

# 北京大学中国经济研究中心

China Center for Economic Research

## 讨论稿系列 Working Paper Series

No.C2016010

2016-10-09

# 中国"市场经济地位问题"备忘录——入世"日落条款"争论缘起、前景与启示

卢锋、李双双1

## 内容提要

我国《入世议定书》第15条对反倾销特殊方法设定包含了15年截止期,履行"日落条款"与承认我国市场经济地位是否有关成为多年讨论议题。随着我国入世十五周年临近,市场经济地位问题近来再次成为国际争论热点,国内有关评论意见也隐然存在认知反差。第15条还规定了反补贴特殊条款,鉴于中国入世后出口竞争力增强现实与"日落条款"到期后反倾销替代国方法终止前景,美欧对我国贸易争端从早先倚重反倾销手段向较多采用反补贴方法调整转变。

何谓"市场经济地位问题"?承认我国市场经济地位与WTO成员履行条约到底有没有关系?为什么解读本应有确定含义的法律条文会发生旷日持久争论?入世特殊条款对我国出口影响如何?本文系统梳理"市场经济地位"问题讨论的来龙去脉,细致考察有关"日落条款"各种解读观点及其是非曲折,同时分析美国对我国"双反(反倾销、反补贴)"传统政策立场特点与现实演变趋势,结合我国入世后贸易争端实际情况讨论入世特殊条款对我国出口影响。

<sup>&</sup>lt;sup>1</sup> 卢锋联系方式: fenglu@nsd.pku.edu.cn. 李双双联系方式: lissjy@126.com 。感谢李昕教授参加该项目早期研究大量工作。感谢刘晓光、杨业伟、玛西·高娃、苏建文、白春华等人在研究不同阶段参与讨论与提供资料及数据帮助。本报告于 2016 年 9 月 29 日在北京大学国家发展研究院"格政"论坛报告,前期研究结果于 2015 年 7 月 19 日以"所谓'市场经济地位问题——我国入世日落条款准确含义与争论'"为题在洪范法律与经济研究所系列讲座上报告,感谢黄益平教授、梁治平教授邀请,感谢杨国华教授、陈卫东教授、霍建国前院长以及两个场合其他参会人员的评议。秦晓先生最初建议我们开展这项研究,并在研究过程中多次提出建议和鼓励,对此表示特别感谢。

关键词: WTO; 市场经济地位; 反倾销; 反补贴。

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## 1、一个令人困惑现象

我国《入世议定书》第 15 条有关反倾销特殊方法设定包含了 15 年截止期"日落条款",履行"日落条款"与承认我国市场经济地位是否有关问题存在长期争议。随着我国入世十五周年逐步临近,有关市场经济地位问题再次成为热议焦点。标志性事件是 2016 年 5 月 12 日欧洲议会以 546 票赞成、28 票反对、77 票弃权的压倒性高票,通过一项不承认中国市场经济地位的"非立法性决议"。决议要点包括:"强调中国尚未达到欧盟有关市场经济地位的五条标准,中国不是市场经济";欧盟委员会应与主要贸易伙伴协调,保证中国入世议定书第 15 条在 2016 年以后继续有效条款内容被赋予"充分法律含义"<sup>2</sup>;未来对中国出口实施双反调查确定价格比较时应继续采用非标准方法<sup>3</sup>等等。

欧洲议会决议体现的保护主义倾向,引发我国政府相关部门与民间评论的普遍批评,国内各方评论在质疑该决议基本取向上高度一致。然而在如何看待WTO成员国履行承诺与承认中国市场经济地位关系问题上,国内对欧洲决议回应观点隐然存在不同理解认知。一方面是官方表述的二者无关观点,即认为这两个问题应当分开讨论不应混为一谈。另一方面不少民间评论认为,欧盟履行入世承诺意味着本应自动承认中国市场经济地位,由此抨击欧盟决议爽约食言。不仅目前官方与民间某些评论看法不一致,我国官方目前观点与早先有关立场也有显著调整,美欧等国相关策略立场前后也发生明显变化。上述多重变化与反差,折射中国市场经济地位问题的特殊复杂性。

## 1-1、官方回应欧洲决议

我国政府有关部门回应欧洲决议的表述内容表达了二者无关的理解。2016年5月16日外交部网站发布"王毅谈欧洲议会否定中国市场经济地位:请守承诺"报道,对"二者无关论"表达得最为清晰。王毅部长批评"欧洲通过这项决议不具有任何建设性,"明确指出"是否给予中国市场经济地位与履行《中国加入世贸组织议定书》第15条是没有关联的两码事,不能人为将两者混为一谈,甚至彼此挂钩",强调"中方的要求明确、简单而又合理,那就是5个字:请遵守承诺。"

李克强总理 6月13日与到访的德国总理默克尔举行会谈,会后回应记者对相关议题提问也表达二者无关观点。李克强在回答中重申:中国是不是市场经济国家,这由中国的国情决定。中国推进市场化改革所取得的成就也已为世界公认。但履行《加入议定书》第15条承诺义务,包括中欧贸易摩擦,都是不同层面的问题,应该分开讨论(李克强,2016)。

政府有关部门其他官员回应也体现二者无关理解。例如外交部发言人陆慷在 5 月 12 日记者会上就中国市场经济地位问题回应时表示,关于市场经济地位,实际上现在在 WTO 框架下没有一个明确的规定。中方一直强调的是,有关各方应当遵守中国加入 WTO 议定书第

<sup>&</sup>lt;sup>2</sup> 这是决议第三点内容:"督促欧盟委员会与主要贸易伙伴协调、包括利用 G-7 和 G-20 峰会场合,保证中国入世议定书 15 条在 2016 年以后继续有效的条款在这些国家国内程序之下具有充分法律含义,并反对任何单边给予中国 MES 做法。(China's market economy status ——European Parliament resolution of 12 May 2016 on China's market economy status, 2016/2677/RSP, European Parliament,http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2016-0223+0+DOC+PD F+V0//EN)".

<sup>&</sup>lt;sup>3</sup> 这是决议第六条内容:"(欧洲议会)得以确信,遵守依据并充分阐发为非标准方法提供支持的中国入世议定书 15 条有关内容,在中国在达到欧盟市场经济标准之前,欧盟应继续在对中国进口反倾销与反补贴调查确定价格比较方面采用非标准方法(a non-standard methodology)"。

15 条的相关规定。也就是说,到了规定的时间,必须取消用'替代国'计价的做法来进行 反倾销调查,这是所有 WTO 成员应当承担的国际义务"4。又如 5 月 13 日商务部世贸司负 责人发表谈话,指出"根据《中国加入世贸组织议定书》第 15 条规定,世贸组织成员应于 2016 年 12 月 11 日终止对华反倾销的'替代国'做法。这是世贸组织各成员应遵守的国际 条约义务,并不取决于任何成员的国内标准。我们希望欧盟作为世贸组织的重要成员,能严格履行自己在世贸协定项下的义务,自 2016 年 12 月 11 日起终止其对华反倾销中的'替代国'做法"(李可, 2015)。上述回应都没有特别提到市场经济地位问题,暗含二者无关理解。

