

A hermeneutical analysis on the recognition of China as a market economy after 2016*

Uma análise hermenêutica sobre o reconhecimento da China como economia de mercado em 2016

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ABSTRACT

This article seeks to analyze the possibility of recognition of China as a market economy for purposes of antidumping investigations, especially in light of China's Protocol of Accession to the World Trade Organization (Protocol of Accession). It is assumed that with the extinction of Article 15(a)(ii) of the Protocol there shall be an automatic grant of market economy treatment to China from December 2016 on. In this article, we will analyze legal aspects and the debate over the possible interpretations of Article 15 of the Protocol of Accession, in view of China's "sui generis" economical practices. In view of China's relevant role and considering the economic dependence of WTO Members towards Chinese economy, this issue should be carefully evaluated by all interested WTO Members, most preferably within WTO Dispute Settlement Body.

Keywords: International law. International Trade Law. Multilateral Trading System. World Trade Organization. Antidumping Agreement. Market Economy. China.

RESUMO

Este artigo busca analisar a possibilidade de reconhecimento da China como economia de mercado, para fins de investigações antidumping, especialmente à luz do Protocolo de Adesão da China à Organização Mundial do Comércio (Protocolo de Adesão). Parte-se da hipótese de que com a extinção do Art. 15 (a)(ii) do Protocolo de Adesão haverá concessão automática de tratamento de economia de mercado à China, em investigações antidumping, a partir de dezembro de 2016. Neste artigo, analisaremos os aspectos legais e o debate sobre as possíveis interpretações do artigo 15 do Protocolo de Adesão, tendo em vista as práticas econômicas "sui generis" da China. Dessa análise, conclui-se que os textos dos artigos 15(a) e 15(d) do Protocolo de Adesão devem ser lidos e interpretados com cautela, à luz das regras de interpretação do direito internacional. A afirmação de que a extinção do Art. 15(a)(ii) concederia automaticamente status de economia de mercado à China parece excessivamente rígida e desconsidera as disposições remanescente do Art. 15. Em vista do posicionamento relevante e da de-

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pendência econômica dos Países Membros com relação à China, a questão deve ser ponderada com prudência, com envolvimento de todos os Estados interessados, preferencialmente, em âmbito do Órgão de Solução de Controvérsias da OMC.

Palavras-chave: Direito Internacional. Comércio Internacional. Sistema multilateral de comércio. Organização Mundial do Comércio. Acordo Antidumping. Economia de mercado. China.

1. INTRODUCTION

In September 1997, the World Bank, in its report entitled “China 2020: China Engaged”, predicted what the benefits to China would be in the scenario of a broadly integrated global economy. The World Bank estimated that if China’s international economic engagement and trade liberalization plan were implemented, Chinese gross participation in world trade could triple by 2020. The World Bank also predicted a drastic increase in Chinese imports and exports in light of its large consumer market and cheap workforce. These were seen as enabling China to become the second largest importer and exporter in the world following the United States (US)¹.

The World Bank estimates were correct. Since the late 1970s, the Chinese system has gone from a closed and centralized economy to a market oriented system. In ten years, China multiplied their exports by a factor of 4.8 and their imports by 5.6. The impact of China’s entry into the World Trade Organization (WTO) was such that since 2009 it has become the world’s leading exporter of goods, surpassing both Germany and the US. These developments demonstrate the relevance of international trade in the economic growth strategy of China – today one of the largest economies in the world.

China’s accession to the WTO in November 2001 represented an important political decision taken by the Chinese government to reinsert the country into the world trade dynamic, but it has also become a major challenge for the WTO. When China joined the WTO, the Member States considered that the Chinese eco-

nomy was not operating under prevailing market conditions because of the high degree of state interference in domestic industries. Therefore, in March 1987, the WTO constituted a Working Party on the Accession of China to the 1947 General Agreement on Tariffs and Trade to analyze and negotiate the terms of China’s status as a contracting party of the GATT 1947. The analysis developed by the Working Group for the Accession of China to the WTO resulted in the Protocol of Accession of People’s Republic of China to the WTO (Protocol of Accession), one of the documents that formalized the country’s entry into that Organization in 2001.

The Protocol of Accession that was approved did not call for immediate, integrated entry, but rather for a gradual and conditioned process of entry into the WTO. The document contains transitional terms and rules for gradual trade liberalization that allow Member States to adopt exceptional measures towards China that were accepted by the Chinese themselves. For instance, Article 15 (a) (ii) of the Protocol of Accession reserves the right of other Member States to adopt alternative methodologies for calculating normal values in antidumping investigations against Chinese imports in cases where Chinese exporters are not able to demonstrate that market conditions prevail in the markets similar to that of the product under investigation.

Unsurprisingly, Article 15 has been the source of much controversy in both academic and political circles. Article 15 (d) provides that Article 15 (a) (ii) is to expire fifteen years after China’s entry into the WTO, i.e., as of December 11, 2016. Consequently, any explicit reference to alternative methodologies for normal value calculation in antidumping investigations involving Chinese imports would no longer be valid according to this reading of the terms of the Protocol of Accession. Yet there are divergent interpretations of the terms of Article 15 (d) of the Protocol of Accession regarding antidumping investigations occurring after December 11, 2016. On one side, there are those who argue that the expiration of the second part of Article 15 (a) in December 2016 means China must automatically be treated as a market economy in antidumping investigations. Others maintain that there is nothing in Article 15 that stipulates an automatic granting of market economy status to China upon that date. Lastly, a third approach suggests that, although automatic recognition of China as a market economy cannot be deduced from

1 DASGUPTA, Dipak. *China 2020: China engaged: integration with the global economy*. Available at: <<http://documents.worldbank.org/curated/en/656981468743976946/China-2020-China-engaged-integration-with-the-global-economy>>.

the text of Article 15 (d), the expiration of the second part of Article 15 (a) means that it is no longer possible to adopt alternative methodologies for normal value calculation in antidumping investigations involving China. Therefore, the burden of proof would be reversed, requiring interested parties to demonstrate that market conditions do not prevail in the investigated domestic market.

