protocol of Accession" (2017)12(9) *Global Trade and Customs Journal* 328-343.

[18] *Vienna Convention on the Law of Treaties* (1969, 1155 U.N.T.S. 331).

[19] See above n 17, Suse, "Old Wine in A New Bottle: The EU's Response to the Expiry of Section 15(A)(II) of China's WTO Protocol of Accession", at 13-16; Rao, "China's Market Economy Status under WTO Antidumping Laws After 2016", at 162-164; Kok, "The Future of EU Trade Defence Investigations against Imports from China", at 527-528.

2 ARTICLE 15 OF CHINA'S ACCESSION PROTOCOL: A CRITIQUE OF THE EU SUBMISSION

Article 15 of China's Accession Protocol reads in the relevant part:

> 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.
>
> (…)
>
> (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. (emphasis added)

2.1 Is Article 15 an Exception?

The threshold question on the interpretation of Article 15 concerns whether it is an exception to the general rules set out in GATT Article VI:1 and Article 2 of the AD Agreement. According to the EU Submission and the US Submission, China seems to have treated Article 15 as an exception and have not proffered sufficient evidence and legal grounds for its claim

that the NME Methodology shall expire after the 15-year deadline.[20] The EU argued that Article 15 is not an exception but confers an autonomous legal right so China has failed to make a *prima facie* case.[21]

While the legal status of Article 15 is an unsettled issue under the WTO law, the EU's argument is tenable. In *EC – Fasteners*, the Appellate Body observed that Article 15 "permits importing Members to derogate from a strict comparison with domestic prices or costs in China", and hence "authorize WTO Members to treat China differently from other Members" in respect of the determination of normal values.[22] One may argue that the Appellate Body did not see the rules under Article 15 as an exception to GATT Article VI:1 and Article 2 of the AD Agreement. Rather, the ruling suggests that Article 15 creates specific rules that apply to China,[23] whereby a right for importing Members to disregard Chinese prices or costs on the basis of the specific rules is created. In such circumstances, WTO Members are permitted to act outside the scope of application of the general rules, and the complainant bears "the burden of proving that the respondent's measure is inconsistent with the respondent's autonomous right."[24] This interpretation is supported by the introductory language of Article 15 which states that GATT Article VI and the AD Agreement shall apply to China based on the (specific) rules set out therein.

No matter how the legal status of Article 15 is resolved, the fundamental issue is how Article 15 should be interpreted in terms of the legal effects of Article 15(d), 2nd sentence ("Sunset Clause") which terminates Article 15(a)(ii), and of the surviving parts of Article 15. Therefore, even if China's characterisation of Article 15 as an exception is adopted, China remains responsible for submitting its own legal analysis of Article 15 based on positive evidence. Ultimately, the WTO tribunal evaluates all the evidence and legal analysis advanced by the parties to determine whose arguments should prevail.[25]

2.2 The Old vs New Article 15: the "Shifting in Burden of Proof" Approach

The interpretation of WTO agreements must consider the materials contemplated in the Vienna Convention, under which the primary ones include the text, the context, and the object and purpose of the treaty under interpretation.[26] While applying the same principles of treaty interpretation, the existing legal analysis of Article 15 has been widely divided and may be categorised into four streams of thought. At one extreme is the view that the legal

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[20] See above n 6, EU Submission, paras. 77, 303, 305; above n 7, US Submission, para. 145.

[21] See above n 6, EU Submission, paras. 307-313.

[22] Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China* (*EC – Fasteners*), WT/DS397/AB/R, adopted 28 July 2011, paras. 287, 290.

[23] See Michael Lennard, "Interpreting China's Accession Protocol: A Case Study in Anti-Dumping" in Cass *et al.* (eds) *China and the World Trading System: Entering the New Millennium* (Cambridge: Cambridge University Press, 2003) 387-412 at 396.

[24] See David Unterhalter, "Allocating the Burden of Proof in WTO Dispute Settlement Proceedings" (2009)42(2) *Cornell International Law Journal* 209-221 at 211.

[25] Joost Pauwelyn, "Evidence, Proof and Presumption in WTO Dispute Settlement" (1998)1(2) *Journal of International Economic Law* 227-258 at 255; John J. Barcelo III, "Burden of Proof, Prima Facie Case and Presumption in WTO Dispute Settlement" (2009)42(1) *Cornell International Law Journal* 23-43 at 38-41.

[26] See above n 18, Vienna Convention, Article 31(1). Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, p.17.

effect of the Sunset Clause is not only to terminate the NME Methodology but also to allow China to graduate from the NME status.[27] At the other extreme lies the view that the expiration of Article 15(a)(ii) does not require a recognition of China as a market economy; nor does it remove the flexibility for the use of the NME Methodology.[28] Two streams of thought are situated in the middle ground. One favourable to China observes that after the 15-year deadline, Article 15 no longer authorises the application of the NME Methodology, although WTO Members are not required to grant China a market economy status according to their national standards.[29] The other view, however, believes that the legal effect of the expiration of Article 15(a)(ii) is limited to removing the assumption of China as an NME and shifting the burden of proving whether China satisfies the national market economy conditions from Chinese producers to investigating authorities; and hence the remaining elements of Article 15 continue to justify the use of the NME Methodology.[30] This "Shifting in Burden of Proof" approach, which was created by Jorge Miranda, was employed and developed by the EU (and the US) in *EU – Price Comparison Methodologies*.

Accordingly, the EU (and the US) contended that the expiration of Article 15(a)(ii) merely shifts the burden of proof from Chinese producers to investigating authorities, and that the remaining elements of Article 15 continue to allow (1) the use of surrogate prices or costs in the absence of the market economy conditions in individual antidumping investigations, and (2) determinations as to the existence or absence of these conditions at the level of an industry or sector, or the Chinese economy as a whole.[31] On how the burden of proof shifts after the expiration of Article 15(a)(ii), the EU elaborated that under the old Article 15, unless the NME Assumption is rebutted, investigating authorities may apply surrogate prices or costs in the absence of any evidence of NME conditions in China. Under the new Article 15, however, as the EU's arguments furthered,

> … if there is no evidence of either market economy conditions or non-market economy conditions, the investigating authority cannot, on the basis of the new Section 15, apply a methodology that is not based on a strict comparison with domestic prices or costs in China. Second, if there is some evidence of market economy conditions (and no evidence of non-market economy conditions), the investigating authority also cannot, on the basis of the new Section 15, apply a methodology that is not based on a strict comparison with domestic prices or costs in China. Third, in weighing some evidence of market economy conditions against some evidence of non-market economy conditions, there is now no China-specific rule in Section 15 placing the burden of proof on Chinese exporters.[32]

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[27] See, eg., above n 17, Rao, "China's Market Economy Status under WTO Antidumping Laws After 2016".

[28] See, eg., above n 17, O'Connor, "Much Ado About 'Nothing': 2016, China and Market Economy Status";

[29] See, eg., above n 17, Kok, "The Future of EU Trade Defence Investigations against Imports from China", at 525; Vermulst *et al*., "Normal Value in Anti-Dumping Proceedings against China Post-2016"; Graafsma and Kumashova, "*In re* China's Protocol of Accession and the Anti-Dumping Agreement"; Gatta, "Between 'Automatic Market Economy Status' and 'Status Quo'".