#### 1-2、民间对欧洲决议评论

然而在市场经济地位与我国入世条约关系问题上,不少民间和媒体评论认为二者有直接关系。如《央视财经评论》在针对这一问题节目预告中指出,"今年是中国加入世贸组织的第 15 年,根据相关规定,中国应在今年 12 月 11 日,自动获得市场经济地位",因而批评欧洲议会否定中国市场经济地位"逆潮流"5。又如 2016 年 5 月 13 日《凤凰国际 iMarkets》刊载一篇题为"欧洲议会反对给予中国市场经济地位"文章指出,"按照世界贸易组织(WTO)规则,中国将在今年底在全球范围自动获得市场经济地位"6。依据上述观点,二者存在法定义务联系。

《海外网》5月18日发表题为"否決中国市场经济地位是失信"评论文章则解释了为什么有关系。该文指出:《中国入世议定书》第15条(d)项规定:"无论如何,(a)项(ii)目的规定应在加入之日后15年终止。"因而所有WTO成员方不管此前是否承认中国全国或各个产业部门的市场经济地位,都不能在对华反倾销、反补贴案中继续采用替代国之类做法,而是只能采用受调查产业的中国价格或成本;"换言之,就是承认中国的市场经济地位。"该文认为入世议定书作为定义中国与WTO成员国法律约定内容,间接包含欧美在内所有缔约方承认中国市场经济地位的义务,因而"欧洲是否承认中国市场经济地位","通俗地说,是一个欧洲是否'要脸'的问题"(梅新育,2015)。

二者相关论观点意味着中国在今年底将自动获得市场经济地位。2016年1月15日《人民日报》发表题为"欧盟承认中国市场经济地位咋就这么难"文章指出:"根据2001年中国加入世界贸易组织(WTO)时签署的4项附加条款,有关中国"非市场经济地位"的有效期最长为15年,这意味即使欧盟没能提前达成协议,WTO成员国也需要在2016年12月底前承认中国的市场经济地位。7

网上还有基于二者存在必然联系批评欧洲人爽约的更为尖锐的段子式评论。如一篇文章写道:"欧盟十五年前给中国打的白条,现在居然耍赖皮欠债不还了。……原本,到 2016年 11月,中国加入 WTO 满 15年后,按照当年的《入世议定书》,中国将自动获得市场经济地位。但现在欧盟翻手为云覆手为雨……"8。在另一篇题为"欧盟与中国,为何十五年修不成'市场经济地位'正果?"文章中,作者用一场婚约变卦描述这个故事:"一场错爱苦耗终生。十五年的守候,终究化为泡影"(邓海清, 2016)。

<sup>4 &</sup>quot;2016 年 5 月 12 日外交部发言人陆慷主持例行记者会", 外交部网站, 2016 年 5 月 12 日, http://www.fmprc.gov.cn/web/wjdt\_674879/fyrbt\_674889/t1362683.shtml

<sup>5 &</sup>quot;逆潮流!欧洲议会否定中国市场经济地位"原文出自央视财经评论微信公众号,转引自今日头条网,http://toutiao.com/a6285219895623057665/,2016 年 5 月 16 日。

<sup>6 &</sup>quot;欧洲议会反对给予中国市场经济地位",凤凰国际 iMarkets,2016-05-13,http://finance.ifeng.com/a/20160513/14381513\_0.shtml

<sup>7 &</sup>quot;欧盟承认中国市场经济地位咋就这么难",《人民日报》,2016年1月15日。

<sup>8&</sup>quot;刚刚, 欧美联手向中国开炮!背后真相让人愤怒!",2016年5月14日《财经内参》)

## 1-3、早先主流观点与官方立场

目前官方观点与我国早先主流观点和官方看法也不一致。如果把时钟倒回几年,国内学界和官方普遍认为二者存在由《中国入世议定书》有关法条规定的确定性关系,认为 WTO 成员国到今年底应自动承认中国市场经济地位。一段时期内国内学术论文和媒体评论屡见不鲜这类表述:"到 2016 年,中国的市场经济地位自动获得承认","根据 WTO 协议的规定,在 2016 年中国会自动成为市场经济国家"。

2011 年 6 月《人民网》发表题为"中国入世十周年——完全市场经济地位并不遥远"文章,首要依据就是"根据中国加入世贸组织的议定书,加入世贸组织的 15 年后即 2016 年,世贸组织成员应承认中国完全市场经济地位"(胡江云,2011)。同年 9 月 14 日在大连举办的第五届夏季达沃斯论坛上,中国领导人在回答世界经济论坛主席施瓦布和企业家的提问中时也明确表达了这一观点%。2011 年 9 月 27 日《人民日报》刊文阐述类似观点,认为"事实上,按照世界贸易组织(WTO)规则,中国加入WTO十五年后,即 2016 年将自动获得完全市场经济地位。但是,早一点承认中国的市场经济地位,'是在向中国表示一种友好'"<sup>10</sup>。

## 1-4、令人困惑的多重反差

《中国入世议定书》这样法律文件内容通常不应出现理解分歧,然而在有关我国入世议定书约定内容与承认我国市场经济地位关系问题上,确实存在多重认知反差与政策立场 U型转变。一是我国目前官方立场与早先国内主流看法客观存在反差。目前官方政策立场是把WTO 成员国兑现"日落条款"承诺与市场经济地位问题分开处理,体现二者相对独立或没有关系的认知方式及策略立场。然而早先国内主流观点以及领导人就此公开表述的看法,则认为二者存在确定关系。

二是美欧等发达国家有关这一政策立场也存在前后反差。早先中国政府力劝欧盟尽早承认中国市场经济地位,理由之一是依据入世条款到2016年底欧盟本来就有义务承认中国市场经济地位,当时欧盟就此总体采取回避拖延立场。然而中国政府立场务实调整后,最近欧盟法院反而通过决议把二者混为一谈。又如美国官方过去对我国要求讨论提前承认市场经济地位问题也采取消极态度,然而在中国不再要求承认市场经济地位而是提醒WTO成员国在"日落条款"到期后履行承诺终止采用替代国方法时,美国反而借题发挥炒作其质疑中国市场经济地位的观点<sup>11</sup>。

三是目前民间某些评论对美欧不承认中国市场经济地位的批评谴责,部分建立在对履行"日落条款"承诺与承认我国市场经济地位直接相关的认知基础上,这种理解与目前我国官方立场存在反差,然而与国内早先流行理解则相互一致。目前官方与部分民间评论看法反差,一定程度是官方观点前后反差的折射与回声。耐人寻味的是,目前民间部分评论激烈批评欧洲法院决议,然而在履行入世承诺与承认市场经济地位关系问题上,反而与其谴责对象隐然抱有类似认知立场。

要透彻解读上述令人困惑现象,就需要回到第 15 条原文与具体细节,需要仔细梳理争论的来龙去脉。系统研究后我们会看到,这个问题目前呈现表象虽然令人困惑,有关法条解

<sup>&</sup>lt;sup>9</sup> "温家宝在第五届夏季达沃斯论坛开幕式和企业家座谈会上答问",新华网,2011 年 09 月 15 日, http://news.xinhuanet.com/politics/2011-09/15/c 122034802.htm。

