Global Trade and Customs Journal
Jorge Miranda’s article, *Interpreting paragraph 15 of China’s Protocol of Accession*, takes on the conventional wisdom that as of 11 December 2016, World Trade Organization (WTO) Members will be prohibited from applying special non-market economy (NME) methodologies when they investigate imports from China under their antidumping laws. 11 December 2016 is the date that is fifteen years after the date of China’s accession to the WTO. According to section 15(d) of China’s Protocol of Accession, “the provisions of subparagraph (a)(ii) [of section 15] shall expire 15 years after the date of accession” – subparagraph (a)(ii) being the provision that has been understood as authorizing the use of NME methodologies in the first place.

Miranda’s analysis leads him to two conclusions. First, he finds that the conventional wisdom is wrong; the expiration provision in section 15(d) does not prohibit the use of NME methodologies in all circumstances after the transition period. Second, he finds that as a result of the expiration provision, “the burden of proof shifts and domestic producers in importing countries are tasked with demonstrating that the individual industries or sectors remain under NME conditions.”

I count myself among those who, until now, have taken for granted that the possibility of using NME methodologies in investigations involving goods from China will expire on 11 December 2016. Having been prompted by Miranda’s article to examine the question more closely, I now come to a somewhat different view.

Although it is not entirely free from doubt, I believe there is a strong case to be made, based on text and context, for Miranda’s first conclusion – i.e., that the second sentence in section 15(d) does not eliminate the possibility of NME methodologies being applied in antidumping investigations involving goods from China after the fifteen-year transition period. I have more difficulty, however, with his second conclusion – i.e., that the provision at issue implies a shifting of the burden of proof from Chinese producers to domestic producers in the importing country. While a shifting of the burden seems to be a reasonable solution under the circumstances, I see no textual support for it. I also see certain practical questions that the text does not answer and that an importing country’s investigating authority, in the first instance, and eventually a WTO dispute settlement panel and the Appellate Body necessarily would have to address if it is assumed that there is a shifting of the burden of proof. Most notably, what is it that domestic producers must show to trigger the right of the investigating authority to apply an NME methodology rather than use Chinese prices or costs as ordinarily would be required under the WTO Antidumping Agreement? Under section 15(a)(i) of the Protocol, which apparently survives the expiration of section 15(a)(ii), the ordinary rule applies “[i]f 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.” (Emphasis added.) If, as Miranda argues, section 15(d) brings about a shifting of the burden to domestic producers, are they also subject to a ‘clearly show’ standard? And if so, what happens if neither Chinese producers nor domestic producers satisfy the ‘clearly show’ standard?

In short, while the burden-shifting solution that Miranda propounds is not implausible, applying it in
practice likely would require substantial gap-filling by an eventual WTO dispute settlement panel and the Appellate Body. That could be problematic in view of the injunction in Article 3.2 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) that “[r]ecommendations and rulings of the DSB [Dispute Settlement Body] cannot add to or diminish the rights and obligations provided in the covered agreements’, and the corresponding injunction in DSU Article 19.2 that dispute settlement panels and the Appellate Body not ‘add to or diminish the rights and obligations provided in the covered agreements’. On the other hand, this may be a circumstance of the type contemplated in Article 17.6(ii) of the Antidumping Agreement, wherein a dispute settlement ‘panel finds that a relevant provision of the [Antidumping] Agreement admits of more than one permissible interpretation’ (assuming that section 15 of China’s Protocol of Accession is treated as a provision of the Antidumping Agreement).3 If that is the case, then the panel is directed to ‘find the authorities’ measure’ (here, presumably an investigating authority’s antidumping measure based on application of an NME methodology after 11 December 2016) ‘to be in conformity with the Agreement if it rests upon one of those permissible interpretations’. In other words, the ambiguity in section 15 of China’s Protocol of Accession would require deference to a ‘permissible interpretation’ applied by an investigating authority.