The potential impact of changes to the Protocol of Accession explains the issue's extreme relevance and the amount of discussion it has attracted in the field of international commerce. The world's dependence on Chinese imports is spreading at the same time as discussion of the impact of Chinese importations on the economies of the Member States increases, especially discussion of unfair competition. Whatever resolution comes out of the debate, that understanding will significantly influence how antidumping rights are applied to Chinese imports in the coming years, and therefore potentially affect the economies of China itself as well as the other Member States.

For instance, Australia granted market economy status to China in 2005 and since then its ability to deal with dumping practices by Chinese producers has declined significantly, as discussed in a Workshop organized by the European Commission: the number of antidumping investigations fell by 50%, as have the number of investigations that resulted in the application of antidumping duties. In addition, the average value of antidumping duties applied fell by more than 80% in relation to the amounts previously applied to the measure².

In this paper, we first analyze different possible scenarios for future antidumping investigations involving China. Following that analysis, and to better understand the debates, we study the concept of market economy, with a special regard for the sui generis nature of China's economy, both in general and in terms of antidumping rights as they have been adopted by international organizations, the European Union (EU) and the US. Finally, drawing from respected interpretations of international law, especially those adopted by the WTO Dispute Settlement Body (DSB), the Articles 15 (a) and

15 (d) of the Protocol of Accession will be studied in detail in order to examine their textual ambiguity.

2. THE IMPLICATIONS OF RECOGNIZING CHINA AS A MARKET ECONOMY

One of the interpretations of Article 15 of the Protocol of Accession holds that China is to be automatically recognized as a market economy starting on December 11, 2016 and, as such, it should not be forced to follow a methodology for determining price comparability in antidumping investigations that is different from other Member States, or risk being found in violation of the principle of good faith.³

According to this understanding, Article 15 (a) (ii) has expired, so the remaining part of Article 15 (a) no longer justifies the adoption of alternative methodologies for the calculation of normal values in antidumping investigations against Chinese imports. Rather, now the use of alternative methodologies would represent an abuse of antidumping rights and a breach of good faith. For these analysts, the second part of Article 15 (d) was always understood to mean that 15 years after its accession to the WTO, China would be considered as a market economy; in other words, as establishing the date at which China would be treated the same as the other Member States in antidumping investigations. When the bilateral agreement for China's accession to the WTO, the basis for the Protocol of Accession, was reached between China and the US, the White House issued the following statement:

The agreed protocol provisions ensure that American firms and workers will have strong protection against unfair trade practices including dumping and subsidies. The US and China have agreed that we will be able to maintain our current antidumping methodo-

2 EUROPEAN PARLIAMENT. Directorate-general for external policies. Policy department. *Workshop: market economy status for China after 2016?*. Available at: <[http://www.europarl.europa.eu/RegData/etudes/STUD/2016/535023/EXPO_STU\(2016\)535023_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/535023/EXPO_STU(2016)535023_EN.pdf)>.

3 RAO, Weijia. China's market economy status under WTO anti-dumping laws after 2016. *Tsinghua China Law Review*, v. 5, 2013. YU, Yanning. Rethinking China's market economy status in trade remedy disputes after 2016: concerns and challenges. *Asian Journal of WTO and International Health Law and Policy*, v. 8, 2013. TIETJE, Christian; NOWROT, Karsten. Myth or reality? China's market economy status under WTO anti-dumping law after 2016. *Policy Papers on Transnational Economic Law*, n. 34, Transnational Economic Law Research Center, 2011. GRAAFSMA, F. Kumashova, E. China's protocol of accession and the anti-dumping agreement: temporary derogation or permanent modification? *Global Trade and Customs Journal*, n. 4, p. 154–59, apr. 2014.

logy (treating China as a non-market economy) in future antidumping cases. This provision will remain in force for 15 years after China's accession to the WTO.⁴

In regard to the EU position, paragraph 55 of the Explanatory Statement attached to the Council's decision established its position on China's accession to the WTO:

The EU's present legislation which provides specific procedures for dealing with cases of alleged dumping by Chinese exporters, which may not yet be operating in normal market economy conditions, will remain available for up to fifteen years after China enters the WTO.⁵

In a workshop of the Public Policy Department of the European Parliament held to address the issue, Jean-François Bellis criticized the interpretation that nothing shall change in December 2016 regarding antidumping investigations involving China.⁶ Bellis considers that the granting of market economy status to China by a Member State would only have practical significance until December 11, 2016. After that date, however, regardless the stipulations for non-market economies in the domestic law of a Member State, the normal value of imports from China should be determined based on Chinese prices and costs.

This analysis would also be shared by the WTO Appellate Body, citing the following excerpt from the Body Report in the *EC v. China Fasteners* case:

For lawyers and governmental officials dealing with antidumping law and practice, the 11 December 2016 is certainly not a myth – it is reality. From that date onwards, it will be almost impossible – at least from the perspective of WTO law – to make a determination of the normal value of products targeted by an antidumping proceeding on the bases of analogous third country methodology.⁷

4 US: China bilateral WTO agreement, antidumping and subsidies methodology, Third WTO Ministerial Conference, Seattle, Washington, 1999.

5 Proposal for council decision establishing the community position within the ministerial conference set up by the agreement establishing the World Trade Organization on the accession of the people's Republic of China to the World Trade Organization, §55, (2001). Available at: <<http://ec.europa.eu/transparency/regdoc/rep/1/2001/EN/1-2001-517-EN-F1-1.Pdf>>.

6 EUROPEAN PARLIAMENT. Directorate-general for external policies. Policy department. *Workshop: market economy status for China after 2016?*. Available at: <[http://www.europarl.europa.eu/RegData/etudes/STUD/2016/535023/EXPO_STU\(2016\)535023_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/535023/EXPO_STU(2016)535023_EN.pdf)>.

7 EC: definitive anti-dumping measures on certain iron or steel fasteners from China. Appellate Body Report. DS397:2011.

Tietje and Nowrot also share this understanding⁸. The authors warn that from December 2016 on it should be virtually impossible – at least from the perspective of WTO law – to justify calculating normal value in antidumping investigations based on an alternative methodology.