<sup>10 &</sup>quot;西方国家拿市场经济地位苛求中国没有道理",《人民日报》,2011年9月27日。

 $<sup>^{11}</sup>$  "美国回应中方 WTO 声明 拒绝 12 月授予中国市场经济地位",一财网 2016 年 7 月 15 日。

读的法律专业内容相当复杂,然而仔细梳理其演变过程不难看出简单清晰的逻辑线索,构成观察我国转型期开放政策史的一个特殊案例。

## 2、第15条内容与结构

2001年11月《中国加入世界贸易组织议定书》签订,我国由此正式成为WTO成员国。出于实施入世战略全局利益考虑,我国在谈判中务实考虑各方面现实情况,接受了几方面特殊条款。《入世议定书》第15条表述了有关反倾销与反补贴的特殊规定,其中有关反倾销价格比较特殊方法与市场经济地位问题以及"日落条款"规定有关,是讨论本文主题的基本一手资料。第15条标题是"确定补贴和倾销时的价格可比性",透彻理解本文考察问题需仔细研读这个著名法条内容<sup>12</sup>。

GATT1994第6条、《关于实施1994年关税与贸易总协议第6条的协议》("《反倾销协议》")以及《SCM协议》应适用于涉及原产于中国的进口产品进入一WTO成员的程序,并应符合下列规定:

- "(a) 在根据GATT1994第6条和《反倾销协议》确定价格可比性时,该WTO进口成员应依据下列规则,使用接受调查产业的中国价格或成本,或者使用不依据与中国国内价格或成本进行严格比较的方法:(i) 如受调查的生产者能够明确证明,生产该同类产品的产业在制造、生产和销售该产品方面具备市场经济条件,则该WTO进口成员在确定价格可比性时,应使用受调查产业的中国价格或成本;(ii) 如受调查的生产者不能明确证明生产该同类产品的产业在制造、生产和销售该产品方面具备市场经济条件,则该WTO进口成员可使用不依据与中国国内价格或成本进行严格比较的方法。
- (b)在根据《SCM协议》第二、三及五部分规定进行的程序中,在处理第14条(a)项、(b)项、(c)项和(d)项所述补贴时,应适用《SCM协议》的有关规定;但是,如此种适用遇有特殊困难,则该WTO进口成员可使用考虑到中国国内现有情况和条件并非总能用作适当基准这一可能性的确定和衡量补贴利益的方法。在适用此类方法时,只要可行,该WTO进口成员在考虑使用中国以外的情况和条件之前,应对此类现有情况和条件进行调整。
- (c)该WTO进口成员应向反倾销措施委员会通知依照(a)项使用的方法,并应向补贴与反补贴措施委员会通知依照(b)项使用的方法。
- (d)一旦中国根据该WTO进口成员的国内法证实其是一个市场经济体,则(a)项规定即应终止,但截至加入之日,该WTO进口成员的国内法中须包含有关市场经济的标准。无论如何,(a)项(ii)目的规定应在加入之日后15年终止。此外,如中国根据该WTO进口成员的国内法证实一特定产业或部门具备市场经济条件,则(a)项中的非市场经济条款不得再对该产业或部门适用。"13

第一段导语定义WTO有关反倾销与反补贴一般条款适用性,(a)到(d)款规定针对中国反倾销与反补贴特殊方法。(a)项规定反倾销可用通常性与区别性两种方法,下设(i)和(ii)二目分别界定采用两种方法的各自适用条件。(b)款规定反补贴区别性方法。(c)

<sup>12</sup> 附录 1 提供第 15 条英语文本。

<sup>13 《</sup>中国入世议定书》,中国中央政府网,http://www.gov.cn/gongbao/content/2002/content\_74608.htm.

款是采用特殊方法必须向WTO相关委员会报告的程序规定。(d) 款定义反倾销特殊方法"提前结束条件"和"日落条款":一是包括经济整体被承认为市场经济的"提前结束条件",二是特定行业被承认为"市场经济条件"的"提前结束条件";(d) 款以"无论如何"一词起句的表述就是著名的"日落条款(sunset clause)"。

在通常情况下,签订 15 年到期的合约条款,好比购买特定时期后生效的期权合同,合同持有者可静等到期行权,此前一般没有必要对合同内容做很多讨论。第 15 条"日落条款"过渡期情况则不同寻常:我国入世后有关条款含义很快在国内出现阐释讨论,流行观点大致认为到期后 WTO 成员国有义务自动承认中国市场经济地位。然而 2011 年国际法学界出现尖锐质疑"自动承认说"观点,引发对如何解读"日落条款"准确含义的热烈争议。WTO旗下权威刊物《全球贸易与关税杂志(Global Trade and Custom Journal)》在 2014 和 2016 年先后发表十余篇论文分析解读"日落条款"。今年 5 月欧洲法院通过决议并引发中国政府多方回应,把相关争论推进到官方表态的最后摊牌阶段。下面分阶段观察相关争论演变过程。

## 3、自动承认说

作为对"日落条款"的较早流行解读,"自动承认论"是认为依据中国《入世议定书》,到我国入世 15 年即 2016 年底,WTO 成员有义务自动承认我国市场经济地位。不能确定谁是这个重要观点发明者,不过从现有文献看至迟到 2004 年已有论文讨论这一观点(宋泓,2004)。此后一段时期内国内学界和媒体不断有这类表述:"到 2016 年,中国的市场经济地位自动获得承认"(杨宇白,2005)。"根据 WTO 协议的规定,在 2016 年中国会自动成为市场经济国家"(刘曦,2007)。国外也有专业人士认为,中国 2016 年以后将永久性获得市场经济地位(Vermulst and Graasfsma,2006; Tietje and Karsten Nowrot,2007)。

与"自动承认说"认识相一致,争取世贸成员国尽早承认中国市场经济地位成为一段时期我国经济外交政策优先目标之一<sup>14</sup>。表 1 显示政府有关部门 2004 年争取到 30 多个国家承认我国市场经济地位,2005-2007 年每年各有十多个国家承认。2011 年国际形势似乎为中国争取承认市场经济地位提供了最为有利条件。2011 年 6 月《人民网》发表中央某研究机构专家题为"中国入世十周年——完全市场经济地位并不遥远"文章,该文把中国争取市场经济努力进程分为"交流沟通、零的突破、飞速发展、艰难攻坚"四个阶段叙述,并在"前景展望"中指出"欧美承认中国完全市场经济地位是必然的,也是指日可待的"。这文作者阐述了这一乐观估计多方面依据,第一条就是"根据中国加入世贸组织的议定书,加入世贸组织的 15 年后即 2016 年,世贸组织成员应承认中国完全市场经济地位。"

#### 表1、争取有关国家承认我国市场经济地位进展情况(2004-2011)

年份	承认国家	当年数	累计数
2004	新西兰、尼泊尔、吉尔吉斯斯坦、刚果(布)、贝宁、多哥、南非、摩	36	36

<sup>14</sup> 不过"根据当时中国加入 WTO 的条款,只有该成员国在中国入世之前的国内就已存在反倾销与是否非市场经济地位的相关规定,才可以在中国加入 WTO 后对华反倾销中利用是否'市场经济地位'这一点。而在中国入世之前就存在相关立法的经济体,主要有美国、欧盟、巴西、埃及、印度、以色列、韩国、马来西亚、墨西哥、秘鲁、新加坡、南非、泰国、土耳其等十四个经济体。从这个意义上说,只有让这些经济体承认中国市场经济地位才是最重要的"。("2016 年中国无法自动获得 WTO 市场经济地位",鲁政委,中国金融四十人论坛,2016 年 1 月 25 日。)