I will come back to the burden-shifting hypothesis. But first I will discuss why, upon closer inspection, I am inclined to agree with Miranda’s first conclusion that the second sentence of section 15(d) does not eliminate the possibility of applying NME methodologies in investigations involving Chinese goods, although that conclusion is not entirely free from doubt.

1 The text and context of section 15

It is useful in this regard to consider the structure of section 15(a). That section reads in its entirety as follows:

15.Price Comparability in Determining Subsidies and Dumping

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

(a) In determining price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement, the importing WTO Member shall use either Chinese prices or costs for the industry under investigation or a methodology that is not based on a strict comparison with domestic prices or costs in China based on the following rules:

(i) If the producers under investigation can clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product, the importing WTO Member shall use Chinese prices or costs for the industry under investigation in determining price comparability;

(ii) The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product.

Thus, the chapau of section 15(a) contemplates two alternatives for ‘determining price comparability’, which I will refer to as ‘X’ and ‘Y’. Under alternative X, the investigating authority of the importing Member ‘use[s] either Chinese prices or costs for the industry under investigation’. Under alternative Y, the investigating authority uses ‘a methodology that is not based on a strict comparison with domestic prices or costs in China’. Subparagraphs (i) and (ii) then set forth ‘if/then’ instructions based on whether 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’, a premise that I will refer to as ‘Z’.

In essence, subparagraph (i) says: If premise Z is true (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), then alternative X must apply (the importing WTO Member shall use Chinese prices or costs for the industry under investigation in determining price comparability).

Subparagraph (ii) says: If premise Z is not true, then alternative X does not mandatorily apply. That is, if the basic premise of producers under investigation clearly

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3 In China – Auto Parts, the dispute settlement panel explained that ‘[China’s] Accession Protocol is an integral part of the WTO Agreement pursuant to Part I, Article 1.2 of the Accession Protocol.’ Panel Reports, China – Measures Affecting Imports of Automobile Parts, WT/DS35/R / WT/DS40/R / WT/DS42/R and Add.1 and Add.2, para. 7.740 (adopted 12 Jan. 2009, upheld (WT/DS35/R) and as modified (WT/DS40/R / WT/DS42/R) by Appellate Body Reports WT/DS35/AB/R / WT/DS40/AB/ R / WT/DS42/AB/R). It does not necessarily follow, however, that a provision such as Antidumping Agreement Art. 17.6(ii) that applies to interpretation of ‘the relevant provisions of the Agreement’ would apply to interpretation of a provision of the Protocol that relates to the Agreement.
showing that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product (in my construct, premise Z) is not true, then alternative X (use of Chinese prices or costs for the industry under investigation in determining price comparability) is not required and, therefore, alternative Y (use of a methodology that is not based on a strict comparison with domestic prices or costs in China) is permitted.

However, in the absence of the express instruction in subparagraph (ii), the subparagraph (i) proposition ‘if Z, then X’ does not necessarily imply the inverse proposition ‘if not Z, then not X’ (and therefore, possibly, Y). Only the express instruction in subparagraph (ii) makes that inverse proposition necessarily true. Consider this statement: ‘If it rains, then my flowers will be watered.’ It does not necessarily follow that if it does not rain my flowers will not be watered; they may still be watered using a watering can or garden hose, for example. The same is true here. The information in subparagraph (i) tells us what is required ‘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’. In that case, use of ‘Chinese prices or costs for the industry under investigation in determining price comparability’ is required. But without more information (of the sort provided in subparagraph (ii)) the statements in subparagraph (i) would not necessarily negate that requirement if the producers under investigation fail to meet their burden. In other words, the information in subparagraph (i), taken on its own, does not preclude situations in which an investigating authority is required to use Chinese prices or costs even though the producers under investigation have not clearly shown that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product.

Subparagraph (ii) changes that. It tells us that regardless of what subparagraph (i) on its own does or does not imply, if the basic premise of subparagraph (i) is not true, then the requirement in subparagraph (i) does not apply (meaning that the investigating authority is free to use a methodology that is not based on a strict comparison with domestic prices or costs in China).

