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Myth or Reality? China's Market Economy Status under WTO Anti-Dumping Law after 2016

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I. Introduction

Currently, a considerable number of WTO members still categorize the People's Republic of China politically and legally as a so called Non-Market Economy (NME) because upon its WTO accession on 11 December 2001 and still as of today, these members perceived and perceive that the Chinese economy operates under intensive governmental control. China's status as a NME causes regularly political tension between China and its main trading partners. Indeed, the NME-question is – next to the arms embargo that was imposed on China after the events of 1989 – the single most important issue in the trade relations of China and with China. This is somehow surprising from a strict legal perspective because there is only one area of trade law in which the NME-status has theoretical and practical significance: anti-dumping law. However, once one realizes that in the last five years more than one-third of all newly initiated antidumping investigations around the world have imports from China as a target (see, e.g., WTO Statistics on Antidumping 2011), one gets an idea on why China is so keen on having changed its WTO status from NME to market economy (MES).

In light of the fact that in particular also the US and the EU are currently not willing to grant China MES, a lot of attention is paid to some specific provisions in the accession protocol of China to the WTO dealing with, as it seems, an automatic expiry of the NME-status of China in 2016. Until recently, the "automatic" shift of China from NME to MES in 2016 was taken as granted by scholars and governments around the world (see, e.g., *Andersen*, 2009: 294 *et seq.*; *Cornelis*, 2007: 105 *et seq.*; *Detlof/Fridh*, 2007: 279). This overwhelmingly shared perception has more recently been challenged by *Bernard O'Connor* (*O'Connor*, 2011) arguing that "[t]here is no provision setting any date in the WTO agreements themselves and there is no deadline in the protocol signed by China when it acceded to the WTO. The idea that there is a deadline is an urban myth that seems to have gone global. It

has gone viral even in a world were the underlying agreements are freely available to all on the Internet".

Against this background, the present analysis takes up the discussion on the NME-status of China and the "myth" of 2016. The main purpose of this contribution is to leave political rhetoric aside and to analyze the situation from a legal perspective in order to make the entire problem more transparent to those not so familiar with antidumping law. In this connection, the authors will first discuss the characteristics of NME-status of a WTO member in antidumping law in general. Second, the specific provisions of China's accession protocol concerning NME-status and the "myth" of 2016 will be analyzed. Third, consequences and options for the time after 11 December 2016 will be highlighted.

II. Background: MES and NME-Status in WTO Law

WTO law does not know any provision that contains the notion of MES or NME-status. However, the rationale for classifying a WTO member as a market economy or a non-market economy becomes clear if one recalls some basic facts about antidumping law. According to Art. 2.1 Antidumping Agreement (WTO ADA), "dumping" means the introduction of a product "into the commerce of another country at less than its normal value". "Normal value" in this regard is defined as "the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country". Thus, the "ordinary course of trade" is essential for the entire concept of dumping and antidumping duties. The idea behind the notion of "ordinary course of trade" is to be actually able to compare two markets/countries in order to determine whether there is "fair" or "unfair" competition between imported and domestic products. In this sense, comparability in the sense of an "ordinary course of trade" in the exporting and the importing country requires that both countries are market economies. However, as economic and political reality around the world is more diverse in the sense that there are both market and non-market economies, antidumping law has to deal with situations in which imports from a non-market economy are at stake.

WTO law knows two different ways of how to deal with non-market economies in antidumping law. The first situation is described in the second *Ad* Note to Art. VI:1 of the GATT 1994:

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

This provision, which was introduced into the GATT 1947 in the year 1955 (BISD 3S/222, at 223, para. 6; see also, e.g., *Snyder*, 2001: 380 *et seq.*; *Polouektov*, 2002: 6 *et seq.*), essentially opens up the possibilities to determine normal value of products by using methodology as deemed appropriate by the investigating country. Usually, importing countries use the "surrogate" or "analogue" country method in order to determine normal value concerning imports from a non-market economy (see, e.g., Art. 2 (7) (a) EU Basic Antidumping Regulation 1225/2009; and thereto *EU – Anti-Dumping Measures on Certain Footwear from China*, Panel Report of 28 October 2011, WT/DS405/R, paras. 7.227 *et seq.*). This possibility provided for by the second *Ad* Note to Art. VI:1 of the GATT 1994 has been incorporated in the WTO ADA (see Art. 2 (7) ADA) (*EC – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, AB Report of 15 July 2011, WT/DS397/AB/R, para. 285).

It is important to draw attention to the fact that the wide discretion enjoyed by the importing country on how to determine normal value with regard to imports from a non-market economy essentially depends on a general determination that the respective exporting country is not entitled to legal treatment as laid down in Art. 2 (1) WTO ADA. This is possible only by either making a general determination of a non-market economy in the sense of the second *Ad* Note to Art. VI:1 GATT 1994 or by having a specific provision in this regard in a respective WTO accession protocol. If none of

these two options is available or given, the only remaining deviation from a "normal" determination of normal value is provided for in Art. 2.2. WTO ADA. Making a respective assessment on the existence of a particular market situation under this provision, however, is only possible with regard to a specific antidumping investigation and thus requires an evaluation on a case-by-case basis.