	尔多瓦、吉布提、印尼、马来西亚、泰国、新加坡、文莱、菲律宾、 越南、老挝、柬埔寨、缅甸、格鲁吉亚、尼日利亚、俄罗斯、亚美尼 亚、巴巴多斯、圭亚那、安提瓜和巴布达、巴西、阿根廷、智利、秘		
	鲁、巴基斯坦、委内瑞拉		
2005	韩国、澳大利亚、以色列、哈萨克斯坦、乌克兰、白俄罗斯、冰岛、	13 49	
	安巴、圣卢西亚、多米尼克、苏里南、牙买加、特立尼达和多巴哥		
2006	阿尔及利亚、苏丹、中非、塞拉利昂、埃及、马里、加蓬(部分名单)	14	63
2007	挪威、瑞士、赞比亚、挪威、叙利亚、佛得角(部分名单)	12	75
至 2011 年	几内亚 (部分名单)	5	81
11月		3	01

资料来源和说明: 2004 年承认国家数据来自 "承认中国市场经济地位的部分国家名单",农博网 2005 年 4 月 20 日 (<a href="http://news.aweb.com.cn/2005/4/20/11075566.htm">http://news.aweb.com.cn/2005/4/20/11075566.htm</a>)。 2005 年承认国家数据来自 "51 个国家承认我完全市场经济地位",搜狐新闻 2006 年 01 月 29 日(<a href="http://news.sohu.com/20060129/n241641730.shtml">http://news.sohu.com/20060129/n241641730.shtml</a>)。 2006 年承认国家数据来自 "66 个国家承认我国市场经济地位",搜狐新闻 2007 年 1 月 14 日

(<a href="http://news.sohu.com/20070114/n247596519.shtml">http://news.sohu.com/20070114/n247596519.shtml</a>)。2007 年承认国家数据来自"75 个国家、地区承认我国完全市场经济地位"《人民日报》2007 年 7 月 12 日。至 2011 年 11 月累计数来自:"入世十周年'关键词': 81 国承认中国市场经济地位",中国网 2011 年 11 月 10 日

(http://www.china.com.cn/economic/txt/2011-11/10/content\_23870240.htm).

2011 年中国谋求承认市场经济地位的外交攻势也达到高潮。2011 年 9 月 14 日在大连举办的第五届夏季达沃斯论坛上,中国领导人敦促欧盟尽早承认中国市场经济地位。当时欧债危机形势恶化,中国领导人"表示中国愿意伸出援助之手,继续加大对欧洲的投资。"同样敦促欧盟领导人"也要大胆地从战略上看待中欧关系,比如承认中国完全市场经济地位。"领导人还指出:"其实,按照 WTO 规则,中国完全市场经济地位到 2016 年就为全世界所承认,早几年表示出一种诚意,是一种朋友对朋友的关系。"他表示"10 月将同欧盟领导人进行会晤,希望这次会晤能够有所突破。" 15

2011年9月27日《人民日报》刊文阐述类似观点。该文指出"事实上,按照世界贸易组织(WTO)规则,中国加入WTO十五年后,即2016年将自动获得完全市场经济地位。但是,早一点承认中国的市场经济地位,'是在向中国表示一种友好'"<sup>16</sup>。到2011年承认我国市场经济地位国家达到80多个,包括俄罗斯、巴西等重要新兴市场国与澳大利亚这样比较重要西方国家,但是未能说服欧盟、美国、日本等主要发达国家承认我国市场经济地位。这一情形延续至今,这方面经济外交努力未能完全取得预期成果。

## 4、质疑观点出现

中国领导人在 2011 年 9 月夏季达沃斯论坛上阐述"自动承认说",并敦促欧盟尽早承认中国市场经济地位,影响力远远超过学界讨论并在国内外引发更多关注。当时欧债危机空前加剧,欧洲内部也有观点认为,与其等几年后履约被动承认中国市场经济地位,还不如尽快

 $<sup>^{15}</sup>$  "温家宝在第五届夏季达沃斯论坛开幕式和企业家座谈会上答问",新华网,2011 年 09 月 15 日,http://news.xinhuanet.com/politics/2011-09/15/c\_122034802.htm

<sup>16 &</sup>quot;拿市场经济地位苛求中国没有道理",《人民日报》,2011年9月27日。

提前承认以更好推动中欧合作应对欧债危机<sup>17</sup>。欧盟承认中国市场经济地位似乎有望取得突破性进展。

就在形势似乎最有利于实现"自动承认说"所支持政策主张之际,一篇博客短文对其提出尖锐质疑并产生颠覆性影响。2011年11月27日欧洲法学界人士伯纳德·奥科纳(Bernard O'Connor)在欧洲 VOX 网站发表题为"中国不会自动获得市场经济地位(Market-economy status for China is not automatic)"文章,尖锐批评广泛流行的自动承认说是缺乏依据的"神话"。从此"自动承认说"共识不复存在,如何解释"日落条款"进入热烈讨论新阶段。

奥科纳这篇 2000 多字博文包含几个层次内容。一是概括自动承认说流行观点及其对欧盟政策含义。文章指出,中国官员到国家领导人,欧洲工业联合会,甚至中美战略与经济对话都赞同类似解读,"似乎所有人都赞同"中国 2016 年将自动被承认市场经济地位,其中提到我国领导人在 9 月份大连-达沃斯论坛演讲中提到的"2016 年截至期"。他引述欧洲某些利益方主张,认为如果中国届时本来会得到这一地位,欧盟还不如提前承认以获取诸如支持欧元方面的利益作为回报。奥科纳通过上述背景强调这一问题对欧洲决策的重要而紧迫含义。

二是根据相关法条质疑和否定多年流行的自动承认说观点。该文一开始就指出,欧盟有关反倾销与反补贴的贸易防卫法律,依据出口国是否具有市场经济地位采取区别对待方法:对于欧盟不承认具有市场经济地位国家,可以采用出口国以外国家的成本与价格数据,因而由此计算的倾销程度相应可能更高。作者认为中国强调自己是市场经济完全可以理解,但是根据入世议定书断言中国将自动得到市场经济地位并不正确,用他的表述说是"误读(misunderstanding)"和"神话(myths)"。考虑相关法条文本可以在网络上自由取读,这个误解仍能在全球范围传播,作者对此表示费解和感叹。

三是指出这个问题来自对《中国入世议定书》第 15 条 (d) 项内容不正确解读。他认为这段话规定中国必须依据 WTO 进口国的法律以确认其是否被认可为市场经济。如果得到认可,有关过渡性特殊比较方法条款将会终止。这段话进一步规定第 15 条中某一段话即上述 (a)款的 (ii) 目中规定的特定比较方法,"无论如何"都会在中国入世 15 年后失效。但是他强调这一规定没有包含中国将由此自动得到市场经济地位。

四是认为中国要被欧盟认可市场经济地位取决于是否符合欧盟制定的五个条件,因而是一个技术性问题。五个条件包括:第一,政府是否影响企业运行决策,或者这些决策是否依据市场信号做出?第二,计划命令经济的遗产在公有体制、实物贸易等方面是否仍然影响企