[30] See above n 17, Miranda, "Interpreting Paragraph 15 of China's Protocol of Accession"; Miranda, "More on Why Granting China Market Economy Status after December 2016 Is Contingent upon Whether China Has in Fact Transitioned into a Market Economy". Jorge Miranda, "Implementation of the 'Shift in Burden of Proof' Approach to Interpreting Paragraph 15 of China's Protocol of Accession" (2016)11(10) *Global Trade and Customs Journal* 447-453.

[31] See above n 6, EU Submission, paras. 95-118; above n 12, US Interpretation, paras. 8.1-8.5.6.

[32] See above n 6, EU Submission, para. 110.

There are a number of weaknesses in the EU's arguments. Firstly, the "Shifting in Burden of Proof" approach finds no textual basis in Article 15. The EU's elaboration creates too many words that are not used in Article 15, which would add to or diminish the rights and obligations provided in Article 15.[33] As one of the authors has argued in detail elsewhere,[34] while the chapeau of paragraph 15(a) envisages the options to use Chinese or non-Chinese prices or costs, it states clearly that such a choice must be made "based on" the rules contemplated in sub-paragraphs (i) and (ii). This means that the chapeau itself does not constitute the basis for the making of the choice.[35] Both of the sub-paragraphs impose an evidentiary burden on Chinese producers to "clearly show" that market economy conditions prevail. However, while sub-paragraph (i) imposes an *obligation* (by the term "shall") on investigating authorities to use Chinese prices or costs once this burden of proof is discharged, sub-paragraph (ii) grants a *right* (by the term "may") to apply non-Chinese prices or costs if the burden is not satisfied. Accordingly, the expiration of sub-paragraph (ii) terminates the right to use surrogate prices or costs, regardless of whether Chinese producers fulfil the evidentiary burden. Therefore, the "Shifting in Burden of Proof" approach completely ignores the substantive and most important element in Article 15(a), that is, the right to employ surrogate prices or costs as authorised by sub-paragraph (ii).[36]

Secondly, Article 15(a)(i), the surviving element which was relied on by many to argue for the continuation of the NME Methodology, does not provide the basis for the "Shifting in Burden of Proof" approach. As mentioned above, the NME Assumption and hence the same burden of proof appears in both sub-paragraphs (i) and (ii). In other words, the requirement for Chinese producers to "clearly show" that market economy conditions prevail remains in sub-paragraph (i). Therefore, the argument that the burden of proof has now shifted to investigating authorities is simply not supported by the text of sub-paragraph (i). With the expiration of sub-paragraph (ii), what also remains under sub-paragraph (i) and hence Article 15(a) is the obligation to use Chinese prices or costs if the NME Assumption is rebutted. However, Article 15(a) is now silent on what investigating authorities may do if the NME Assumption is not successfully refuted. No matter how this gap is to be filled to give meaning to the new Article 15(a), an *a contrario* interpretation of sub-paragraph (i) must be rejected, as it would reintroduce exactly the same right conferred by the expired sub-paragraph (ii) and hence render the Sunset Clause meaningless.[37] In the authors' view, what the Sunset Clause terminates is the right to use non-Chinese prices or costs *solely* based on the failure of Chinese producers to satisfy the national market economy conditions. The termination does not require WTO Members to recognise China as a market economy according to their

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[33] See, eg., above n 17, Posner, "A Comment on Interpreting Paragraph 15 of China's Protocol of Accession by Jorge Miranda"; Matthew Nicely, "Time to eliminate Outdated Non-Market Economy Methodologies" (2014)9(4) *Global Trade and Customs Journal* 160-164.

[34] See Weihuan Zhou, "China's Litigation on Non-Market Economy Treatment at the WTO: A Preliminary Assessment" (2017)5(2) *Chinese Journal of Comparative Law* 345-364.

[35] Also see above n 17, Vermulst *et al*., "Normal Value in Anti-Dumping Proceedings against China Post-2016", at 216; Yu and Guan, "The Non-Market Economy Methodology Shall Be Terminated after 2016", at 20-21.

[36] Also see above n 17, Graafsma and Kumashova, "*In re* China's Protocol of Accession and the Anti-Dumping Agreement".

[37] Also see above n 17, Vermulst *et al*., "Normal Value in Anti-Dumping Proceedings against China Post-2016", at 216-217.

national standards. Nor does it constitute an absolute ban on the application of surrogate prices or costs. It merely means that such an application must now comply with the multilateral rules/criteria envisaged in GATT Article VI:1 and Article 2 of the AD Agreement, as opposed to the market economy conditions created unilaterally by certain WTO Members.

The third weakness of the EU's "Shifting in Burden of Proof" approach concerns its interpretation of the first and third sentences of Article 15(d), the other surviving elements of Article 15. These two sentences respectively impose the burden on China to prove that the Chinese economy as a whole, or a particular Chinese industry or sector, satisfies the national market economy criteria. The EU contended that these two sentences continue to justify the use of non-Chinese prices or costs based on a finding that the market economy conditions do not prevail in the Chinese industry under investigation.[38] Specifically, this contention relies on the textual difference between the Sunset Clause which refers to Article 15(a)(ii) only and the first and the third sentences which refer to Article 15(a) as a whole.[39] In the authors' view, the EU has misinterpreted this textual difference and overstated its effect. Contrary to the EU's understanding, the textual difference should be explained by considering the first and the third sentences as an early termination clause. In *EC – Fasteners*, the Appellate Body observed:

> 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 (that is, 11 December 2016). It also provides that other WTO Members shall grant before that date the early termination of paragraph 15(a) with respect to China's entire economy or specific sectors or industries if China demonstrates under the law of the importing WTO Member "that it is a market economy" or that "market economy conditions prevail in a particular industry or sector". 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). Both paragraphs concern exclusively the determination of normal value. 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.[40]

Thus, these two sentences provide the opportunity for China or Chinese industries to seek an early termination of the special rules before 11 December 2016 by satisfying the national market economy criteria. However, the special rules must not be applied after the 15-year deadline regardless of whether these criteria are met. Accordingly, the two sentences do not provide a basis for the continuation of the NME Methodology based on the national standards. Notably, when discussing the termination of the "special rules for the determination of normal value", the Appellate Body referred to "paragraph 15(a)" as a whole instead of "paragraph 15(a)(ii)". This suggests that in the eyes of the Appellate Body, all relevant provisions of paragraph 15(a) which create the special rules must be terminated according to the deadline. Indeed, as the EU and the US submitted, the Appellate Body's observation above is not the *ratio decidendi* of that case, but rather an *obiter dictum*. However, it shows

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[38] See above n 6, EU Submission, para. 108.
[39] See above n 6, EU Submission, para. 113.
[40] See above n 22, *EC – Fasteners*, para. 289.

the position of the Appellate Body in such a clear-cut manner that one should not expect a change of that position without cogent reasons.[41] This interpretation of the first and third sentences of Article 15(d) as an early termination clause means that they should necessarily refer to Article 15(a) as a whole. That is, if China proves that its economy or a particular industry satisfies the national market economy standards, then Chinese producers are no longer required to establish the same in individual investigations; therefore, Article 15(a) as a whole should be terminated as it no longer applies to all Chinese producers or Chinese producers in the industry concerned. This also offers an explanation as to why the Sunset Clause refers to Article 15(a)(ii) only. That is, even though the early termination at an industry or the economy level does not materialise before the 15-year deadline, the NME Methodology must not be applied in individual investigations after the deadline. As will be discussed in Section 2.3, the interpretation above is supported by the negotiating records of Article 15. Towards this end, one may argue that the first and third sentences of Article 15(d), which survive after 11 December 2016, must be attributed meaning. We believe that it means that WTO Members may continue to label China or a Chinese industry as having an NME status. However, whatever this label may entail, it no longer justifies the application of the NME Methodology in antidumping actions against China.