Based on a systematic approach of the antidumping law according to which the Protocol of Accession is read as an international treaty that is a part of the multilateral system of the WTO (a single undertaking), and on the principle of presumption of consistency, the authors concluded that with the extinction of Article 15 (a) (ii), China shall receive market economy status. After the extinction of Article 15 (a) (ii), there is no longer any legal basis in the Protocol of Accession that justifies the adoption of an alternative methodology. Consequently, since no adjustment is necessary for price comparability evaluation in antidumping investigations regarding Chinese products, it is understood that the country possesses adequate market economy conditions.

3. IF CHINA IS NOT RECOGNIZED AS MARKET ECONOMY: THE APPLICABLE ALTERNATIVE METHODOLOGY

Another interpretative analysis of Article 15 of the Protocol of Accession, directly opposed to the one presented above, sustains that China should not be accorded market economy status from December 11, 2016 forward.⁹ For these analysts, there is nothing in the Protocol of Accession that indicates an automatic granting of market economy status to China upon the extinction of Article 15 (a) (ii), unless the condition set forth in the first part of Article 15 (d) is fulfilled; that is, until China has demonstrated that it is a market economy under the domestic law of the importing Member States.

Even in the case that Article 15 (a) (ii) loses effect after December 2016, other provisions of Article 15 (a)

8 TIETJE, Christian; NOWROT, Karsten. Myth or reality? China's market economy status under WTO anti-dumping law after 2016. *Policy Papers on Transnational Economic Law*, n. 34, Transnational economic law research center, 2011.

9 O'CONNOR, Bernard. *The myth of China and market economy status in 2016*. Available at: <<http://worldtradelaw.typepad.com/files/oconnorresponse.pdf>>. RUESSMANN, L.; BECK, J. 2016 and the application of an NME methodology to Chinese producers in antidumping investigations. *Global Trade and Customs Journal*, v. 8, 2014.

that will remain valid past this date must be taken into consideration: the second part of Article 15 (d) clearly provides that “only the provisions of Article 15 (a) (ii) shall expire” and not all the terms of Article 15 (a). According to the authors who read the clause this way, the wording of Article 15 (a) (i) implies that China is not a market economy and that the burden of proving the contrary falls to Chinese exporters. If market economy status were automatically granted to China, the text of Article 15 (a) (i) would be meaningless, for in the event all Member States were to automatically consider China a market economy after December 2016, what would be the rationale behind the requirement that Chinese exporters prove market conditions prevail at home? Similarly, the provisions of the first and third parts of Article 15 (d) – the ones that deal with the recognition of China as a market economy by each Member State – would be empty.

On this point, the defenders of this interpretation appeal to the principle of interpretative efficacy, which requires that a treaty be interpreted in such a way as to give meaning and effect to all its terms, implying that no provision may be interpreted in such a way that annuls the effect of another provision of the same treaty.¹⁰ Accordingly, it would be impossible to interpret the second part of Article 15 (d) in a way that renders its other provisions completely devoid of effect and meaning. These are the arguments used to affirm that automatically conceding the status of market economy to China in December 2016 is mistaken. It is important to question, however, what would happen when Chinese producers are unable to meet the requirements of Article 15 (a) (i) and 15 (d) – i.e., what happens when they do not demonstrate market economy conditions for the investigated area – and Article 15 (a) (ii) has already expired. It is worth exploring. The provisions of Article 15 (a) (i), as seen above, indicate that when an individual producer can demonstrate that market economy conditions prevail in its industry or sector, Chinese prices and costs for the industry should be used to determine whether the exporter is engaging in dumping. Thus, Article 15 (a) (i) imposes the burden of proof on demonstrating the existence of market economy conditions in its sector on the Chinese producer.

The article does not specify the requirements or standards to be observed in this demonstration, however, in a systematic analysis of Article 15, we observed that the provisions of Article 15 (d) indicate that the law of the importing country would determine the requirements for a market economy. Therefore, the authors conclude that the rule to be applied in Article 15 (a) (i) is the one established in the domestic law of the importing Member. What if Chinese producers cannot meet these requirements and Article 15 (a) (ii) had already expired? In that case Article 15 should be applied, as it provides the use of alternative methodology in anti-dumping investigation that does not use Chinese prices and costs.

At the Workshop promoted by European Parliament's Public Policy Department, O'Connor argued that a restrictive textual analysis of the term “based” would indicate that the rules set out in sub-paragraphs (i) and (ii) of Article 15 (a) would not need to be applied rigidly, allowing a different application from that provided for in those sub items. All the authors who stand by this position foresee serious economic consequences if the understanding that China should be recognized as a market economy by December 2016 prevails. The authors defend that the recognition would promote a significant weakening of antidumping rights and an increase in Chinese imports that would directly impact production and employment in the importing Member State.

4. IF CHINA IS NOT RECOGNIZED AS A MARKET ECONOMY BUT THE BURDEN OF PROOF IS INVERTED

The last interpretation to be analyzed argues that there is no provision in Article 15 of the Protocol of Accession implying a mandatory recognition of China as a market economy after December 2016.¹¹ What is different from

11 MIRANDA, Jorge. Implementation of the shift in burden of proof approach to interpreting paragraph 15 of China's protocol of accession. *Global Trade and Custom Law*, v. 11, 2016. POSNER, Theodore. A comment on interpreting paragraph 15 of China's protocol of accession by Jorge Miranda. *Global Trade & Customs*, 146, 2014. SPADANO, Lucas. *O tratamento da China como economia (não) de mercado após 2016*. Em Observatório de Defesa Comercial da Confederação Nacional da Indústria (CNI). 2013. THORSTENSEN, Vera; RAMOS, Daniel; MULLER, Carolina. O reconhecimento da China como economia de mercado: o dilema de 2016. *Revista Brasileira de Comércio Exterior*, ano 26, n. 112, jul./set. 2012.