This then brings us to paragraph (d) of section 15, which reads:

Once China has established, under 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.

As Miranda correctly explains, the text of the second sentence tells us that subparagraph (a)(ii), but not the entirety of paragraph (a), expires fifteen years after the date of China’s accession. The context supplied by the first and third sentences supports the conclusion that there is an intentional distinction between termination of ‘the provisions of subparagraph (a)’ (first sentence); expiration of ‘the provisions of subparagraph (a)(ii)’ (second sentence); and non-application of ‘the non-market economy provisions of subparagraph (a)’ (third sentence). Giving effect to that distinction requires a construction of section 15(a) whereby, on the fifteenth anniversary of China’s accession, subparagraph (a)(ii) expires, but the rest of section 15(a) survives. At that moment, section 15(a) in effect will read as follows:

15. Price Comparability in Determining Subsidies and Dumping

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

(a) In determining price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement, the importing WTO Member shall use either Chinese prices or costs for the industry under investigation or a methodology that is not based on a strict comparison with domestic prices or costs in China based on the following rules:

(i) If the producers under investigation can clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product, the importing WTO Member shall use Chinese prices or costs for the industry under investigation in determining price comparability.

Using the labels I defined earlier, we will be left with an instruction that says: ‘If Z, then X.’ But there will no longer be an instruction for the ‘if not Z’ scenario. To assume that if not Z, then not X would be to revert to the status quo ante and to deprive the second sentence of section 15(d) of effectiveness which, as Miranda correctly states, would be contrary to the ordinary rules of treaty interpretation. But to assume that if not Z, then X – in other words, to assume that the requirement to use Chinese prices or costs always applies, even 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 – also is problematic. That assumption would render subparagraph (a)(ii) superfluous. Why provide an express instruction about one circumstance in which Chinese prices or costs must be used when in fact they must be used in all circumstances?

Just as the interpretation that says ‘if not Z, then not X′ would negate the second sentence of section 15(d), so the interpretation that says ‘if not Z, then X′ would negate the surviving text of section 15(a) as well as the distinction that section 15(d) makes between termination of paragraph (a) in its entirety and expiration of paragraph (a)(ii). If the surviving text – that is, the chapeau of paragraph (a) plus subparagraph (a)(i) – is to have any meaning, then it cannot be the case that there is no circumstance in which an NME methodology can be applied.

That interpretation is bolstered by the third sentence of paragraph (d), which deals with the situation in which China (i.e., the State as distinct from the particular producers under investigation) establishes ‘that market economy conditions prevail in a particular industry or sector’. In that situation the non-market economy provisions of subparagraph (a) shall no longer apply to that industry or sector’. Notice that the drafters here used the phrase ‘the non-market economy provisions of subparagraph (a)’ rather than the phrase ‘the provisions of subparagraph (a)(ii)’ (i.e., the phrase used in the second sentence). If ‘the non-market economy provisions of subparagraph (a)’ meant the same thing as ‘the provisions of subparagraph (a)(ii)’, then the drafters presumably would have used the identical phrase in the second and third sentences. The fact that they used different phrases supports the view that ‘the non-market economy provisions of subparagraph (a)’ is not coextensive with ‘the provisions of subparagraph (a)(ii)’. Or, to put it another way, the third sentence tells us that in the drafters’ view subparagraph (a) contains non-market economy provisions in addition to ‘the provisions of subparagraph (a)(ii)’.

Accordingly, there must be scenarios other than those contemplated in subparagraph (a)(ii) in which an NME methodology may be applied after 11 December 2016.

It is for the foregoing reasons (as well as other arguments Miranda makes, including his argument that repetition of the text at issue in Vietnam’s Protocol of Accession evidences that the drafters chose their words deliberately) that I am inclined to agree with Miranda that the conventional wisdom according to which under all circumstances the application of NME methodologies after 11 December 2016 must cease probably is incorrect. I say ‘probably’, because even though a close reading of the text supports that conclusion, the question is not entirely free from doubt. I now will turn to some of the sources of doubt.