The fourth weakness of the EU Submission on Article 15 lies in its misuse of paragraph 150 of the Working Party Report on the Accession of China[42] which 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.

Accordingly, the EU claimed that surrogate prices or costs may be used if special difficulties exist in determining cost and price comparability in antidumping investigations against China.[43] This claim is unfounded. Paragraph 150 is explicitly excluded from the list of commitments undertaken by China according to paragraph 342 of the Working Party Report. This exclusion shows the common intention of the WTO Members that paragraph 150 must not be interpreted in a way that imposes additional obligations on China. While several members attempted to establish a connection between "special difficulties" in conducting price comparison and China's transition into a full market economy under paragraph 150, this was not accepted by China or otherwise endorsed by the other WTO Members. In other words, China undertakes no commitments that the NME Methodology may be applied until it is recognised as a full market economy by certain WTO Members according to their national standards. Therefore, a finding that China is not yet a full market economy – and hence such "special difficulties" exist by investigating authorities of these WTO Members – cannot justify the continuation of the NME Methodology.

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41 Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, adopted 20 May 2008, para. 160.

42 *Report of the Working Party on the Accession of China*, WT/ACC/CHN/49, 1 October 2001.

43 See above n 6, EU Submission, para. 108.

The EU sought to support its claim under paragraph 150 in reliance on Article 15(b) of China's Accession Protocol, which concerns the price comparability under the WTO Agreement on Subsidies and Countervailing Measures ("SCM Agreement"), and argued that the fact that the reference to "special difficulties" extends beyond the 15-year deadline under Article 15(b) allows an interpretation that the same reference must be read into Article 15(a).[44] Consequently, when "special difficulties" exist, as benchmark prices are allowed to be used to determine the benefits conferred by a subsidy, the use of surrogate prices must also be permitted to determine normal values.[45] As argued above, the EU's attempt to add the term "special difficulties" to Article 15(a) so as to revive the right to apply the NME Methodology writes into Article 15 a commitment that China never agreed to undertake. The fact that the term "special difficulties" is invoked under Article 15(b) but does not appear in Article 15(a) confirms that this term must not be read into the latter so as to create extra obligations on China. The EU's interpretation, therefore, undermines the balance in the rights and obligations embodied in the text of Article 15. Furthermore, the reason behind the permission to use benchmark prices under Article 14 of the SCM Agreement or Article 15(b) of China's Accession Protocol does not support the use of surrogate prices or costs under the AD Agreement or Article 15(a). Article 14(d) of the SCM Agreement relevantly provides:

> the provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration, or the purchase is made for more than adequate remuneration. The adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).

In *US — Softwood Lumber IV*, the US authority found that the Canadian prices of stumpage did not reflect competitive market prices and hence applied benchmark prices based on stumpage prices in the US to determine adequacy of remuneration.[46] The Appellate Body ruled:

> … investigating authorities may use a benchmark other than private prices in the country of provision under Article 14(d), if it is first established that private prices in that country are distorted because of the government's predominant role in providing those goods.[47]

The Appellate Body explained that the reason why price distortions caused by state intervention constitute a basis for the use of benchmark prices under Article 14(d) of the SCM Agreement is that government influence on private prices would preclude the measurement of benefit conferred by subsidies.[48] The Appellate Body confirmed this explanation in subsequent cases.[49] Therefore, the use of benchmark prices is necessary under Article 14(d) because a price affected by a government subsidy does not allow the calculation

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[44] See above n 6, EU Submission, paras. 123-127.
[45] See above n 6, EU Submission, paras. 124, 128.
[46] Appellate Body Report, *United States – Final Countervailing Duty Determination with respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004, para. 77.
[47] Ibid., para. 90.
[48] Ibid., paras. 93, 100-101.
[49] See, eg., Appellate Body Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R, adopted 19 December 2014, para. 4.151;

of the benefit conferred by the subsidy. In other words, benchmark prices are employed to identify the difference between subsidised and unsubsidised prices so that the magnitude of the benefit derived from the subsidy can be assessed. This reasoning above, however, is specific to the purpose of Article 14 of the SCM Agreement and hence to Article 15(b) of China's Accession Protocol. It does not provide any support for the continuous application of the NME Methodology through an unjustified incorporation of "special difficulties" into Article 15(a).

Lastly, the burden of proof under the new Article 15(a), as proposed by the EU, is unlikely to lead to any substantive changes in the outcome of antidumping investigations. Chinese producers will still need to satisfy the national market economy conditions with positive evidence. In this connection, one must note that apart from the second paragraph of the Ad Note to GATT Article VI:1 (which will be discussed in Section 3.1), the WTO does not provide any definitions for "market economy" or "non-market economy". Nor does it provide any criteria for determining whether a Member is a market economy or NME. The market economy conditions that China is required to satisfy under Article 15 are created by certain WTO Members unilaterally. In practice, these conditions have little to do with "price comparability" and were applied at the discretion of the competent authorities in different jurisdictions.[50] In relation to China, no individual Chinese producer or exporter has been able to establish the EU's market economy conditions since 2012.[51] This suggests strongly that in evaluating the evidence of market economy conditions against the evidence of NME conditions in individual investigations, the EU authorities are likely to continue to exercise a wide discretion so as to continue the NME Methodology. As a result, the outcome of future antidumping investigations in the EU is unlikely to change, if the "Shifting in Burden of Proof" approach is adopted.

Towards this end, the authors are mindful of the ongoing debate over Article 15 and share the view that the interpretation of Article 15 by recourse to the primary means of treaty interpretation is likely to leave the issues under interpretation ambiguous.[52] Thus, in *EU – Price Comparison Methodologies*, the WTO adjudicators should carefully examine and attach great importance to the supplementary materials for interpreting Article 15.