10 CANADA - Term of Patent Protection (Canada - Patents) (WT/DS170/R). Panel Report. Appellate Body Report DS170. 2000. par. 6.49.

the view presented above, in this analysis it is held that some change must occur due to the extinction of item 15 (a) (ii), since the part that expires must have had some effect while it was in force. This positioning suggests that a procedural change should occur due to the elimination of Article 15 (a) (ii). More specifically, it is argued that after December 2016 there would be a reversal of the burden of proof regarding market economy conditions demonstration, whether general or sectorial, prevail in China.¹² Currently, Member States proceed on the premise that true market conditions do not prevail in China. From December 11, 2016 on, however, this interpretation maintains that it should be necessary for the importing Member State to demonstrate the absence of genuine market conditions in China before the product's Chinese price and costs are not used to determine "normal value."

In making this point, advocates of this interpretation argue for the application of the provisions contained in the Interpretative Note to Article VI of the GATT 1994 which contemplates exceptions to the regular system of normal value calculation established in the Antidumping Agreement (ADA). The Interpretative Note aimed to correct potential distortions arising from, for example, dumping margins greater than those that would exist if the normal value of the exports was established on the basis of what the products' or like products' price would be if market conditions prevailed in the domestic market.

Even if December 2016 is taken as the deadline for the application of the system provided in the Protocol of Accession, Member States would be able to have recourse to the provisions of the general rule established in the Interpretative Note above mentioned. Unlike the second part of Article 15 (d) of the Protocol of Accession, the Interpretative Note determines that whoever claims the right to apply an alternative methodology carries the burden of proof. Consequently, after December 11, 2016 there would be a reversal of the burden of proof with respect to antidumping investigations involving China.

In *European Communities v. Fasteners*, in a footnote, the Appellate Body examines the Interpretative Note as follows¹³:

12 MIRANDA, Jorge. Implementation of the shift in burden of proof approach to interpreting paragraph 15 of China's protocol of accession. *Global Trade and Custom Law*, v. 11, 2016.

13 EC – Definitive Anti-Dumping Measures on Certain Iron or

We observe that the second Ad Note to Article VI:1 refers to a "country which has a complete or substantially complete monopoly of its trade" and "where all domestic prices are fixed by the State". This appears to describe a certain type of NME, where the State monopolizes trade and sets all domestic prices. The second Ad Note to Article VI:1 would thus not on its face be applicable to lesser forms of NMEs that do not fulfill both conditions, that is, the complete or substantially complete monopoly of trade and the fixing of all prices by the State.

In this regard, the Appellate Body argues that there are different levels of economies that do not adequately demonstrate free market dynamics. The Interpretative Note could be applied only to those that wholly fulfilled two conditions: (i) when a complete or nearly complete monopoly of trade exists and (ii) where all prices are fixed by the State.

In the Legal Opinion of the European Parliament's legal sector dated of June 25, 2015, the same interpretative view is followed, however, an additional solution is also presented¹⁴. Although the opinion does not maintain that China should receive automatic market economy status from December 2016 on, it proposes that subsequent to that date it will no longer be possible for Member States to adopt an alternative methodology for the calculation of normal value in antidumping investigations against Chinese imports based on Art 15 (a) (ii). The Legal Opinion esteems that the alternative methodology can be applied by adapting the EU legal and administrative framework to those cases where it has found that China does not comply with the "5 Criteria" provided for in Article 2.7 (c) of the Antidumping Regulation of the EU¹⁵:

A claim under subparagraph (b) must be made in writing and contain sufficient evidence that the producer operates under market economy conditions, that is if:

- (i) decisions of firms regarding prices, costs and inputs, including for instance raw materials, cost of technology and labour, output, sales and investment,

Steel Fasteners from China. Appellate Body Report. DS397:2011, para. 285.

14 NEERGAARD, Anders; AUERSPERGER MATIC, Andrej. *Parecer legal do parlamento europeu*. Bruxelas: 2015. Disponível em: <<http://www.vieuws.eu/eutradeinsights/wp-content/uploads/2015/10/Extract-of-EP-legal-opinion-on-market-economy-status-for-China.pdf>>.

15 ANTIDUMPING Regulation of the EU on protection against dumped imports from countries not members of the European Community, 1225/2009. Available at: <http://trade.ec.europa.eu/doclib/docs/2010/april/tradoc_146035.pdf>.

are made in response to market signals reflecting supply and demand, and without significant State interference in this regard, and costs of major inputs substantially reflect market values;

(ii) firms have one clear set of basic accounting records which are independently audited in line with international accounting standards and are applied for all purposes;

(iii) the production costs and financial situation of firms are not subject to significant distortions carried over from the former non-market economy system, in particular in relation to depreciation of assets, other write-offs, barter trade and payment via compensation of debts;

(iv) the firms concerned are subject to bankruptcy and property laws which guarantee legal certainty and stability for the operation of firms, and

(v) exchange rate conversions are carried out at the market rate.

The EU currently applies “cost adjustment” methodology in some antidumping investigations for certain countries, whether market conditions predominate or not. This cost adjustment methodology is based on Article 2.2 of the ADA, which states that the existence of a “particular market situation” justifies the adoption of a methodology that disregards production and administrative costs, sales and other expenses and profits from the country of origin:

When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country(2), such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits [...]

Adoption of the cost adjustment policy is thus warned against, as the policy is being challenged by the EU’s trading partners within the WTO.¹⁶ As observed at the outset, it remains unclear how the new legal scenario regarding Chinese economy status will be designed.

16 Argentina v. European Union, EU- Antidumping Measures on Biodiesel from Argentina, DS473, (2014). Russia v. European Union, EU - Cost Adjustment Measures and Certain Antidumping Measures on Imports from Russia, DS474, 2014. Indonesia v. European Union, EU - Antidumping Measures on Biodiesel from Indonesia, DS480, 2014.

5. ANALYZING CHINA’S SUI GENERIS ECONOMY

The treatment China receives in antidumping investigations has been under discussion for many years. Overall, China is considered by economists and lawyers as an economy that does not operate under prevailing market conditions. But what, in the end, would such conditions look like in the Chinese context? The theoretical basis for the concept of market economy was developed by classical economists who advocated classical liberalism, in particular Adam Smith and David Ricardo, between the 19th and 20th centuries, theorists who believed that protectionism and State intervention generated economic inefficiencies. The theories of Adam Smith, the precursor of economic that the definition of a market economy is, in general, related to the degree of State interference liberalism, are basically structured around a concern for economic growth, that is, around the factors that lead to increased productivity of labor and distribution to different classes of society.¹⁷ All these theories involve the notion that the State should not intervene in the economy; it should only guarantee free competition between economic agents and the right to private property when it is threatened during social upheavals. Analysis of the theories of Smith and Ricardo demonstrates in the economy of the country. Few countries have anything approaching wholly free trade or a full market economy,¹⁸ but ever since Adam Smith and David Ricardo, economists have defined free trade as an ideal towards which trade policy should strive.