III. "Let there be Light": Evaluating the Relevant Provisions in China's WTO Accession Protocol

In principle, Art. VI of GATT 1994 as well as the provisions of the WTO ADA are also currently applicable to antidumping proceedings initiated by WTO members against imports from China. Nevertheless, the respective general legal regime is subject to important modifications on the basis of the relevant stipulations enshrined in China's accession protocol that constitutes an integral part of the WTO Agreement (see Paragraph 1(2) of the Accession Protocol; *China – Measures Related to the Exportation of Various Raw Materials*, Panel Report of 5 July 2011, WT/DS394/R, WT/DS395/R, WT/DS398/R, paras. 7.113 *et seq.*). Reflecting concerns voiced by several members of the working party on the accession of China (Report of the Working Party, para. 150), paragraph 15(a) of the accession protocol reads 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."

This provision itself does not explicitly bestow NME-status on China. Nevertheless, it is precisely this regulation that, at present, essentially permits other WTO members to deviate from the requirements of Art. 2 (1) WTO ADA when determining the normal value of imported products. Thus, it basically subjects goods of Chinese origin to the same treatment as imports from NME countries in the sense of the already mentioned second *Ad* Note to Art. VI:1 GATT 1994 (see also *EC – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, AB Report of 15 July 2011, WT/DS397/AB/R, para. 287). Compared to this general provision, however, the accession protocol grants already currently Chinese producers insofar a more favorable status as paragraph 15(a)(i) provides them with the option of proving that market economy conditions prevail in the respective industry, thereby potentially giving rise to a valid claim for industry-wide market economy treatment; a procedure to be distinguished from individual market economy treatment (MET) such as for example provided for in Art. 2 (7) (b) EU Basic Antidumping Regulation 1225/2009 (see also *EU – Anti-Dumping Measures on Certain Footwear from China*, Panel Report of 28 October 2011, WT/DS405/R, para. 7.194).

Aside from this surely notable variation, the finding that China can under paragraph 15(a) of the accession protocol essentially be regarded as a NME is further confirmed by the wording of the first and the third sentence of paragraph 15(d) that reads as follows:

> "(d) Once China has established, under the national law of the importing WTO Member, that it is a market

> economy, the provisions of subparagraph (a) shall be terminated provided that the importing Member's national law contains market economy criteria as of the date of accession. In any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession. In addition, should China establish, pursuant to the national law of the importing WTO Member, that market economy conditions prevail in a particular industry or sector, the non-market economy provisions of subparagraph (a) shall no longer apply to that industry or sector."

This last mentioned provision leads also already to the issue of China's status under WTO antidumping law from 11 December 2016 onwards. The second sentence of paragraph 15(d), stipulating that "the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession", has so far conventionally been interpreted as resulting in the already mentioned "automatic" shift of China from MNE to MES on 11 December 2016. Verifying or falsifying this perception requires a very careful reading of the respective provisions with due regard to the overarching systematic conception of WTO antidumping law as a whole.

Again, this second sentence of paragraph 15(d) of the accession protocol itself does not explicitly grant China MES from that "magic" date onwards. However, with paragraph 15(a)(ii) expiring, it essentially creates a situation where other WTO members are no longer permitted to "use a methodology that is not based on a strict comparison with domestic prices or costs in China" when determining the normal value of imports of Chinese origin and thus to deviate from the requirements of Art. 2 (1) WTO ADA by taking recourse to China's accession protocol. Consequently, from 11 December 2016 onwards it is more or less exclusively the general regime on WTO antidumping law, as laid down in Art. VI of GATT 1994 and the WTO ADA, that applies to China and imports originating from it.

This finding, however, should not prematurely lead to the conclusion that from this date onwards China is from a legal perspective quasi automatically and necessarily enjoying the benefits of MES for an indefinite period of time or even permanently. Quite to the contrary, al-

ready a careful reading of the accession protocol itself reveals that the possibility of China being qualified by some WTO members as a NME after 11 December 2016 has already been anticipated and addressed at the time of accession.

What is frequently overlooked or disregarded (see, e.g., *EC – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, AB Report of 15 July 2011, WT/DS397/AB/R, para. 290) is the important fact that the second sentence of paragraph 15(d) only stipulates the expiring of "the provisions of subparagraph (a)(ii)", thus retaining the applicability of subparagraph (a)(i) even after 11 December 2016. With regard to its material scope of application, however, this paragraph 15(a)(i), providing the basis for a claim by Chinese producers to industry-wide market economy treatment, exclusively addresses a situation where China is by at least one other WTO member qualified as a NME. Considering the well-recognized rule that the interpretation of a treaty must give meaning and effect to all of its clauses and is, thus, not free to reduce individual provisions to inutility (see, e.g., *US – Standards of Reformulated and Conventional Gasoline*, AB Report of 29 April 1996, WT/DS2/AB/R, 23; *Japan – Taxes on Alcoholic Beverages*, AB Report of 4 October 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 12; *Van Damme*, 2009: 275 *et seq.*), the only legally sound conclusion possibly to be drawn from the continued validity of paragraph 15 (a)(i) after 11 December 2016 is the at least theoretical possibility of China being considered as a NME by some other WTO members after this "magic" date.