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[50] See above n 17, Vermulst *et al*., "Normal Value in Anti-Dumping Proceedings against China Post-2016", at 222-225; Yu and Guan, "The Non-Market Economy Methodology Shall Be Terminated after 2016", at 18-19; Kok, "The Future of EU Trade Defence Investigations against Imports from China", at 523. Alexander Polouektov, "Non-Market Economy Issues in the WTO Anti-Dumping law and Accession Negotiations: Revival of a Two-tier Membership?" (2002)36(1) *Journal of World Trade* 1-37 at 30;

[51] See above n 17, Yu and Guan, "The Non-Market Economy Methodology Shall Be Terminated after 2016", at 19.

[52] See above n 23, Lennard, "Interpreting China's Accession Protocol", at 406.

3 THE NEGOTIATING HISTORY OF ARTICLE 15

Where the primary means of treaty interpretation leaves the issues under interpretation ambiguous, it is both appropriate and necessary to resort to supplementary means including "the preparatory work of the treaty and the circumstances of its conclusion".[53]

China's accession to the GATT/WTO underwent two interdependent tracks of negotiations – the bilateral track and the multilateral track. Under the multilateral track, a Working Party on China's resumption of GATT membership was established on 4 March 1987, consisting of 33 GATT Contracting Parties.[54] After the birth of the WTO, the GATT Working Party was converted into a WTO Working Party on the Accession of China, which was composed of 43 WTO Members.[55] Both working parties were tasked to prepare a draft protocol of accession. Therefore, the documents produced by the GATT/WTO Working Party are relevant preparatory work for the interpretation of China's Accession Protocol. The WTO Secretariat prepared a list of documents on the accession of China.[56] However, not all of the listed documents are accessible. As will be discussed below, the accessible documents provide little guidance on whether the NME Methodology shall expire after the 15-year deadline.

Under the bilateral track, China conducted market access negotiations with 44 WTO Members.[57] Among these negotiations, the most critical were the US-China negotiations concluded in November 1999, which propelled the conclusion of all other bilateral negotiations.[58] The US-China bilateral negotiations may serve as supplementary means for interpreting Article 15. In this regard, the Appellate Body has relevantly ruled that (1) in addition to the preparatory work of a treaty, the circumstances of its conclusion may help to discern the common intentions of the parties at the time of the conclusion of the treaty; and (2) "preparatory work" and "circumstances of conclusion" do not exhaust the supplementary means of interpretation, such that the WTO tribunals may decide to consider other relevant supplementary means to assist in ascertaining the common intention of the parties.[59] In practice, the WTO tribunals have turned to bilateral agreements between disputing parties, the unilateral practice of one party to a dispute, and other types of events, acts or instruments for interpreting WTO agreements.[60] The language of Article 15 was heavily negotiated and

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[53] See above n 18, Vienna Convention, Article 32. Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/R, WT/DS113/AB/R, adopted 27 Oct 1999, para. 138.

[54] General Agreement on Tariffs and Trade, "Working Party on China", GATT/AIR/2392, 11 March 1987; GATT "Working Party on China Status as a Contracting Party", L/6191/Rev.1, 25 February 1988.

[55] World Trade Organisation, "Communication from China", WT/ACC/CHN/1, 7 December 1995. Also see Jeffrey L. Gertler, "China's WTO Accession – the Final Countdown" in Cass *et al.* (eds) *China and the World Trading System: Entering the New Millennium* (Cambridge: Cambridge University Press, 2003) 55-67 at 56.

[56] For a list of documents on the accession of China, see World Trade Organisation, "Accession of China: Checklist of Documents", WT/ACC/CHN/23, 14 July 2000.

[57] See above n 55, Gertler, "China's WTO Accession – the Final Countdown", at 57.

[58] Ibid., at 56-57.

[59] Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 Sep 2005, paras. 283, 289.

[60] See, eg. Panel Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/R, WT/DS169/R, adopted 10 Jan 2001, para. 539; Appellate Body Report, *European Communities – Customs*

drafted in the US-China bilateral talks, and was subsequently transposed directly into China's Accession Protocol.[61] While it is unclear how the various drafts of Article 15 were discussed at the Working Party meetings, no GATT/WTO records publicly available suggest that the final text of it, as negotiated and drafted by the US and China, does not reflect the common intention of the WTO Members.[62] In *EU – Price Comparison Methodologies*, it is therefore appropriate for the adjudicators to consider how Article 15 evolved in the US-China negotiations as supplementary means of interpretation. It is also necessary to do so given the lack of relevant negotiating records under the multilateral track. In the EU Submission, the EU itself resorted to the US-China bilateral negotiations on Article 15 as supplementary means of interpretation.[63]

3.1 The Multilateral Track

China's economic structure and progress of economic reforms, particularly its transformation from a centrally-planned economy to a market-oriented economy, was a matter of crucial importance since the outset of its accession negotiations.[64] In one of the earliest sessions of the GATT Working Party, it was noted that the negotiations were aimed at understanding "China's economic system in the light of GATT principles" so as to ensure that the terms and conditions of China's accession strike a balance in the rights and obligations of China and the Contracting Parties.[65] This suggests that in examining the supplementary materials for interpreting Article 15, one must consider how such a balance was achieved under Article 15 itself and China's Accession Protocol more broadly.

In the same session, one member characterised China as a centrally-planned economy and proposed the inclusion of special rules in China's accession protocol to address various issues relating to China's economic structure and conditions.[66] These issues included, for instance, China's trade administrative practices ranging from subsidies and non-tariff barriers to state trading, transparency of China's trade regime, and pricing policies.[67] Furthermore, the member envisaged that "GATT contracting parties would need some protection in their markets from trade affected by non-market and non-economic decisions."[68] In this connection, the member referred to the GATT practice of imposing special rules on the accession of centrally-planned economies, and observed that for China, those rules would be transitional, "pending the changes in China's economy and trade regime that would make it

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Classification of Certain Computer Equipment, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 Jun 1998, para. 93

61 See above n 23, Lennard, "Interpreting China's Accession Protocol", at 393, 396.

62 For a discussion of whether bilateral agreements can be employed as preparatory work for treaty interpretation, see Michael Lennard, "Navigating by the Stars: Interpreting the WTO Agreements" (2002)5(1) *Journal of International Economic Law* 17-89 at 47-50.

63 See above n 6, EU Submission, para. 113 & FN116.

64 General Agreement on Tariffs and Trade, "Working Party on China's Status as A Contracting Party: Introduction and General Statements – Note by the Secretariat", Spec(88)13, 29 March 1988.

65 Ibid., at 7-8.

66 Ibid., at 10-11, 15-16.

67 Ibid., at 12-15.

68 Ibid., at 16.

unnecessary."[69] Those views were shared by another member.[70] Neither of the two members were identified in the negotiating records. In *EU – Price Comparison Methodologies*, the US Submission relied heavily on these records, arguing that it was the common intention of the WTO Members that the NME Methodology must remain applicable until China fully transitions into a market economy.[71] We submit that the US' arguments overly stretched the implications of these records. First of all, the statement relied on by the US was made by *one* member and hence does not represent a general concern or consent of the members of the Working Party. Secondly, in contemplating the need to impose special rules on centrally-planned economies to protect domestic markets, this member was most likely referring to the second interpretative note to GATT Article VI:1 ("GATT Ad Note") which provides for a situation where surrogate prices or costs may be employed in determining normal values. It reads:

> It is recognized that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purposes of paragraph 1, and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate.