It is based on the theories developed by these and related economists that an understanding of what characterizes a “market economy” was created. Yet there is no concrete and unified definition of “market economy,” and each individual country or organization confers its own certain peculiarities and requirements to the concept. To take one example, in explaining the idea of the “invisible hand”, Krugman identifies the salient features of what he means by market economy:

[...] the US has a market economy, where production and consumption are the result of decentralized decisions by businesses and individuals. There is no central authority telling people what to produce and where to carry it. Each individual does what it is believed to be more profitable; each consumer

17 KRUGMAN, Paul; OBSTFELD, Maurice. *Economia internacional: teoria e política*. 6. ed. São Paulo: Pearson, 2009.

18 Krugman cites the city of Hong Kong as one of the only modern economies without tariffs or import quotas.

chooses its buys.¹⁹

Krugman adds that market economies “are able to coordinate extremely complex activities and guarantee consumers the supply of the goods and services required.” Drawing a parallel to what a non-market economy would resemble, Krugman affirms that “the alternative to a market economy is a command economy, where there is a central authority making decisions about production and consumption.”²⁰

The economist David Ricardo, in his development of Adam Smith’s theory, proposes a theory of “Comparative Advantages.” In his book, *Principles of Political Economy and Taxation* (1817), Ricardo contests Smith’s assertion that a country should specialize in producing merchandise where it has an absolute advantage, and instead argues that it should focus on producing in areas where it has greater relative advantages, usually related to the lower costs of production. The theory of Comparative Advantages, as well as other theories developed by Ricardo, helped to form the basis and direction for the development of a line of theories of international trade during the 20th century that came to dominate the international scene and remains largely relevant in the current economic and foreign trade scholarly literature.

The World Bank, for one, although it has never issued a definition for market economy, has identified the conditions it considers relevant in the characterization of an economy as such, including minimal State interference. The World Bank argues that a market economy is not one in which the State is absent; on the contrary, State intervention is considered essential since in its absence market economies would succumb to monopolies. On the other hand, State intervention must be moderated in order to avoid favoring specific sectors, uniform pricing, and other State practices that impede competitive market dynamics.²¹

In the context of the WTO, certain perceptions regarding the concept of market economy can be noted

19 KRUGMAN, Paul; WELLS, Robin. *Introdução à economia*. Rio de Janeiro: Campus, 2007.

20 KRUGMAN, Paul; WELLS, Robin. *Introdução à economia*. Rio de Janeiro: Campus, 2007.

21 Although the World Bank has not explicitly defined what a market economy is, in its reports and studies, especially on countries in transition to market economies, in the 1990s, some patterns can be observed. A World Bank Country Study On Czechoslovakia, ECA Sector Units World Bank, (1991). Available at: <<http://documents.worldbank.org/curated/pt/197971468746734285/Czechoslovakia-Transition-to-a-market-economy>>.

in Interpretative Note 1.2 to Article VI of the GATT 1994, as noted earlier in this article by the Appellate Body in *EC v. Fasteners*.²² Combining an analysis of this excerpt from the Appellate Body’s decision mentioned above in this article with the text of Interpretative Note 1.2 to Article VI of the GATT 1994 indicates the existence of different levels of economies that may not be considered market-oriented. This is because, for the purposes of invoking the Interpretative Note, a total or substantial monopoly of trade must exist in the exporting country targeted by the antidumping investigation, as must price fixing by the State.

The lack of a concrete legal definition allows Member States to decide the issue based on a wide range of diverse criteria, such as exchange rates, interest rates, wages, prices, capital controls and political factors. In EU law, for example, there are no criteria that determine when a country is to be considered a market economy. The EU has created a non-exhaustive list of countries, however, where, according to the bloc, market conditions are presumed not to prevail. Notwithstanding, this regulation neglects to indicate the criteria that must be met for a country to be removed from the list²³.

Yet the EU has analyzed China’s situation and the possibility of considering the country a market economy in certain circumstances. In 2008, China requested market economy recognition from the EU. In its Report published in September 2008,²⁴ the European Commission’s application of the “5 Criteria” indicated in Article 2.7 (c) of the EU’s Antidumping Regulation is evident.²⁵ This article identifies the requirements that a group of companies or industries from countries where market conditions do not prevail must comply to receive market economy treatment in antidumping investigations.

22 EC – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China. Appellate Body Report. DS397:2011, parag. 285.

23 The first list dates from 1968 and includes all then communist countries except Cuba. This list has been modified on occasion, having shrunk significantly following the breakup of the Soviet Union in 1989.

24 Commission Of The European Communities, Commission Staff Working Document On Progress By The People’s Republic Of China Towards Graduation To Market Economy Status In Trade Defense Investigations, No 1225/2009, (2008). Available at: <http://trade.ec.europa.eu/doclib/docs/2010/april/tradoc_146035.pdf>.

25 Criterion reached by China was: 2) An absence of state-induced distortions in the operation of enterprises linked to privatization and the use of non-market trading or compensation system.