<sup>17</sup> 如商务部网站发布我国爱尔兰使馆经商参处提供报道,"据爱尔兰广播电视公司(RTE)9月 14 日报道,中国总理温家宝于9月 14 日在大连举办的世界经济论坛上表示,中国愿意帮助欧盟应对债务危机,将继续扩大对欧元区的投资,但希望欧盟采取积极措施防止危机进一步扩散,并呼吁欧盟承认中国市场经济地位。欧盟委员会主席巴罗佐当天在欧洲议会表示,作为中国救助欧盟的回报,欧盟应尽早提前承认中国的完全市场经济地位。巴罗佐强调:"根据 WTO 协议,中国将在 2016 年自动获得市场经济地位。如果欧盟能够提前表达诚意,将显示出中欧的友谊。"("巴罗佐呼吁欧盟尽早承认中国完全市场经济地位"http://ie.mofcom.gov.cn/article/jmxw/201109/20110907739824.shtml)。不过我们查对巴罗佐当天在欧洲议会演讲"Speech by President Barroso to the European Parliament during the debate on the economic crises and the euro"European Parliament plenary session(Strasbourg, 14 September 2011),其中没有发现上面引述观点。当然也不能排除这位欧盟政要接受媒体采访时表达上述观点。

业决策?第三,企业是否拥有有效的会计标准?第四,企业是否在破产管制和产权保护的有效框架下运营?第五,企业是否能依据标准市场汇率换汇?

五是在中国是否已符合欧盟定义的市场经济地位问题上,作者虽然貌似客观地指出这是一个可以讨论的问题,然而随后列举几点相关证据实际给出消极答案。他列举证据包括:美欧针对中国企业反倾销调查显示,中国企业不符合国际会计标准;针对中国企业反补贴调查显示,很多市场部门在五年计划框架下运营,这类计划会在鼓励某些行业同时抑制另一些行业。他还认为,受到鼓励行业的企业获得国有银行资助而不考虑这类融资可能派生的风险。该作者还把巴西曾在WTO质疑中国货币倾销(monetary dumping)等情况作为相关证据。最后结论是,依据欧盟相关法律中国不大可能被承认为具有市场经济地位。

从奥科纳文章不难看出,这位欧洲法学家对中国经济实际情况缺乏了解并存在明显偏见。例如把五年规划与市场经济地位对立起来,无论在逻辑还是事实上都难以成立;断言国有银行没有风险意识,显然也是过于片面和简单化。另外巴西曾在WTO质疑中国操纵人民币汇率,然而WTO官方并未接受这一无理指责,奥科纳罔顾人民币汇率市场化改革实际进展,以一个不合理指责事件为依据认定中国不具有市场经济地位显然存在偏见。另外用欧盟制定标准衡量中国是否市场经济地位,表面客观其实评估过程注定有主观性。

不过从研究"日落条款"认识演变过程看,仍应肯定该文对"自动承认说"质疑有一定依据并产生逆转性影响。这篇文章促使人们回头仔细研读第 15 条内容,发现自动承认说虽然有一定道理然而毕竟缺少足够法条依据。将 WTO 成员国承认中国市场经济地位与其履行中国入世承诺无条件绑定起来理解,并以此作为敦促有关国家尽早承认中国市场经济地位的依据,是否妥当确实有待探讨。"自动承认说"以这样具有某种戏剧性方式被颠覆,奥科纳这位欧洲法学家因这篇博客短文声名大振。

## 5、争议持续发酵

奥科纳短文启动重新解读中国入世议定书第 15 条日落条款的旷日持久争议: 首先是在博客上发生不同观点争论,随后在专业学术性杂志上进行更为深入的讨论,欧洲议会决议是这场争论进入到最后摊牌阶段的标志。

奥科纳博文当天被国际经济法和政策博客(International Economic Law and Policy Blog)转载,随后一个多月在该博客中引发一场多位法律学家与业内人士参与的名为"中国非市场经济地位何时结束"的大讨论,奥科纳本人也再次撰文参与讨论<sup>18</sup>。博客讨论就第 15 条尤其是日落条款的解读提出不同观点,还从该条款文本歧义瑕疵方面分析了意见分歧的技术原因,有关讨论不再有专业人士继续坚持"自动承认说"。附录 2 提供上述博客讨论内容。

WTO《全球贸易与海关期刊》2014年第3期发表WTO法专家Jorge Miranda 题为"解读中国入世议定书第15条"文章(Miranda, 2014),标志对中国入世第15条与市场经济地位问题争论深入到更具有学术性阶段。该文大部分篇幅用于系统考察GATT-WTO历史上不同时期不同国家面临反倾销歧视性方法的具体案例,意在说明这是一个比中国加入WTO具有更久远历史背景的议题,实际上是从非市场经济条款历史来源角度进一步质疑自动承认说。

<sup>&</sup>lt;sup>18</sup> "When Will China's NME Status End?" International Economic Law and Policy Blog, http://worldtradelaw.typepad.com/ielpblog/2011/11/when-will-chinas-nme-status-end.html.

该文认为 2016 年以后 WTO 成员国对中国反倾销仍可采用针对非市场经济体的特殊方法,但是认为进口国需要转而承担指认特定行业不符合市场经济条件的举证责任。

该杂志 2014 年第 4 期接着发表四篇评论文章 (Posner,2014;Graafsma and Kumashova, 2014;Nicely,2014;Gatta,2014a)和一篇背景介绍短文(Gatta,2014b),从不同角度分析解释 "日落条款"。例如 Posner(2014)认为 2016 年以后仍有理由采用非市场经济方法,不过也强调这个解释存在可质疑之处。Graafsma and Kumashova(2014)<sup>19</sup>从欧盟角度分析这一问题,认为第 15 条是对 WTO 反倾销规则一般按排的"暂时偏离(temporary derogation)"而不是"永久修改(permanent modification)",主张中国入世议定书并不必然要求特定国家承认中国市场经济地位,但是中国此后将适用 WTO 反倾销一般规则。

Nicely(2014)则从美国角度分析,认为 WTO 应当在反倾销规则领域一劳永逸地抛弃早已过时的非市场经济方法,在肯定中国适应反倾销一般规则同时,对转型国家国有企业影响较大的特定行业和场合保留采取变通处理的权力<sup>20</sup>。Gatta(2014a)同样否定 2016 年以后WTO 成员国仍有权对中国企业诉诸非市场经济方法,但是主张美欧等国应修改国内相关法律使之与 WTO 规则一致(WTO-compliant)。

《全球贸易与海关期刊》2016 年第 5 期和第 7/8 期进一步刊登 5 篇文章继续上述专题讨论。Vermulst, Sud and Evenett(2016)认为,2016 年底以后欧美等国不能再对中国反倾销中适用替代国方法,然而这并非意味着欧美就没有其他贸易防御措施可用。Miranda(2016a, 2016b)又发表两篇文章,分别对 Nicely(2014)、Graafsma and Kumashova(2014),以及 Vermulst, Sud and Evenett(2016)观点进行反驳,继续阐述自己认为 2016 年以后 WTO 成员国仍可对中国采用非市场经济特殊方法观点。Li(2016)认为,中国工作组报告可以作为判定 2016 年底以后中国应该自动获得市场经济地位认可的依据。Noel(2016)认为非市场经济方法与 WTO 精神相违背,欧盟应该放弃非市场经济方法,并对反倾销调查方法进行调整。