This interpretative note was introduced at the GATT Review Session of 1954-55 to cope with the extreme market conditions in certain countries (i.e. Poland, Romania, and Hungary) where the market was dominated by state monopolies.[72] As noted in the US Interpretation, given the existence of this note, no special rules on antidumping were added to the accession protocols of these economies.[73] Accordingly, the drafting records above suggest that at the beginning of China's accession negotiations, it was considered to be comparable to these economies with extreme market conditions. Since the records indicate the application of the special rules codified in the GATT Ad Note, they are not directly relevant to the interpretation of Article 15. Therefore, contrary to the US Submission, the records provide no clarity on the common intention of the parties as to the duration of the NME Methodology.

In a subsequent session of the GATT Working Party, the head of the Chinese delegation emphasised that the Chinese economy was no longer a centrally-controlled economy, but had integrated planning with market mechanism during a decade of reforms since 1979.[74] Therefore, the delegate explicitly opposed the imposition of the so-called NME obligations on China and insisted that the general GATT rules should apply.[75] At the request of the Working Party, the GATT Secretariat prepared a checklist of issues raised by the members to facilitate the drafting of an accession protocol. Dumping was not listed as one of the issues. Indeed, the members of the Working Party were concerned about state

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69 Ibid., at 16.
70 Ibid., at 16-17.
71 See above n 7, US Submission, paras. 1.1-1.8, 2.19-2.21.
72 GATT Analytical Index, "Article VI Anti-Dumping and Countervailing Duties", at 228, available at: https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art6_e.pdf
73 See above n 12, US Interpretation, paras. 6.1-6.5.
74 General Agreement on Tariffs and Trade, "Working Party on China's Status as A Contracting Party: Communication from China", Spec(88)37, 11 July 1988, at 2.
75 Ibid., at 7.

intervention and market distortions in China which "could result in the export by China of large quantities of goods at non-market prices that would have a detrimental impact on markets of the contracting parties."[76] However, this concern was targeted at price controls and export subsidies by the Chinese Government as opposed to dumping. Subsequently, the GATT Secretariat note on China's foreign trade regime confirmed that China was committed to establishing a "socialist market economy system … where the market plays a fundamental role in the rational allocation of resources under State macro-control"[77], which differentiated China from a purely centrally-controlled economy. China's rapid reforms and liberalisation towards the establishment of a socialist market economy was also recognised by Mr Peter Sutherland, the founding Director General of the WTO, in his speech in Beijing after the conclusion of the Uruguay Round negotiations.[78] While these drafting records are not particularly useful for the interpretation of Article 15, they show a general agreement of the GATT Contracting Parties on the significant progress that China had made in establishing a market-oriented economy. This is probably why the US insisted on the negotiations and insertion of special antidumping rules (i.e. Article 15) in addition to the GATT Ad Note, which was no longer applicable to China. However, there were no records to suggest that the US' position was shared by other members. To the contrary, the records above indicate that the members of the Working Party did not treat dumping as a major issue associated with China's economic conditions while they were concerned about other policy instruments and state influence in China. Finally, the proposal of imposing NME special rules was rejected by China. This suggests that the text of Article 15 is a compromise reached between the US and China in their negotiations, and therefore the interpretation of it must reflect that compromise.

Compared with the GATT negotiating records discussed above, the WTO records on the drafting of Article 15 or China's Accession Protocol in general are even more sparse. According to the publicly accessible records, dumping and antidumping were not even mentioned in the discussions of a wide range of issues relating to China's economic conditions at the WTO Working Party.[79] In the first published draft of the Working Party Report, it was noted that the difficulties in determining price comparability in antidumping and countervailing investigations concerned *one* member of the Working Party.[80] This concern was then shared by several members according to the subsequent drafts of the Working Party Report.[81] While China raised several concerns about the application of the

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[76] General Agreement on Tariffs and Trade, "Working Party on China's Status as A Contracting Party: Annotated Checklist of Issues – Note by the Secretariat", Spec(88)13/Add.5, 9 June 1989, at 17.

[77] General Agreement on Tariffs and Trade, "Working Party on China's Status as A Contracting Party: China's Foreign Trade Regime – Note by the Secretariat", Spec(88)13/Add.4/Rev.1, 4 March 1993, at 1. For a comprehensive note on China's foreign trade regime, see General Agreement on Tariffs and Trade, "Working Party on China's Status as A Contracting Party: China's Foreign Trade Regime – Note by the Secretariat", Spec(88)13/Add.13, 7 September 1993.

[78] General Agreement on Tariffs and Trade, "Global Multilateral Trading System: The Role of the PRC", Address by Peter D. Sutherland, GATT/1633, 10 May 1994.

[79] See, eg. World Trade Organisation, "Communication from China", WT/ACC/CHN/15, 13 July 1998; World Trade Organisation, "Communication from China", WT/ACC/CHN/30, 18 July 2000.

[80] See, eg. World Trade Organisation, "Revised Outline of the Draft Report of the Working Party on the Accession of China to the WTO", WT/ACC/SPEC/CHN/1, 14 June 2000, para. 78.

[81] See World Trade Organisation, "Draft Report of the Working Party on the Accession of China to the WTO", WT/ACC/SPEC/CHN/1/Rev. 1, 18 July 2000, para. 78; WT/ACC/SPEC/CHN/1/Rev. 2, 21 July 2000, para.

NME Methodology, the function of the Sunset Clause was not discussed.[82] Therefore, like the GATT drafting records, the WTO records also suggest that the imposition of special antidumping rules on China was a matter of importance merely to one member which subsequently convinced several other members to share its position. Given the intense US-China negotiations on Article 15 (which are discussed below), one may safely conclude that this member was the US. Short of GATT/WTO drafting records, the US-China negotiating records are consequently the most relevant and useful for interpretation of Article 15.

3.2 The Bilateral Track

To the authors' knowledge, no official sources have released records of the US-China bilateral negotiations as detailed as those provided by China's Ministry of Commerce in a series of volumes titled "Basic Instruments and Selected Documents on the Multilateral Negotiations for China's Accession to the WTO" ("MOFCOM Records").[83] To clearly show the compromise reached between the US and China on Article 15, we divide the bilateral negotiations into three stages.

3.2[a] *Stage 1 – China Unequivocally Rejected the Introduction of Special Antidumping Rules*

According to the MOFCOM Records, a draft protocol of accession for China, attached to a draft decision of the WTO General Council on 24 November 1994, proposed the following provision:

> **Price Comparability in Determining Subsidies and Dumping**
>
> It is recognized that, in the case of imports of Chinese origin into a contracting party/WTO Member, special difficulties may exist in determining price comparability for the purpose of paragraph 1 of Article VI of the GATT 1947/GATT 1994. In such cases, the importing contracting party/WTO Member may find it necessary to take into account the possibility that a strict comparison with domestic prices in China may not always be appropriate.[84]

This proposal indicates that GATT Article VI:1 and the GATT Ad Note were considered to be inadequate to deal with China so that special rules for determining price comparability were required. However, China opposed the inclusion of this provision or any such discriminatory antidumping rules, which was noted in the subsequent drafts of the accession protocol on 9th, 18th, and 20th December 1994.[85]

78; WT/ACC/SPEC/CHN/1/Rev. 3, 11 September 2000, para. 142; WT/ACC/SPEC/CHN/1/Rev. 7, 12 July 2001, para. 156; WT/ACC/SPEC/CHN/1/Rev. 8, 31 July 2001, para. 150.