US antidumping legislation only generally defines what comprises a non-market economy country. Under Section 771 (18) of the Tariff Law of 1930, a non-market economy would exist in a country where marketing principles of cost and pricing do not operate and, therefore, the sale prices of goods do not reflect fair value. The criteria used in the US to determine whether a country is a market economy correspond only partially to the EU approach. The US Department of Commerce (DC) takes into account the extent of state control over the means of production, resource allocation and business decision-making. The DC also examines currency manipulation, free wage bargaining and private or public foreign investment. The regulation is not fully defined and allows the DC to consider other factors deemed appropriate, such as the existence and functioning of anti-monopoly laws and stock exchange transactions.²⁶

The US conducts an annual review entitled “USTR Report to Congress on China’s WTO Compliance” (Report), which analyses nine major areas of trade in the WTO in which China has made commitments. In addition, the Report also provides an analysis of the internal policies adopted by the Chinese Government that affect its business practice.²⁷ In the last Report, published in 2015, it focused on: (i) discriminatory trade practices; (ii) taxation; (iii) subsidies; (iv) price control; (v) standardization, technical regulations, transparency; (vi) state-owned enterprises. Especially with regard to government-controlled enterprises, the Report has maintained that the Chinese Government is heavily involved in investments and decisions in strategic sectors such as civil aviation, electric power, petrochemical, marine and telecommunications. About 82% of the assets of central state-owned enterprises are concentrated in the petrochemical, electric power, defense, telecommunications, transportation, mining, metallurgy and machinery sectors. According to the document, since the beginning of the global economic crisis at the end of 2008, there have been a large number of mergers and acquisitions among state-owned enterprises. Consequently, the Report, while indicating gradual progress by the Chinese Government, has concluded that a high degree

of state interference still exists in China, as reflected by its control practices for prices, means of production, exchange rates and wages.

The Report concludes that state-owned enterprises continue to play a key role in China’s political economy even after more than three decades of experimental and gradual reforms and private sector expansion. According to the Report, since the Chinese government started using state-owned enterprises as a mechanism to pursue social, industrial and foreign policy objectives, these companies have benefited from direct and indirect subsidies (capital, energy and property), as well as regulatory preferences (e.g., competition law, public contracts), which resulted in a regime that is highly restrictive for foreign direct investment.

From the perspective of the US Government, these privileges allow Chinese state-owned enterprises to maintain a monopolistic position in certain sectors although they often perform less efficiently and profitably than private-sector firms. While controlled companies – around 155,000 local and central state-owned enterprises (according to data from 2013) – account for 30% of total secondary and tertiary assets, or more than 50% of China’s total corporate industrial assets, and absorb most of state-backed loans, these enterprises only represent 22% of Chinese profits and 17% of total employment, and are also surpassed by the private sector in terms of job creation and innovation.

It is worth noticing that the “Trade Policy Report” (TPR) on China published by the WTO in June 2016 affirms that China continues to maintain an economic system in which the basic mainstay is public ownership of property. As a result, the private sector is dominant in industries such as textiles and food, while sectors of strategic importance – energy, utilities, transportation, telecommunications services, education, finance – remain only partially open to private investment.²⁸ In addition to the Chinese government’s control over local enterprises, the Chinese government’s price controls and fixing also attracts a good amount of attention, as the modification of economic data in a way that privileges China’s domestic industry is also suspected. The WTO’s China TPR indicated that China applies price controls at both central and provincial levels on goods and services it deems to have a direct impact on the na-

26 ANTI-DUMPING Investigations Against China in Latin America. IBA Divisions Project, IBA Trade and Customs Law Committee and the IBA Latin American Regional Forum. p. 11. (2010).

27 UNITED STATES Trade representative. 2014 report to congress on China’s WTO compliance, 2014.

28 Trade Policy Review Body, WTO Secretariat, Trade Policy Review Body. WTO. 2016.

tional economy and people's subsistence. The products and services that are subject to price controls are listed in Central Government and Local Government Price Catalogs. The China TPR also indicated that products and services subject to government fixed prices include pharmaceuticals, tobacco, natural gas and certain telecommunications services; while products and services subject to the government-mandated pricing policy included gasoline, kerosene, diesel oil, fertilizers, cotton, edible oils, various grains, wheat flour, various forms of transportation services, professional services such as engineering and architecture, and certain telecommunication services. From the analysis of the documents mentioned above it can be asserted that China continues to apply price controls on goods and services that have a direct impact on its national economy, practices that sustain the doubts and concerns regarding the degree to which its hybrid economy can be characterized as a market economy.

6. AN ANALYSIS OF ARTICLES 15 (A) AND 15 (D) THROUGH THE LENS OF THE VIENNA CONVENTION ON THE LAW OF TREATIES

The treaties concluded within the framework of the WTO were negotiated by many parties over an extended period and, therefore, divergent interpretations of the precise text of an agreement or specific article are quite common. Article 15 of the Protocol of Accession is one such example where a multilateral negotiation process led to an international treaty termed a single undertaking of the WTO that is not technically perfect, for it contains gaps that open space for a series of doubts and interpretations. As the Article involves an international trade rule, Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT) stand out as tools of interpretation in addition to the general principles of international law and the WTO's jurisprudence.

Article 3.2 of the Dispute Settlement Understanding ("DSU") emphasizes the importance of customary rules and sources of international law, emphasizing the need for the Dispute Settlement Body ("DSB") to rely on the usual practices of international law to clarify possible disagreements involving the provisions of the WTO agreements. For this reason, the WTO panels and Appellate Body make constant references to Articles 31

and 32 of the VCLT, which codify the customary rules of treaty interpretation. The WTO Appellate Body, as well as other prestigious international organizations, have emphasized that the rules of interpretation established in the VCLT constitute accepted customs of international law.²⁹ The VCLT deals with the interpretation of treaties in three separate articles – Articles 31, 32 and 33 – which form a coherent and harmonious system to guide hermeneutical analysis. The VCLT's authors were aware from the outset of the difficulties that arise from the diversity of meanings words possess. This was the reason why Article 31 holds that the "ordinary meaning" of a treaty should be determined in accordance with the treaty's context, object and purpose.