近年有关讨论超出法律解释,延伸到分析欧美承认中国市场经济地位的利弊得失。美国经济政策研究所(Scott, Robert E. and Jiang Xiao,2015)一份报告提出一个耸人听闻观点,认为欧盟承认中国市场经济地位将会造成 350 万工人失业。Christian Oliver(2015)指出,欧盟一些竞争力脆弱行业非常担心承认中国市场经济地位,对欧盟而言关键是要找到一种既承认中国市场经济地位,又对一些行业提供防卫措施的折中方案。美国彼得森国际经济研究所研究人员认为,在当前贸易形势以及中国尚未能满足其国内市场经济标准条件下,欧盟和美国不太可能在 2016 年底承认中国市场经济地位(Hufbauer and Cimino-Isaacs,2016)。

德国慕尼黑 IFO 经济研究所 2016 年 2 月提交给欧洲议会的一份报告,从经济、政治和 法律等角度比较全面分析了欧盟如期履行《中国入世议定书》承诺的利弊得失,认为是否承 认中国市场经济地位不仅涉及反倾销问题,还涉及欧盟未来与中国、美国关系等。报告认为 欧盟应对策略在承认与不承认中国市场经济地位之外还有第三种选择,就是在承认中国市场 经济地位前提下保持一定程度自由裁量权,对中国某些行业适用"特定市场条件"原则,在 其国内市场价格存在扭曲时仍然适用替代国价格<sup>21</sup>。

<sup>&</sup>lt;sup>19</sup> 布鲁塞尔律师。该文提到欧盟委员会贸易事务专员 De Gucht 在 2013 年表达的中国入世 15 年后被承认市场经济地位的观点。

<sup>&</sup>lt;sup>20</sup> 这一主张被 Gatta(2014b)解读为这类场合应采用默认规则(default rule)处理应对。

<sup>&</sup>lt;sup>21</sup> "New trade rules for China? Opportunities and threats for the EU",IFO, 2016.

依据初步检索情况,国内学界在奥科纳质疑文章发表后最初两年公开回应较少<sup>22</sup>。随着十五年截止期临近,去年以来国内这方面研究显著增加这一问题,对"日落条款"解释观点呈现分化趋势。刘学文、朱京安(2015)认为,我国入世十五年后并不能自动获得完全市场经济地位,因为第 15 条(d)项规定,"一旦中国根据该 WTO 进口成员的国内法证实其是一个市场经济体",(a) 项规定方可终止。陈卫东(2015)认为,第 15 条(d)项明确了(a)项终止的范围是"(a)项(ii)目",而并未明确规定 2016 年 12 月 10 日之后(a)项前言和(i)目终止适用。换句话说,上述条款仍存在继续适用的可能。所以,在中国加入 WTO15 周年,即 2016 年 12 月 10 日后,在美国和欧盟的国内法没有作修改的情况下,是否给予市场经济地位问题仍然从属于它们国内相关部门的行政决定,而非时间一到自动获得。

朱兆敏(2015)认为奥科纳观点存在条约解释方法方面的逻辑混乱与错误,存在主观臆断与学术偏执。中国《入世议定书》没有说过中国是非市场经济国家,15年过渡期安排仅仅是中国单方面承诺的临时性安排,并非WTO一般规则。国外学者企图将"非市场经济地位"的不合理义务强加给中国。并认为2016年以后终止的不仅仅是(a)款(ii)项,而是包括(a)款(i)项和(a)款(ii)项全部条款。

刘敬东(2015)认为,由于(a)款(i)项依然存在,因此,即便在2016年后,中国企业在接受反倾销调查时,WTO 其他成员方仍可要求该中国企业提供其所作产业已具备"市场经济"条件的证明,如果证明成立,那么,该成员方必须使用中国的价格或成本。可见,2016年后,(a)款(i)项存在的法律意义主要是中国企业的举证责任,证明自身已具备市场经济条件。彭德雷(2015)认为协议文本存在模糊性,从协议看并没有直接明确中国的市场经济地位自动到期,因此实践中其他成员可能继续采取以替代国成本计算正常价值的特殊方法;或者主张"举证责任倒置",即调查成员的国内申请者如能证明出口价格等是在非市场经济条件下形成,则采取替代国成本加以核算。

2015年7月卢锋在"洪范法律与经济研究所"做题为"所谓'市场经济地位'问题——我国入世'日落条款'准确含义争论"讲座,对中国入世议定书第15条争议问题进行了系统梳理,对我国入世特殊条款的影响进行了定量讨论,对有关争论演变前景与中国应对政策进行了分析(卢锋、李双双、李昕,2015)。鲁政委等人(2015)认为,中国入世议定书第15条相关条款并不意味着我国到期就能够自动取得市场经济地位。根据世贸组织条款,中国要想取得市场经济地位,需要获得包括欧盟、美国在内的十四个国家的分别认可。不管中国是否能够证明自己满足市场经济地位,在2016年12月11日之后,WTO成员国都不能继续使用"替代国价格"作为参考。

任清(2016)认为"在中国入世15年后,除第15条(a)项(ii)目将失效之外,(a)项的序言部分和(i)目也将在实质上失效。届时,进口成员不得再以第15条(a)项作为依据,对中国产品的正常价值适用替代国方法。"该文依据对第15条内容内在逻辑的分析,

<sup>&</sup>lt;sup>22</sup> 漆彤(2013)认为即便是在第 15 条有关规定十五年期限届满之后,也只是意味着进口国不得再在 反倾销调查中使用举证责任倒置的类比国方法。至于中国是不是具备了市场经济地位,依据规则仍要根据 进口国的国内法来进行判断。李雪平(2014)认为,由于国际贸易内容的复杂多样以及各种利益集团的积 极参与和不同诉求,在中国怀着良好愿望满心期待因时效而终止的非市场经济地位问题的同时,也许这一问题在 WTO 某些成员的国内法上会变得复杂起来。任清(2014)认为 2016 年 12 月 11 日以后,WTO 成员国在确定价格可比性时,不能继续使用不依据中国国内价格或成本进行严格比较的方法,而应使用受调查的中国价格或成本。在此意义上,中国将确定获得"市场经济地位"。

结合《中国入世工作组报告》相关内容、美国方面在中美WTO 谈判有关议题的立场和意图、中美谈判人员回忆(a)项(i)目的由来等不同方面资料,对"日落条款"涵义的解读比较具有说服力。针对欧洲法院决议发表引发中国官方回应情况,卢锋、李双双(2016)分析了有关"日落条款"争议进入摊牌阶段的形势特点与演变前景。屠新泉(2016)认为,议定书第15条并非要求各成员承认中国是一个市场经济国家,而是规定无论各成员依据其国内法是否承认中国是一个市场经济国家,都不得再对中国企业采用"替代国"做法。

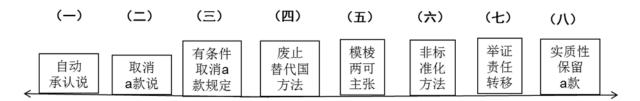
2016年6月6日,中国社科院欧洲所组织专题讨论会,研究人员围绕奥科纳2011年文章观点与欧洲议会决议发表看法<sup>23</sup>。与会人员认为中国是否获得市场经济地位与我国入世议定书第15条没有必然联系,中国难以从该条款中自动获得市场经济地位。然而十五年过渡期后WTO成员国无论是否承认中国市场经济体,都不能在反倾销调查中继续采用针对非市场经济的计算方法。也有研究人员认为,欧盟最初将市场经济地位与"日落条款"相互挂钩,然而随着十五年截止期临近欧盟担心给予中国市场经济地位对其经济、产业、就业等带来不利影响,因而开始考虑如何避免上述"自动机制",转而强调中国没有达到欧盟所谓的市场经济标准。还有观点认为,在中国市场经济地位问题上欧盟成员国态度有异,主要取决于与中国双边经贸关系、特定国家自身经济特点。我国在争取终止"替代国"做法同时,要防止欧盟采取新的变相歧视方法(江时学等,2016)。