82 See above n 81, WT/ACC/SPEC/CHN/1/Rev. 1, para. 78; WT/ACC/SPEC/CHN/1/Rev. 2, para. 78; WT/ACC/SPEC/CHN/1/Rev. 3, para. 143; WT/ACC/SPEC/CHN/1/Rev. 7, para. 157; WT/ACC/SPEC/CHN/1/Rev. 8, para. 151.

83 Department of WTO Affairs of the Ministry of Commerce of the People's Republic of China (eds), *Basic Instruments and Selected Documents on the Multilateral Negotiations for China's Accession to the World Trade Organization* (中国加入世界贸易组织谈判文件资料选编) (Beijing: China Commerce and Trade Press, 2012).

84 See above n 83, Series on Multilateral Negotiations (多边卷), Vol. 4, at 756.

85 See above n 83, Series on Multilateral Negotiations (多边卷), Vol. 4, at 868, 886, 913, 929, 962.

On 8 November 1995, the US issued a Non-Paper on China's WTO accession, proposing that WTO Members should be allowed to "continue the long-standing practice of using surrogate countries to develop price data in antidumping investigations" against China.[86] China bluntly rejected the US proposal during the 10th round of the US-China negotiations on 12 February 1996. China's position was that the use of surrogate prices for the determination of normal value was intended to address certain extreme market situations in centrally-planned economies, and that China was no longer such an economy.[87] In the 11th round of the bilateral negotiations in August 1996, China reiterated that the imposition of NME antidumping rules on China was unacceptable as it failed to recognise China's extensive achievements in economic reforms and was discriminatory and unfair to Chinese exporting industries and companies.[88]

3.2[b] *Stage 2 – China Agreed to Negotiate Special Antidumping Rules but Insisted on a Clear Termination Date, Making the Sunset Clause a Key Matter of Negotiation*

Due to the US' insistence, China agreed to negotiate a special provision on antidumping. On 18 March 1999, the US proposed a draft of the special provision, which reads in the relevant part:

> **Price Comparability in Determining Dumping and Subsidization**
>
> It is recognized that, in the case of imports of Chinese origin into a WTO Member, special difficulties exist in determining price comparability in the context of anti-dumping proceedings and in identifying and measuring the subsidy benefit in subsidies and countervailing duty proceedings.
>
> (1) In anti-dumping proceedings, the importing WTO Member may use, as a matter of general practice, a methodology for determining price comparability that is not based on a strict comparison with domestic prices or costs in China. 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 values of the merchandise.
>
> (2) Notwithstanding the provisions of subparagraph (1), it is recognized that, in a particular case, the importing Member may use Chinese prices or costs for the industry under investigation. In such a case, the importing WTO Member should consider factors such as government involvement in setting prices or amounts to be produced for the merchandise under investigation, the nature of ownership of enterprises in the industry producing the merchandise under investigation, and whether market-determined prices are paid for all significant material and non-material inputs.[89]

On 26 March 1999, China responded and added two major qualifications to the proposed text:

> … 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 Chinese domestic prices or costs, the importing WTO Member may, for the purpose of determining the fair price comparability, use the

[86] See above n 83, Series on Bilateral Negotiations (双边卷), Vol. 1, at 825.
[87] See above n 83, Series on Bilateral Negotiations (双边卷), Vol. 1, at 869-870.
[88] See above n 83, Series on Bilateral Negotiations (双边卷), Vol. 1, at 925.
[89] See above n 83, Series on Bilateral Negotiations (双边卷), Vol. 3, at 845.

> 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 prices under market conditions, the importing Member should use the prices or costs of such components in the calculation of the normal value for the relevant parts.
>
> (…)
>
> *This Paragraph shall be terminated on the first day of the 5th years upon entry into force of the Protocol of China*.[90] (emphasis added)

China's intention was obvious: the special rules may be applied only when Chinese prices or costs are proved to be non-market prices, and most importantly, must not be applied after five years of its accession. This latter proposal made by China became the original form of the Sunset Clause.

On 29 March 1999, the US proposed a revised text which reads in the relevant part:

> (1) In determining price comparability under Article VI of GATT 1994 and the Antidumping Agreement, the importing WTO Member may use either a methodology that is not based on a strict comparison with domestic prices or costs in China or Chinese prices or costs for the industry under investigation 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 may 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.
>
> (…)
>
> (4) *The importing WTO Member shall review, within five years of the entry into force of the Protocol, whether it continues to be appropriate to use the methodologies described in subparagraph (1)*.[91] (emphasis added)

Two important observations came out of the above negotiations and draft proposals. First, it was the US revised draft of paragraph (1) that eventually became Article 15(a) with only one substantive change. That is, the underlined word "may" under the first sub-paragraph of paragraph (1) was later changed to "shall", as proposed by China. This change is significant as it confines the scope of the first sub-paragraph (i.e. Article 15(a)(i)) to an obligation to use Chinese prices or costs if Chinese producers discharge the burden of proof, making an *a contrario* reading of it impossible. This drafting record, therefore, lends support to our analysis in Section 2.2. Second, at this stage of the negotiations, the US and China were divided on the Sunset Clause as to whether it should terminate the special provision or trigger a review of its continuous application in five years.

In a subsequent round of negotiations between 4th and 10th April 1999, China responded to the US draft of the Sunset Clause by proposing the following:

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[90] See above n 83, Series on Bilateral Negotiations (双边卷), Vol. 3, at 848.

[91] See above n 83, Series on Bilateral Negotiations (双边卷), Vol. 3, at 857.

> Within three years from the date of the entry into force of this Protocol, the Working Party on China shall review the implementation of this Paragraph and make recommendations on the continuation of it. At such time as it is determined that this Paragraph is no longer relevant, it shall then be terminated. Nonetheless, this Paragraph shall be terminated at the end of five years from the date of entry into force of this Protocol.[92]

This was followed by a lengthy discussion of the Sunset Clause, where China maintained that the special provision must be subject to a clear expiration date.[93] In their subsequent drafts of the Sunset Clause on 7 April 1999, the US proposed the same text,[94] and China slightly modified the proposed language as follows:

> Three years from the date of the entry into force of this Protocol, a Working Party shall review the implementation of this Paragraph and make recommendations on whether or not the continuation of it is necessary. At such time as it is determined that this Paragraph is no longer relevant, it shall then be terminated. Otherwise, this Paragraph shall be extended for another two years.[95]

Thus, the parties continued to disagree on whether the special antidumping rules should be subject to a review mechanism or should be terminated after five years. At this point of negotiations, the parties had already reached an agreement on almost all other provisions of China's accession protocol, leaving the Sunset Clause one of the few outstanding issues to be settled.