We first address a textual analysis of Article 15 (a) and 15 (d) of the Protocol of Accession. Article 15 (a) deals with the comparability of prices determined in antidumping investigations, which involves comparing export price and normal value pursuant to Article 2.1 of the Antidumping Agreement. The article provides two alternatives for the calculation of normal value in antidumping investigations related to China's exports: (i) the use of Chinese prices and costs in the industry under investigation or (ii) an alternative methodology. Article 15 (a) (i) states that Member States may use Chinese prices or costs in cases where producers in the industry under investigation clearly demonstrate that market conditions prevail in that sector. In this case, the burden of proof to demonstrate that market conditions prevail in the investigated sector rests upon Chinese exporters.³⁰ If the Chinese exporter cannot prove that free market rules prevail in its sector, Article 15 (a) (ii) should be applied. Article 15 (a) (ii) states that an alternative methodology may be used for price comparison in an antidumping investigation. As noted earlier, the provisions of Article 15 (a) do not explicitly indicate that China is not a market economy. However, by requiring Chinese exporter to produce evidence of its market character, it is implied that in certain Chinese sectors market conditions do not prevail – an interpretation confirmed later in the text of Article 15 (d) of

29 US Gasoline, DS2, Appellate Body Report, 1996, parag. 16-17. Us Gambling, DS285, Panel Report. 2005.

30 In the United States there is no news of any case in which market economy treatment was granted to individual Chinese producers. On the other hand, the European Commission has already recognized market conditions for Chinese exporters in some cases. See: Antidumping Investigations Against China in Latin America, 2010, at 10.

the Protocol of Accession and discussed in detail below.

It is precisely this mechanism that allows Member States to adopt alternative methodologies when determining the normal value of Chinese imports by subjecting goods of Chinese origin to the same treatment as imports from non-market economy countries. From the analysis of the Working Group for the Accession of China to the WTO, it can be concluded that the use of alternative methodologies to calculate normal value in antidumping investigations was considered appropriate because of difficulties related to the special characteristics of the Chinese domestic market.³¹ The absence of a regular trade environment and the high level of State interference in the economy were considered as characteristics that would have the effect of rendering antidumping investigations based on Chinese domestic prices impossible. A similar mechanism had already been planned in the Working Group for the Accession of Vietnam to the WTO.³² The Working Group for the Accession of China to the WTO, when referring to Article 15 of the Protocol of Accession, states that³³:

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 antidumping 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.

The Working Group for the Accession of China to the WTO drew attention to the consequences of the WTO system on economies where market conditions did not prevail without, notwithstanding, providing a definition of exactly how a market economy should be identified.

What is possible to observe in Article 15 (a) of the Protocol of Accession is that, especially if compared to the general rule in the Interpretative Note to Article VI

of the GATT 1994, the Protocol does guarantee more favorable treatment for Chinese exporters to the degree that it foresees the possibility of allowing them to prove that market economy conditions prevail in their respective sectors. It seems clear that Article 15 (a) is intended to guarantee Chinese exporters the right to avoid alternative methods for determining normal value by providing them an opportunity to demonstrate that market conditions are prevalent in their sector. In addition, the use of alternative methodologies is established by the article only as a subsidiary alternative, which reduces the chances of abusive calculations by other Member States.

We now turn to the analysis of Article 15 (d), whose interpretation is directly related to Article 15 (a). The hypothesis contemplated in the first sentence of Article 15 (d) concerns the recognition of China as a market economy by a Member State in view of its domestic law, in which case the provisions of Article 15 (a) would remain without effect. According to the first part of Article 15 (d), once a country has determined that China represents a market economy, there would be no justification for applying alternative methodologies based on the absence of market conditions. Another possibility foreseen in the final part of Article 15 (d) arises if China proves that market conditions prevail in a specific sector or industry, but not in its entire economy. In that case, the provisions of Article 15 (a) would no longer apply to these specific sectors. Here it is essential to note the particularities of Article 15 (a) and 15 (d). The provisions of Article 15 (a) refer to a “Chinese producer” that can demonstrate market conditions specifically with respect to the object under investigation. Thus, the analysis from the point of view of Article 15 (a) must be carried out on a case-by-case basis, depending on the details and peculiarities of each sector and each product being investigated. In turn, Article 15 (d) says that China may prove to Member States that market conditions prevail generally or in relation to a specific industry. Thus, the recognition under Article 15 (d) could have an *erga omnes* effect, covering all Chinese producers or all producers of the area specifically analyzed.

The second part of Article 15 (d) contains the most controversial point, since it states that “in any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession”. It states that after 15 years from China’s accession to the WTO, that is, on December 11, 2016, the provisions of Article 15 (a) (ii), which determine the use of alternative methodology for com-

31 Even if the text of the Reports of the Working Group is not considered as part of the text or context, under the terms of Article 31 of the CVDT, they may constitute additional instruments of interpretation, pursuant to Article 32 of the CVDT.

32 WTO. Report of the Working Group on Vietnam Access to the WTO, WT/ACC/CHN/49, parag. 255, (2001).

33 WTO. Report of the Working Group on Vietnam Access to the WTO, WT/ACC/CHN/49, parag. 150 (2001).

parison purposes in antidumping investigations against Chinese imports, would cease to have effect. As already noted, extensive debate and competing interpretations currently surround this issue. The WTO Appellate Body has already argued that the text of an agreement should be analyzed in parallel with its context, object and purpose.³⁴ Sir Sinclair, who participated as delegate to the Vienna Conference when the VCLT was approved, noted that the true meaning of a text must be reached in the light of all the consequences that flow naturally and reasonably from that text.³⁵ Therefore, it is essential to ascertain the purpose of the signatory parties to the Protocol of Accession by providing for the transitional application of a special system for the determination of normal value for Chinese imports under investigation.³⁶ For him the essential question is whether it was the intention of the signatory parties of the Protocol of Accession to automatically designate China as a market economy in December 2016 regardless of its actual economic practices.

From the analysis of the above-mentioned positions, the assertion that the expiration of Article 15 (a) (ii) automatically grants market economy status to China seems excessively rigid and disregards the remaining provisions of Article 15 of the Protocol of Accession.³⁷ First of all, according to analysis of the Chinese economy, the Chinese Government still maintains an active and relevant role in its industrial sector. The very endorsement of another Five-Year Plan indicates that the Chinese state will likely continue to have considerable influence on the country's trade practices in order to comply with the measures and achieve the goals identified by the Communist Party. As a result, considering the reality and the factual context of Chinese economy, the automatic concession of market economy status might go against the objectives and purpose of the Protocol of Accession and to the antidumping legislation as a whole, which are, respectively, (i) the gradual emergence of the Chinese market in international trade, with liberalization of its trade and respect for free market ru-

les; and (ii) a fair comparison of prices in antidumping investigations, in order to protect Member States from unfair trade practices and, at the same time, protect China from protectionist measures against their exports.