2 ADDITIONAL CONTEXT MAY SUPPORT CONTRARY INTERPRETATION

A significant one is paragraph 151 of the Report of the Working Party on China’s Accession. As a general matter, the Report records various issues that were raised in the course of negotiating China’s Protocol of Accession and memorializes certain commitments that were made by China and by the existing WTO Members. The Report provides context for interpreting the Protocol. Paragraph 151 in particular explains that during the accession negotiation China had expressed certain concerns about the way WTO Members had applied their antidumping laws to Chinese goods. The Report says, ‘In response to these concerns, members of the Working Party confirmed that in implementing subparagraph (a)(ii) of section 15 of the Draft Protocol, WTO Members would comply with the following:’ (Emphasis added.) It then sets forth a list of six steps that WTO Members would take, all having to do with transparency and procedural fairness. For example, a Member ‘should ensure that it had established and published in advance (1) the criteria that it used for determining whether market economy conditions prevailed in the industry or company producing the like product and (2) the methodology that it used in determining price comparability’. Paragraph 151 also calls for a transparent investigation process with ‘sufficient opportunities’ for Chinese producers or exporters to make comments. And it contains other, similar procedural fairness requirements.

As relevant here, paragraph 151 applies only ‘in implementing subparagraph (a)(ii) of section 15 of the Draft Protocol’. Thus, when subparagraph (a)(ii) of section 15 of the Protocol expires, Members’ commitment to comply with the procedural safeguards under paragraph 151 of the Report presumably expires as well. Thus, if it is still possible for a Member to apply an NME methodology in an investigation involving China after 11 December 2016, it theoretically could do that without applying the transparency and procedural fairness provisions in paragraph 151 of the Report. That outcome seems anomalous and, as context, it may undercut the conclusion

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2 In EU – Footwear (China), the dispute settlement panel considered an argument by China that the EU had breached commitments under para. 151 of the Working Party Report. The panel found that the provision was not one of the enumerated provisions from the Working Party Report that had been incorporated into the WTO Agreement and, therefore, ‘cannot be understood to impose a legally binding obligation on any WTO Member, and cannot be the basis of a claim in WTO dispute settlement’. Panel Report, European Union – Anti-Dumping Measures on Certain Footwear from China, WT/DS605/R, para. 7.181 (adopted 22 Feb. 2012). My point here does not relate to the status of commitments in para. 151 as binding obligations or not. Rather, it concerns the relevance of that provision as context for understanding s. 15(a)(ii) of the Protocol.
that application of NME methodologies to China remains possible even after 11 December 2016.8

Put another way, if the Working Party on China's accession to the WTO intended for the application of NME methodologies to remain possible even after the fifteen-year transition period, one would have expected them to say something like, “In response to these concerns, members of the Working Party confirmed that in implementing the non-market economy provisions of section 15(a) of the Draft Protocol, WTO Members would comply with the following: Their express reference instead to subparagraph (a)(ii) lends support to the conventional view that the availability of NME methodologies ends after the fifteen-year transition period.

Another element of context is the contemporaneous understanding of other WTO Members at the time China's Protocol was concluded. The NME issue was particularly important to the United States, and the formulation of what would become section 15 of the Protocol first shows up in draft text from mid-2000, following bilateral negotiations between the United States and China regarding China's WTO accession.7 Given this history, statements by senior US government officials concerning their understanding of section 15 could be revealing.