3.2[c] *Stage 3 – the US Agreed to Negotiate a Termination Date, Reaching an Agreement with China on a 15-Year Timeframe*

Given China's entrenched position, the US agreed to negotiate the Sunset Clause based on China's proposed text above.[96] However, the bilateral talk was interrupted by the US bombing of the Chinese Embassy in Belgrade from May 1999. When the negotiations resumed in September 1999, China immediately reiterated its position that the special antidumping rules must be subject to an expiration date or China would not join the WTO.[97]

On 3 November 1999, the last month of the negotiations, the US proposed a "balanced final package", and in addition, agreed to "discuss procedures for graduating sectors of China's economy or the economy as a whole from application of" the special provision.[98] On 13 November 1999, the US communicated a revised Sunset Clause as follows:

> **NME Dumping**
>
> Once China has established that it is a market economy, under the national law of the importing member, this provision will be terminated in its entirety. *In any event the non-market economy provision will expire twenty years after accession.* In addition, should China establish pursuant to the national law of the importing member, that an industry or sector is market oriented, the

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92 See above n 83, Series on Bilateral Negotiations (双边卷), Vol. 3, at 863.
93 See above n 83, Series on General Matters (综合卷), Vol. 1, at 249-250.
94 See above n 83, Series on Bilateral Negotiations (双边卷), Vol. 3, at 869.
95 See above n 83, Series on Bilateral Negotiations (双边卷), Vol. 3, at 880.
96 See above n 83, Series on Bilateral Negotiations (双边卷), Vol. 3, at 139.
97 See above n 83, Series on Bilateral Negotiations (双边卷), Vol. 3, at 1013.
98 See above n 83, Series on Bilateral Negotiations (双边卷), Vol. 3, at 1045.

> non-market economy provision will no longer apply to that industry or sector.[99] (emphasis added)

This proposed text then appeared, with minor modifications, in the WTO Working Party draft protocol of accession on 15 November 1999 as follows:

> **Non-Market Economy Duration**
>
> (4) Once China has established, under the national law of the importing WTO Member, that it is a market economy, the provisions of subparagraph (1) shall be terminated. *In any event, the provisions of subparagraph (1) shall expire twenty 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 (1) shall no longer apply to that industry or sector.[100]

The 20-year deadline was subsequently negotiated down to 15 years by China on the same day. Therefore, on 16 November 1999, the day after the conclusion of the US-China Bilateral WTO Agreement, the White House website summarised the special antidumping rules as follows:

> The U.S. and China have agreed that we will be able to maintain our current antidumping methodology (treating China as a non-market economy) in future anti-dumping cases without risk of legal challenge. This provision will remain in force for 15 years after China's accession to the WTO.[101]

According to the MOFCOM Records, Article 15 was not a major issue in the EU-China bilateral negotiations which followed the US-China negotiations. However, it is interesting to note that in the EU-China negotiations, the EU made a comment that the 15-year timeframe was too long and was not beneficial for the development of trade.[102]

3.2[d] *Conclusion*

A number of observations can be drawn from the review of the bilateral negotiating records above. These are set out below:

1. The records show convincingly that the compromise reached between the US and China on Article 15 was that while China accepted the application of the special antidumping rules, the US agreed that these rules would remain applicable for fifteen years only. Throughout the bilateral negotiations, while the US insisted that the special rules must be made available, China firmly opposed such discriminatory treatment. When the parties began moving to a compromise, the Sunset Clause became the key issue of negotiation. In the negotiation, the US' attempt to make the special rules a subject for review, as opposed to a subject of automatic termination, was also unequivocally rejected by China. Therefore, China's bottom line was that the special methodology must be subject to a termination date and this was not negotiable. This entrenched

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[99] See above n 83, Series on Bilateral Negotiations (双边卷), Vol. 3, at 1089.

[100] See above n 83, Series on Multilateral Negotiations (多边卷), Vol. 6, at 936-937.

[101] White House, "Summary of U.S. – China Bilateral WTO Agreement, 16 November 1999", available at: https://clintonwhitehouse4.archives.gov/WH/New/WTO-Conf-1999/factsheets/fs-006.html

[102] See above n 83, Series on Bilateral Negotiations (双边卷), Vol. 5, at 21.

position of China was accepted by the US in exchange for the incorporation of the special rules into China's accession protocol. Any proposed interpretation of Article 15 must respect and reflect this compromise.

2. It is evident that the Sunset Clause was intended to apply to the special antidumping rules as a whole, and was not intended to be limited to any part of the rules. Therefore, an interpretation of Article 15 must not lead to the extension of the NME Methodology beyond the 15-year deadline. The negotiating records do not support reliance on the remaining element of Article 15(a), and/or the first and third sentences of Article 15(d), as the basis for continuing the NME Methodology. As explained above, the negotiations confined the former to an obligation of investigating authorities to use Chinese prices or costs when the NME Assumption is rebutted. Accordingly, it must not be interpreted as also conferring the right to use non-Chinese prices or costs. As to the latter, when the two sentences were introduced into the Sunset Clause at the final stage of the US-China negotiations, they were by no means intended to affect the 15-year deadline. Otherwise, it would have been impossible for China to accept the special rules as a whole. Therefore, the negotiating records support an interpretation of the first and third sentences of Article 15(d) as an early termination clause. This interpretation is also shared by other observers of the US-China negotiations.[103] Accordingly, the textual difference between the two sentences and the Sunset Clause, which was introduced after the conclusion of the US-China negotiations, must be treated as a technical change rather than a substantive one, as explained in Section 2.2 above.

3. The records reveal that the evidentiary burden under the special rules was not discussed at all. This indicates that both the US and China treated the NME Assumption and the resulting burden of proof as a non-issue in the negotiations. In contrast, abundant records demonstrate that the crux of the negotiations concerned an automatic termination of the special rules which authorise the application of non-Chinese prices or costs, if they were to be inscribed into China's Accession Protocol. Therefore, the negotiating records provide no support for the "Shifting in Burden of Proof" approach proposed by the EU and the US.