Secondly, Article 32 lists the preparatory works as one of the supplementary sources of treaty interpretation. It is therefore important that Article 15 (a) of the Protocol of Accession be read in conjunction with paragraph 150 of the Working Group for the Accession of China to the WTO. This paragraph defends and allows the application of alternative methodology for value comparison purposes in antidumping investigations in certain situations in order to ensure fair comparison of prices. In addition, it should be noted that, although there is no automatic recognition of China as a market economy, the Chinese Government and producers retain the guarantee and the right to demonstrate that market rules prevail in certain sectors under the terms of the remaining provisions of Article 15 (the first and third parts of Article 15 (a) (i) and 15 (d)). As the provisions of Article 15 (a) (i) and parts one and three of Article 15 (d) will remain in force, the most plausible interpretation is that it will also remain the right of the Chinese exporting producer and the Chinese Government to defend and prove the existence of market conditions for a specific or general industry, in the unlikely event that a Member State's investigation attests to the absence of market conditions in that industry.

On the other hand, it seems reasonable to recognize that the reversal of the burden of proof regarding price comparison in antidumping investigations will be mandatory after December 2016, since the extinction of Article 15 (a) (ii) means that characterizations of China as a non-market economy subsequent to December 11, 2016 can no longer find their legal basis in the Protocol of Accession, which would constitute legal abuse from that date. International law forbids the abusive exercise of rights from a State and requires that treaty obligations be performed reasonably and in good faith. It is not reasonable to assert that the extinction of Article 15 (a) (ii) will not result in any change in the legal order of the antidumping legislation. Such an understanding, while voiding the letter of Article 15 (a) (ii) counter to the principle of effectiveness, would likely incentivize abusive exercise by the Member States of their trade defense right, thus resulting in a violation of Chinese rights and the transitional nature of the Protocol of Accession.

34 JAPAN v. Canada, Canada - certain measures affecting the automotive industry, DS139, 807, 2000. EUROPEAN communities v. United States, US - Trade Act, DS200, 7.22, 638, 2000.

35 SINCLAIR, Ian. *The Vienna convention and the law of treaties*. 2. ed. Manchester: Manchester University Press, 1984. 130-31.

36 EUROPEAN Communities v. Japan, Japan - Taxes on Alcoholic Beverages, DS8, 1996.

37 This type of rigid analysis has been studied by the Appellate Body in Japan - Taxes on Alcoholic Beverages, 1996.

This said, the dispositions Article 15 constitute complementary rules specifying Article 6 of the GATT 1994 and the ADA, which governs price comparability in the context of antidumping investigations. In case of extinction of this special rule, the Member States may use the remaining general rules provided for in Article 6 of the GATT 1994 and the ADA. The multilateral system of the WTO constitutes a single undertaking, which means that every negotiated item is part of a single and indivisible package that cannot be agreed upon, read and interpreted separately, but rather jointly and systematically.³⁸ Therefore, it is most likely that from December 2016 on Member States will have to return to the provisions set forth in Article 6 of the GATT 1994, as well as in the ADA, more specifically in the Interpretative Note to the GATT 1994.

It is worth noting that the Interpretative Note was drawn up in 1955, almost sixty-two years ago and in a completely different historical context in which the world was divided between planned economies and market economies: socialist systems versus capitalist system. In the current political-economic panorama, however, it may be reckless to draw such divisions, even for China since, although there is strong state intervention in economic circles, it cannot be wholly considered a planned economy, but more accurately as a *sui generis* economy from the perspective of international trade. Another possibility that should be considered is the suggestion by the legal department of the European Parliament cost and price adjustment techniques be adopted based on Article 2.2 of the ADA. However, any cost adjustment policy by Member States would likely face serious obstacles. In a recent analysis, the European Parliament's Public Policy Body acknowledged that

[...] the nature of state intervention in China can be so intense that it is very difficult to detect state subsidies – and hence other price and cost distortions of production for the purposes of price adjustment [...].

Thus, importing authorities may encounter difficulty collecting sufficient information and making appropriate cost adjustments in investigations.³⁹

38 The concept of single undertaking is the principle of international trade, defined in: <https://www.wto.org/english/tratop_e/dda_e/work_organ_e.htm>.

39 BARONE, Barbara. *One year to go: the debate over China's market economy status (MES) heats up*. 2015.

7. FINAL CONSIDERATIONS

The debate over the possible interpretations of Article 15 of the Protocol of Accession is of great importance and currently represents, as mentioned before, one of the most discussed topics in political and commercial circles. Chinese growth, as reflected in its political, economic and military influence, has altered the existing global order. On December 12, 2016, that is, the day after the date established by Article 15 (d) of the Protocol of Accession, China notified the WTO Secretariat that it challenged the calculation methodology used by the US and the EU in antidumping investigations. China did not, however, propose any argument related to the most appropriate interpretation of the Article in question. Rather, China based its challenge on an understanding that Article 15 (d) would immediately and without question apply starting December 11, 2016.

Without doubt, automatic recognition of China as a market economy in antidumping investigations would defy antidumping law as a whole, since the ultimate purposes of the Protocol of Accession, the application of the alternative methodology and main goal of antidumping law are all to avoid distortions in dumping margin calculations. WTO law has developed appropriate methods to accommodate China and its *sui generis* economy within the multilateral trading system through several concessions by Chinese State. However, the recent change in the antidumping legislation represents a new challenge for the WTO. On one side, the Organization must consider not only China's claims that the rules of the Protocol of Accession are eminently transitional and, thus, cannot persist indefinitely, but also the political, economic and commercial strength and influence of China today. On the other hand, WTO must also evaluate Chinese progress in implementing the WTO's rules and in liberalizing trade in view of relevant international studies by the US and the EU that maintain that China cannot yet be considered a market economy. When China entered the WTO in 2001, the political-economic outlook was completely different from the one that exists today, and therefore the analysis to be made by the DSB must necessarily display a broad foundation in international law, especially in the principles established by the VCLT.

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