As it happens, there is a relatively rich record of the consideration by US government officials of China's accession to the WTO. That is because prior to its accession, China had been subject to the so-called Jackson-Vanik Amendment, a provision of the Trade Act of 1974 whereby, due to Cold War-era concerns about communist countries' restrictions on their citizens emigration, the United States denied unconditional most-favored-nation (MFN) treatment to imports of nonmarket economy countries.9 In fact, the United States accorded MFN treatment to Chinese goods continuously since 1980, but it did so pursuant to waivers and other authorities in the Jackson-Vanik Amendment, thus making MFN treatment conditional. To make MFN treatment unconditional – a fundamental requirement of the WTO, codified in Article I of the General Agreement on Tariffs and Trade (GATT) 1994 – the United States had to permanently remove China from coverage under Jackson-Vanik, which required an act of Congress. Although the policy underlying Jackson-Vanik was a human rights policy, the debate in Congress and the dialogue between Congress and the Executive branch about removing China from Jackson-Vanik so as to put US relations with China on a proper WTO footing dealt with a host of issues in addition to human rights. One of those was the issue of whether the US Department of Commerce could continue to apply special NME methodologies to Chinese imports in antidumping investigations.

Both the Secretary of Commerce and the US Trade Representative addressed that issue in congressional testimony. However, their testimony sheds little (if any) light on the question at hand and could be construed as reinforcing the prevailing view that the ability to use NME methodologies would expire after the fifteen-year transition period. Thus, in a hearing before the Ways and Means Committee of the US House of Representatives, then Secretary of Commerce William M. Daley stated: ‘China has agreed to guarantee our right to continue using our current methodology (treating China as a non-market economy) in antidumping cases for fifteen years after China's accession to the WTO.’9 The testimony of US Trade Representative Charlene Barshefsky at the same hearing was nearly identical.10 Neither official asserted that even after the fifteen-year transition period there could be circumstances in which application of NME methodologies would continue to be permissible. The report that the Ways and Means Committee later issued to accompany the legislation extending unconditional MFN treatment to China summarized key elements of China's Protocol of Accession, stating among other things that China had committed to ‘[a]ccept the use by the United States of certain antidumping provisions (over a transitory period).’11 The report did not suggest an understanding that even after a transitory period the United States would be able to use ‘certain antidumping provisions’.

In January 2006, just over four years after China acceded to the WTO, the United States Government Accountability Office (an independent agency that investigates how Federal money is spent and provides reports to the US Congress) issued a report that discussed the eventual elimination of the NME methodology. In that report, it cited ‘officials at the Office of the U.S. Trade Representative’ as stating that ‘[a]fter 2016, the ability of

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8. Again, this point is still relevant even if, as the EU – Footwear (China) panel found, the commitments in para. 151 of the Working Party Report are not legally binding commitments. Whatever the status of those commitments, in undertaking them the WTO Members stated that they applied only ‘in implementing subparagraph (a)(ii)’, implying that the expiration of subparagraph (a)(ii) would render them obsolete.


12. Id. at 49 (‘China’s WTO entry will guarantee our right to continue using our current “non-market economy” methodology in antidumping cases for fifteen years after China’s accession to the WTO’); see also US Consideration of Permanent Normal Trade Relations With China, Hearing Before the Committee on Finance, Senate, 106th Cong., 2d Sess. at 6 & 137, 138 (23 Feb. 2000) (same). Id. at 204 (prepared statement of Ira S. Shapiro).

WTO members to continue using third-country information in AD calculations involving China would be governed by generally applicable WTO rules.12

In sum, notwithstanding the text and certain context of section 15, the understanding of officials of the United States as stated both contemporaneously with the conclusion of the Protocol and several years later adds to the doubt concerning the view that even after 11 December 2016, there are circumstances in which importing WTO Members will continue to be allowed to apply WTO methodologies in antidumping investigations involving China.

3 Possible bases for continued application of NME methodologies

This then brings us to the second conclusion in Miranda’s article. For if his first conclusion – that the possibility of applying NME methodologies in appropriate cases will not expire on 11 December 2016 – is correct, then one must ask what circumstances would trigger the right to apply those methodologies after that date. Before that date, all that is required is that the producers under investigation failed to ‘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. But after that date, it would seem that a mere failure on the part of the producers under investigation to meet this ‘clearly show’ standard is not enough. What else would have to happen? Miranda concludes that ‘the burden of proof shifts and domestic producers in importing countries are tasked with demonstrating that the individual industries or sectors remain under NME conditions’.