To conclude, the proposition that the NME Methodology shall remain in force until China satisfies the national market economy conditions contradicts the negotiating records, constituting an unjustified denial of the compromise reached in the US-China bilateral negotiations and subsequently endorsed by the WTO membership. Therefore, an acceptance of the US' and the EU's arguments in *EU – Price Comparison Methodologies* would undermine the balance in the rights and obligations embedded in Article 15. The negotiating records suggest strongly that the Sunset Clause must be interpreted in a way that terminates the special antidumping rules in their entirety. The negotiating records do not seem to allow for any alternative interpretation. This conclusion was confirmed by Jeffrey Gertler, secretary to the GATT/WTO Working Party throughout China's accession negotiations. Gertler

[103] See above n 23, Lennard, "Interpreting China's Accession Protocol", at 397.

observed that the agreement reached by WTO Members on Article 15 was that the NME Methodology is of a temporal nature, "lasting fifteen years".[104]

4 CONCLUDING REMARKS: ARTICLE 15 AND THE BROADER ISSUE

In *EU – Price Comparison Methodologies*, China's opening statement before the panel, delivered by Ambassador Zhang Xiangchen, contained the following remarks:

> Section 15 of China's Accession Protocol was, for the most part, negotiated bilaterally between the United States and China, and it was one of the toughest and most contentious issues between the two sides. I myself participated in almost every round of those bilateral negotiations, including the final round in Beijing when the bilateral Agreement on Market Access was signed. The United States' contention is beyond the imagination of those, including myself, who actually participated in the negotiations.[105]

Our analysis of the records of the US-China bilateral negotiations on Article 15 above lend support to the remarks. We have argued that the negotiating records show convincingly that the NME Methodology authorised under Article 15 shall expire after the 15-year deadline. This expiration does not hinge on whether China has satisfied the market economy conditions invented by certain WTO Members unilaterally. Therefore, the EU's and the US' arguments that the Sunset Clause merely terminates the NME Assumption and hence does not stop the application of the NME Methodology must be rejected.

Beyond Article 15, the China-EU dispute is believed to have broader implications for the world trading system, that is, whether China is now a market economy and whether the WTO rules are adequate to overcome the challenges arising from China's state capitalism. However, it is our view that the WTO dispute settlement mechanism is not the right forum to resolve the former issue. WTO Member states are at various stages of economic development, with different economic structures, policy priorities, and regulatory regimes. The WTO rules do not require the Member states to change their market structure or pattern of ownership.[106] Nor does the WTO define or distinguish between market economies and NMEs as there is no agreement among the WTO membership on such a definition or distinction. Accordingly, a resolution of whether or not the WTO should now define market economies and NMEs, and if so, how and whether China or any other economies are market economies or NMEs, must be made by all Members through the negotiating arm of the WTO.

In contrast, we believe that the latter issue relating to China's unique economic structure[107] and the use of WTO rules to address China-specific problems is critical to the operation and development of the WTO dispute settlement system. Mr Robert Lighthizer, the US Trade Representative, has been the most outspoken recently on this front. For example, in commenting on the US trade policy priorities, Mr Lighthizer stated:

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[104] See above n 55, Gertler, "China's WTO Accession – the Final Countdown", at 59.
[105] See above n 5, China Opening Statement, para. 10.
[106] See Aaditya Mattoo, "Dealing with Monopolies and State Enterprises: WTO Rules for Goods and Services" in Thomas Cottier and Petros Mavroidis (eds), *State Trading in the Twenty-First Century* (The University of Michigan Press, 1998) 37-70 at 37.
[107] For a comprehensive discussion of various unique features in China's economy, see Mark Wu, "The "China, Inc." Challenge to Global Trade Governance" (2016)57(2) *Harvard International Law Journal* 261-324.

> in the face of market distortions to arrive at free and fair competition … we must be proactive … and that we must use all instruments we have to make it expensive to engage in non-economic behavior, and to convince our trading partners to treat our workers, farmers, and ranchers fairly.
>
> (…)
>
> … there is one challenge on the current scene that is substantially more difficult than those faced in the past, and that is China. The sheer scale of their coordinated efforts to develop their economy, to subsidize, to create national champions, to force technology transfer, and to distort markets in China and throughout the world is a threat to the world trading system that is unprecedented.
>
> Unfortunately, the World Trade Organization is not equipped to deal with this problem. The WTO and its predecessor, the General Agreement on Tariffs and Trade, were not designed to successfully manage mercantilism on this scale. We must find other ways to defend our companies, workers, farmers, and indeed our economic system. We must find new ways to ensure that a market-based economy prevails.[108]

The statement can be boiled down to one central issue relating to government intervention and market distortions in China. While this issue is subject to further debate, we observe that a number of GATT/WTO rules are relevant to it. For example, GATT Article II:4 prohibits the operation of import monopolies from eroding the value of tariff concessions. The interpretative note to GATT Articles XI, XII, XIII, XIV and XVIII condemns the imposition of import or export restrictions through state trading operations. GATT Article XVII imposes a general obligation of non-discrimination on state-trading enterprises. The SCM Agreement can be invoked to address various financial contributions granted to state-owned enterprises ("SOEs") or to other entities through SOEs.[109] In addition, China's WTO accession instruments have imposed some very broad WTO-plus commitments that may be invoked to overcome the China-related challenges. These include, for example,

- the requirement that China liberalises the right to import and export goods for all enterprises in China (Article 5.1 of the Accession Protocol);
- the restriction on the Chinese Government from influencing or directing SOEs in import purchasing procedures (Article 6.1 of the Accession Protocol);
- the obligation to ensure "prices for traded goods and services in every sector to be determined by market forces" (Article 9.1 of the Accession Protocol);
- the agreement that subsidies granted to SOEs are deemed to be specific (Article 10.2 of the Accession Protocol);
- the obligation to eliminate all export taxes and charges (Article 11.3 of the Accession Protocol);

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[108] Centre for Strategic & International Studies, "U.S. Trade Policy Priorities: Robert Lighthizer, United States Trade Representative", 18 September 2017, at 4, available at: https://csis-prod.s3.amazonaws.com/s3fs-public/publication/170918_U.S._Trade_Policy_Priorities_Robert_Lighthizer_transcript.pdf?kYkVT9pyKE.PK.utw_u0QVoewnVi2j5L

[109] See Julia Ya Qin, "WTO Regulation of Subsidies to State-Owned Enterprises (SOEs) – A Critical Appraisal of the China Accession Protocol" (2004)7(4) *Journal of International Economic Law* 863-919.

- the commitment to ensure that all SOEs and state invested enterprises "make purchases and sales based solely on commercial considerations", and that the Chinese Government does "not influence, directly or indirectly, commercial decisions" of these enterprises (paragraph 46 of the Working Party Report);
- the undertaking that price controls are not used "for purposes of affording protection to domestic industries or services providers" (paragraph 62 of the Working Party Report); and
- a range of obligations on the publication of laws and regulations to ensure transparency (paragraphs 324-336 of the Working Party Report).

The above is not an exhaustive list of China's WTO-plus obligations; nor does it provide a detailed analysis of these obligations.[110] For the purpose of this article, it would suffice to note that the obligations above are drafted so broadly as to have the potential to capture any major forms of state intervention.

Thus, the termination of the NME Methodology under Article 15 is unlikely to restrain the capacity of the WTO to address the issues relating to government-caused market distortions in China. Rather, it merely means that WTO Members must now comply with the multilateral antidumping rules on the use of surrogate prices or costs, and explore the flexibility of other general WTO rules and the WTO-plus commitments under China's accession instruments. Accordingly, a decision by the WTO panel in the China-EU dispute that the NME Methodology is no longer applicable would not frustrate the balance in the rights and obligations between China and WTO Members.

[110] For a detailed discussion of the WTO-plus obligations, see Julia Ya Qin, " 'WTO-Plus' Obligations and Their Implications for the World Trade Organisation Legal System" (2003)37(3) *Journal of World Trade* 483-522.