## 6、主要观点梳理

从上述诸说并起的争论情况看,针对"日落条款"存在两种截然不同解读观点:一种认为"日落条款"意味着规定中国反倾销特殊方法的整个(a)款内容都失效,可称为"取消(a)款"论;对立观点则认为"日落条款"到期仅意味着(a)-(ii)规定的反倾销特定方法失效,(a)款基本原则规定仍应保留延续,可称为"保留(a)款"论。其它观点大体可看作是这两种基本观点的某种中间或转化形态。"自动承认说"则比"取消(a)款"论更为激进,各种观点加在一起可列举八种之多。

图 1 用一个谱系坐标表示这八种观点相互联系。最左边是"自动承认说",依据上文讨论,这个解读一度曾被广泛接受而流行,然而毕竟缺乏充分法条依据。奥科纳博文发表后,在专业讨论场合很少有人继续坚持这一解读。中国官方后来也不再坚持这一观点和主张。如本文开头所观察,目前中国官方反对把市场经济地位与履行"日落条款"简单联系与混为一谈。

## 图 1、对日落条款不同解释观点



资料来源: 作者根据有关讨论资料整理。

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<sup>&</sup>lt;sup>23</sup> 深度讨论:如何看待中欧经贸关系中的"中国市场经济地位",社科院欧洲研究所网站,2016-06-06 http://ies.cssn.cn/wz/sdtl/201606/t20160606\_3059696.shtml

第二种观点是"废除(a)款"观点。这个理解建立在对整个(a)款逻辑分析解读基础上。(a)款规定了两种方法,一种是采用中国国内成本价格信息的与WTO反倾销一般规则相一致的方法,二是采用不严格依据中国成本价格信息的特殊方法,由于两种场景穷尽了所有可能,因而在日落条款终结第二种情况之后,对中国采取特殊方法的规则依据不复存在,(a)款内容也就随之取消。因而,仔细分析第15条相关法条的逻辑关系和上下文内容含义,"日落条款"实质上针对整个(a)条款。

第三种观点是原则上取消非市场经济地位待遇但是针对特定行业体制特殊情况区别对待,或是在整体承认中国市场经济地位同时通过所谓缺省规则(default rule)应对中国转型阶段仍然存在的某些扭曲。对此可以 2002 年美国承认俄罗斯市场经济地位采取的方式作为参考。当时美国同意承认俄罗斯市场经济地位,同时"保留了考虑持续存在国家干预影响而选择性地不采用外国(即俄罗斯)生产者国内市场价格和成本的权利",区分不同情况"美国商务部考察俄罗斯内部价格和成本,适当场合会采用这些信息决定正常价值,或在不适用时则不采用这些信息"(Nicely,2014,pp. 162-163)。

第四种观点是中国官方回应欧洲法院决议时提出的"取消替代国方法""观点。替代国概念有不同理解,一种是美国反倾销调查中所指的第三国,英文称作 surrogate country approach,对此欧盟则称作 analogue country approach。中国官方所指替代国应当指的是所有第三国方法。前文引述的中国官方有关政策立场,建立在对"日落条款"的特定解读基础之上。由于(a)条款特殊方法表现为对中国反倾销采用第三国或替代国方法,因而全面取消替代国方法等于实质性取消(a)条款。

最右边第八种观点是"实质性保留(a)款论",大体认为2016年以后WTO成员国仍有依据采取非市场性方法,因为取消(a)-(ii)后(a)款导言部分对两种方法规定以及(a)-(i)规定仍然有效。这个解读等于说,"日落条款"到期后什么也不会"落下",其最大困难在于武断否定了"日落条款"对中国本应带来的利益改善,实质性取消了"日落条款"的真实意义,从而违背了"有效条约解读规则(the principle of effective treaty interpretation)"这个解读法律条文的基本原则<sup>24</sup>。这一观点在职业法学家和严肃学者讨论中并不多见,不过有关博客讨论有个别论者对第15条(d)款片面解释得到这一观点。

第七种观点认为 2016 年以后 WTO 成员仍可采用特殊方法,但是相关举证负担转移到起诉方(shift of burden of proofing)。这个观点在 2011 年底针对奥科纳文章网络讨论中就有人提出,认为 2016 年以后举证责任将会转移到正常 WTO 规则,即调查方在诉诸任何非市场经济地位方法之前将不得不证明中国相关行业存在非市场经济条件。Miranda(2014)表达类似观点。该文认为(a)-(ii)的特殊条款建立在"可辨驳设定(rebuttable presumption)"基础上,即事先假定中国属于非市场经济因而 WTO 成员国进行反倾销调查时可以采用特殊方法,然而即便在过渡期内中国企业也可对此置辩反驳,有可能通过举证说明特定行业存在"市场经济条件"而摆脱非市场经济待遇。该文进一步认为,"日落条款"到期后(a)款规定原则上仍然有效,然而举证责任负担转移到进口国方面,即调查发起方在采用特殊方法之前需证明中国特定行业不存在"市场经济条件"。这一观点除了与所有主张"保留(a)款"论者面临共同可质疑处之外还面临其他难题:一是第15条根本没有涉及举证责任内容,二

<sup>&</sup>lt;sup>24</sup> "One of the well-established principle of treaty interpretation is the principle of effective treaty interpretation 'an interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility' Appellate Body Report, US-Gasoline, WT/DS2/AB/R, 23) "(Graafsma and Kumashova, 2014, p. 153)。

是未来判定中国市场经济程度将在 WTO 系统内部对仲裁系统引入难以承受压力(参见 Posner 2014, Gatta 2014b)。

第六种观点是欧洲法院提出的继续采用非标准化方法。欧洲法院决议第六点指出:依据并充分利用中国入世议定书第 15 条为利用非标准性方法提供机会的相关法条内容,(欧洲法院)得以确信在中国满足欧盟有关市场经济五条标准之前,欧盟应当在对源自中国进口品反倾销反补贴进行价格表时采用非标准性方法<sup>25</sup>。决议认为中国加入 WTO 议定书第 15 条规定某些内容仍将有效,可作为今后继续实施非标准方法的理由。虽然语焉不详,从决议语境看接受了"保留(a)款论"某种因素,然而"非标准方法"表述较有弹性,与"取消替代国方法"并非完全对立。

第五种观点认为"维持(a)款论"及其对立观点都有道理。Posner(2014)表达这一折中观点。他对日落条款解释大体接受了 Miranda(2014)有关(a)条款仍然有效观点,同时举例说明多方面相反观点<sup>26</sup>。这类解读观点最后往往面临尴尬局面,如 Posner(2014)不同意举证责任转移观点,然而又认为这个不理想解释或许有助于提供未来实际解决方法。他还进一步预测,如果采取这一方法,中国很可能会提出挑战,最终结果要看 WTO 上诉机构(AB)<sup>27</sup>如何就此给出最终裁定。

## 7、几点讨论

上述梳理结果提出三点需要进一步分析探讨的问题:第一,诸多解读中哪种较为合理?第二,本应含义确定的法律条文为何引发如此复杂争议?第三,争论前景如何?