This finding is further supported by a comparative evaluation of the second sentence of paragraph 15(d) on one side and the first as well as the third sentence of this provision on the other. Whereas the two last mentioned stipulations rightly and consequently provide for a termination of the "non-market economy provisions of subparagraph (a)" as a whole once China has established that it is a market economy (first sentence) or that market economy conditions prevail at least with regard to a particular industry or sector (third sentence), the more limited termination under the second sentence has to be understood as intentionally retaining a more favor-

able status for Chinese producers in the case that China will again be considered by some other WTO members as a NME after 11 December 2016.

In light of these findings, it thus appears – at least from a theoretical legal perspective – in principle very well admissible that some other WTO members qualify China as a NME even after the date provided for in the second sentence of paragraph 15(d) of the accession protocol. However, three legal aspects are worth drawing attention to in this connection.

First, the second sentence of paragraph 15(d) incontrovertibly illustrates that such a qualification as an NME can no longer find its legal basis in China's accession protocol after 11 December 2016.

Second, in light of the overarching systematic approach adopted by general WTO antidumping law, being from that date onwards the more or less exclusive legal regime applicable to China, it is – in the same way as all other WTO members – presumed to have acquired MES. Consequently, it might very well be argued that, at least for a so-called "logical" or "juridical" second, China has on 11 December 2016 to be regarded as having achieved MES *erga omnes*. Thus, if only in this limited sense, there is indeed a certain automatism involved in this regard.

Third, a subsequent – renewed – qualification of China as a NME by other WTO members, in order to be legally sustainable, has to find its basis in the general regime on WTO antidumping law as laid down in Art. VI of GATT 1994 and the WTO ADA. In light of the background observations as outlined in the previous section, this essentially requires that the WTO member in question has to argue and prove that the requirements stipulated in the second *Ad* Note to Art. VI:1 GATT 1994 are fulfilled with regard to economic conditions prevailing in China at the time when respective antidumping proceedings are initiated.

IV. Consequences for the Status of China after 11 December 2016: Two Possible Scenarios

The main consequence of the legal situation described is clear. Until 11 December 2016, WTO Members

may treat China with regard to the determination of normal value in antidumping proceedings as a non-market economy without any further justification. However, this will change after 11 December 2016. As China will, at least for a logical second, enjoy MES on 11 December 2016, the burden of proof shifts to other WTO members to establish that – as an exception – the prerequisites of the second *Ad* Note to Art. VI:1 GATT 1994 are fulfilled. This, however, will probably be almost impossible to prove in practice. It is worth recalling in this regard what the Appellate Body recently said in *EC – Fasteners* (WT/DS397/AB/R):

> 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 fulfil both conditions, that is, the complete or substantially complete monopoly of trade and the fixing of all prices by the State. (para. 285, footnote 460).

This statement of the Appellate Body, even though obiter dictum and merely included in a footnote, underlines what follows already from the clear wording of the second *Ad* Note to Article VI:1 GATT 1994: the provision can only be invoked concerning a WTO Member that monopolizes trade in total and where all prices are set by the government. It seems doubtful whether this high threshold could ever be proven with regard to any current and future WTO member (see also, e.g., *Yan*, 2010: 162 *et seq.*; *Hoogmartens*, 2004: 145).

Nevertheless, should, e.g., the EU or the US with effect on 11 December 2016 make a determination according to the second *Ad* Note to Art. VI:1 GATT 1994, the industry-wide market economy treatment provided for in paragraph 15(a)(i) of the accession protocol remains valid. As already indicated, this provision does not expire on 11 December 2016.

If no determination in the sense of the second *Ad* Note to Art. VI:1

GATT 1994 is made, the only remaining possibility to treat imports from China different than those from other WTO Members in anti-dumping proceeding concerning the determination of normal value is to refer to and prove a "particular market situation" in the sense of Art. 2.2. WTO ADA.

V. Conclusion

For lawyers and governmental officials dealing with anti-dumping 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. The only possibility to do so would be to make a positive, explicit determination of China's NME-status based on the second *Ad* Note to Art. VI:1 GATT 1994. However, taking into account the high threshold stipulated in the second *Ad* Note to Art. VI:1 GATT 1994, chances to convincingly and thus successfully do so are almost non-existing. Therefore, from 11 December 2016 onwards Chinese imports have to be treated with regard to a determination of normal value in the same way as imports from any other WTO member.

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