But where does this tasking come from? There is no text in China’s Protocol of Accession that makes domestic producers’ demonstration that individual industries or sectors remain under NME conditions the trigger for application of NME methodologies. If that were indeed the rule, then from a practical standpoint there are a number of critical details to be filled in. For example, what threshold of proof would domestic producers need to meet when the burden shifts to them? Are they subject to a ‘clearly show’ standard, just as the producers under investigation are subject to a ‘clearly show’ standard? And if they are, then what happens if neither party succeeds in clearly showing what is required of it? In other words, what happens if the producers under investigation put forward evidence of market economy conditions and domestic producers put forward evidence of NME conditions, but neither party ‘clearly’ establishes what it is trying to establish? Or what if neither party puts forward any evidence at all on this issue? The Protocol just does not say what should happen under these circumstances. And that means that investigating authorities, in the first instance, and eventually dispute settlement panels and the Appellate Body will be left to fill the gaps. But that prospect brings its own set of problems.

The WTO system does not look favorably on ‘judge-made’ law. The rights and obligations of WTO Members are set forth in the WTO agreements, and Articles 3.2 and 19.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes expressly prohibit dispute settlement panels or the Appellate Body from ‘add[ing] to or diminish[ing] the rights and obligations provided in the covered agreements’.13 As the first sentence of Article 3.2 explains, ‘The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system.’ If panels and the Appellate Body were free to create new rules to fill perceived lacunae in the rules as written, they would be undermining security and predictability.14

Articulating a new rule for when an importing Member may apply NME methodologies in antidumping investigations of goods from China would seem to be the quintessential act of gap-filling that adds to or diminishes rights and obligations provided for in the covered agreements. As indicated above, it is not simply a matter of acknowledging that the combination of (1) expiration of the Protocol and (2) continuation of the ability to apply NME methodologies in some circumstances by virtue of the survival of the rest of the Protocol must imply a burden shift. That is only the start. A panel or the Appellate Body would have to identify, among other things, the level of proof that domestic producers in the importing Member would have to establish as well as the consequence of neither domestic producers nor Chinese producers meeting their respective burdens. The need to delve into these issues makes the fact of the dispute settlement apparatus engaging in impermissible legislation even more obvious.

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13 DSU, Art. 3.2.

14 See, e.g., Panel Report, Mexico – Definitive Countervailing Measures on Olive Oil from the European Communities, WT/DS341/R, para. 7.38 (adopted 21 Oct. 2008) (rejecting European Communities’ argument that obligation under Art. 15.1 of the Agreement on Subsidies and Countervailing Measures for importing Member to invite exporting Member for consultations before initiating a subsidy investigation implies an obligation to hold such consultations, because implying such an obligation would add to or diminish rights and obligations of Members, contrary to DSU Arts 3.2 and 19.2).
But if dispute settlement panels and the Appellate Body are barred from developing new rules to compensate for the inherent ambiguity in section 15 after the expiration of subparagraph (a)(ii), then what? We are left with a situation in which (1) the surviving provisions of section 15(a) may well still allow for the application of NME methodologies in some circumstances, but (2) they fail to tell us what those circumstances are, and (3) the DSU expressly prohibits the dispute settlement system from prescribing new rules to eliminate the ambiguity.

This may well be a situation of the type contemplated by Article 17.6(ii) of the Antidumping Agreement. That provision requires a dispute settlement panel to ‘interpret the relevant provisions of the [Antidumping] Agreement in accordance with customary rules of interpretation of publication international law’ and then states:

Where the panel finds that a relevant provision of the [AD] Agreement admits of more than one permissible interpretation, the panel shall find the [investigating] authorities’ measure to be in conformity with the Agreement if its rests upon one of those permissible interpretations.

There have been several disputes in which panels have referred to Article 17.6(ii) in the course of accepting the interpretation of Antidumping Agreement provisions made either explicitly or implicitly by the investigating authority whose measure was under review. However, the Appellate Body has urged caution in reliance on Article 17.6(ii). It has stressed that the second sentence applies only after a panel has interpreted the text at issue in accordance with customary rules of interpretation of public international law and determined for itself that the text at issue indeed does admit of more than one permissible interpretation. As the Appellate Body explained in US – Continued Zoning, The function of the second sentence is thus to give effect to the interpretative range rather than to require the interpreter to pursue further the interpretative exercise to the point where only one interpretation within the range may prevail.

Given its prior statements about Article 17.6(ii), the Appellate Body may be expected to tread cautiously if that provision is invoked as the basis for deferring to an investigating authority’s interpretation of section 15(a) of China’s Protocol of Accession in light of the ambiguity created by the expiration of subparagraph (a)(ii). In this regard, it should be borne in mind that in its report in EC – Fasteners (China), the Appellate Body already expressed the view that section 15(a) in its entirety (and not just subparagraph (a)(iii)) expires at the end of the fifteen-year transition period. As Miranda points out, that statement was obiter dictum, as it dealt with an interpretive question that the Appellate Body did not need to reach in order to address the issue at hand in the Fasteners case. Still, whether inadvertently or not, the Appellate Body may have tipped its hand when it comes to the fate of section 15(a) after 11 December 2016, and that could reveal something about its likely view when the question is squarely presented to it in a future dispute settlement proceeding.

4 Conclusion

Where does this leave us? Plainly, there is an ambiguity at the heart of section 15(a). On the one hand, the text and structure suggest that even after the end of the fifteen-year transition period there may be some circumstances in which it is permissible for an investigating authority to use NME methodologies in antidumping investigations involving Chinese goods. On the other hand, the text gives no guidance on what those circumstances are, and some elements of context (paragraph 151 of the Working Party Report, statements by US government officials) support the conventional wisdom that the NME option really does expire after fifteen years. Interpreting the text following the expiration of subparagraph (a)(ii) as causing the burden of proof to shift seems to be a reasonable way to resolve the ambiguity. But that approach comes with problems of its own inasmuch as it requires dispute settlement panels, and eventually the Appellate Body, to prescribe rules that are not set forth in either the Antidumping Agreement or China’s Protocol of Accession.

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15 See, e.g., Panel Report, European Communities – Anti-Dumping Measures on Farmed Salmon from Norway, WT/DS57/R, para. 7.181 (adopted 13 Jan. 2008) (accepting EC’s interpretation of Antidumping Agreement Art. 6.16 as permitting investigating authority to decline to determine individual margin of dumping for known non-producing exporters); Panel Report, Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil, WT/DS241/R, para. 7.341 (adopted 19 May 2003) (accepting Argentina’s interpretation of the phrase ‘a major proportion of the total domestic production’ in the definition of Domestic Industry in Antidumping Agreement Art. 4.1 as encompassing a proportion that is significant but less than a majority); Panel Report, European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China, WT/DS397/R and Corr.1, para. 7.278 (adopted 28 July 2011, as modified by Appellate Body Report WT/DS397/AB/R) (accepting EU’s interpretation of Antidumping Agreement Art. 2.1 as not requiring that product under consideration in an antidumping investigation consist of products that are ‘like’ one another.


I find it difficult to accept Miranda’s conclusion that a shifting of the burden of proof is the necessary resolution of the ambiguity in section 15(a). But I agree that it is a reasonable resolution and one that quite possibly could be embraced by investigating authorities of WTO Members, at which point there likely will be a challenge by China and eventually we will know the Appellate Body’s definitive view on the matter.

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18 On the other hand, investigating authorities may determine that there are other tools at their disposal to deal with what they see as China’s continuing NME status, in which case they may rely on those tools rather than continue to apply NME methodologies in antidumping investigations. See generally Kenneth J. Pierce and Matthew R. Nicely, Transitioning to China’s Market Economy Antidumping Treatment in 2016, hard copy on file with Author. As these authors point out, even after 11 Dec. 2016, the United States will still have plenty of tools available to apply protective trade restraints against imports from China. Id. at 9.
Author Guide

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