## 7-1、合理的解释

全面分析有关法条上下文含义以及客观情境,比较合理解释应是"取消替代国方法",同时意味着实质性"取消 a 款特殊方法"。道理很简单,从第 15 条内容看,只有(a)-(ii)条件下 WTO 成员国才有理由在对中国进口商品发起反倾销调查时采用替代国方法,(d)款"日落条款"规定中国入世十五年后(a)-(ii)作废,实际上也就否定了整个替代国方法。进一步理解,随着反倾销替代国方法终止,(a)条款实质内容也就失去意义,因而比较合理解释应是"取消替代国方法",同时意味着实质性"取消 a 款特殊方法"。

对上述解读具有很强说服力的证据,是中美有关中国入世双边协议以及中国入世议定书先后签订后,美国高官政要与相关机构在很多场合阐述中美协议及中国入世议定书中包含的反倾销非市场经济特殊条款存在 15 年有效期限制。2001 年 11 月 10 日世贸组织多哈第四次部长级会议审议批准中国加入世贸组织,11 月 13 日美国总统发布报告比较中国入世最终条款与中美协议关系,指出依据中美协议"中国入世十五年间美国可以在未来反倾销案例中继续使用目前的反倾销方法(即认为中国是非市场经济体)"。"上述条款被纳入中国最终入世

<sup>&</sup>lt;sup>25</sup> European Parliament resolution of 12 May 2016 on China's market economy status, 2016/2677/RSP.

<sup>&</sup>lt;sup>26</sup> 如博客讨论也有人认为,观察有关"日落条款"讨论感觉置于一个悖论式境地: 你或者要接受一个怪异观点,或要接受一个更为怪异观点。

<sup>&</sup>lt;sup>27</sup> The Appellate Body (AB) of the World Trade Organization is a standing body of seven persons that hears appeals from reports issued by panels in disputes brought by WTO members. It was established in 1995 under Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). The Appellate Body can uphold, modify or reverse the legal findings and conclusions of a panel, and Appellate Body Reports, once adopted by the Dispute Settlement Body (DSB), must be accepted by the parties to the dispute. The Appellate Body has its seat in Geneva, Switzerland.

一揽子协定,没有实质性改变"。本文附录 3 搜集后来美国官方在几十种不同场合就此问题发表观点,反复重申针对中国反倾销非市场经济条款存在十五年有效期理解。

例如《华盛顿时报》报道美国贸易谈判代表查琳·巴尔舍夫斯基在 1999 年 11 月 15 日 评论中美有关中国入世双边协议指出:"(有关谈判)去年春天以来未能解决的最重要问题中,有两个分别涉及对进口飙升采取限制特殊措施以及反倾销时采用针对'非市场经济'的特殊方法"。去年春天中国人坚持对这些条款要有非常严格的分步取消规定。我们同意中国立场,这些条款当然不会永久存在,但是我们认为它们需要延续存在合理长的时期。(最后达成协议中) ……有关应用'特殊反倾销'方法条款将持续 15 年"。这位美国贸易谈判代表 2000年 2 月 10 日在美国参议院金融委员会作证时指出:"与中国协议包含……十五年内持续采用'非市场经济'反倾销方法条款"。2001年 12 月 11 日美国贸易谈判代表发布有关中国加入世界贸易组织情况说明指出:"中国入世后 15 年,美国和其他 WTO 成员国对中国企业反倾销调查时将有能力继续采用特殊的非市场经济方法来衡量倾销"。

2000年1月24日美国总统克林顿致信美国众议院与参议院领袖指出:"中国同意在加入世贸组织后15年内允许美国采用针对非市场经济国家设计的制衡倾销的特殊方法。"2000年2月15日美国白宫关于中美协议有关产业部门情况说明"反倾销:非市场方法"部分指出:"中国同意目前美国依据其反倾销法针对非市场经济地位国家做法,可以在中国入世后15年内应用到中国进口场合"。2002年10月3日美国问责办公室(US General Accounting Office)在分析中国入世对WTO其他成员国承诺时指出:"这些承诺允许WTO成员国对中国进口反倾销调查时采用不同方法持续15年(到2016年)"。

2002 年美国贸易谈判代表向国会呈报有关中国履行 WTO 承诺情况报告(Report to Congress on China's WTO Compliance)指出: "虽然中国入世议定书重点内容是保证中国市场向 WTO 成员国开放,中国入世协议也包括几方面旨在保护美国或其他 WTO 成员国工业和工人可能遭遇进口飙升与不公正贸易做法的防护机制。这些措施包括针对中国独特的保障机制条款,允许 WTO 成员国限制对其国内市场造成扰动的中国进口增长(适用 12 年),特殊纺织品保障措施(适用 7 年)以及发起针对中国企业反倾销案件衡量倾销时有能力持续采用特殊的非市场经济方法(适用 15 年)。本机构承诺维持这些机制有效性以维护遭受影响的美国企业、工人和农民的利益"。美国贸易谈判代表此后每年都会发表这类报告,重声类似说明和判断,可见把"日落条款"解释为取消反倾销特殊方法本来根本不应有争论。

## 7-2、可辩驳设定原则

另外中国入世议定书还规定了提前结束替代国特殊方法的两个途径:一是(d)款第一句规定,如果中国根据特定WTO成员国国内法证实了自身是市场经济体,则(a)款规定即应终止。二是(d)款第三句规定,如果中国根据WTO成员国国内法证实了某一特定产业部门部门具备市场经济条件,则(a)款中的非市场经济调控不得再对该产业或部门适用。可见虽然中国在反倾销问题上接受了采用替代国方法的区别性待遇,然而"日落条款"赋予中国十五年过渡期后摆脱替代国方法权利,同时依据"可辩驳设定原则(rebuttable presumption principle)"中国具有在双边或特定行业局部场合提前摆脱区别性待遇权利。

这个原则不同于早年东欧国家加入 GATT 规定反倾销区别性待遇时采用的"无条件判定方法(all or nonthing approach)"。多边贸易规则框架内引入非市场经济地位概念,滥觞于上世纪 60-70 年代针对东欧国家申请加入关税总协议(GATT)的反倾销特殊安排。据研究1966 年南斯拉夫入关时 GATT 肯定其市场经济体制没有设置反倾销特殊条款,但是对波兰

(1967)、罗马尼亚(1971)、匈牙利(1973)都设置了反倾销特殊条款,规定 GATT 成员国对其可采用反倾销特殊方法。虽然相关法条都要求 GATT 成员国实施特殊方法时应"适当而合理"("appropriate and not unreasonable"),然而仅限于督促发起调查国实施规则权利应自我克制,非市场经济地位与方法通过"无条件判定"方式引入,被调查国不具有置疑辩驳权利(Miranda,2014)。

随着 20 世纪 70 年代东欧国家开始经济改革,特别是中国实施渐进式改革开放战略,50-60 年代前苏联主导的东方阵营所属计划经济国家先后开始体制转型,推动美国相关法律以及 WTO 相关法律后续调整。例如美国针对转型国家"双反"贸易救助措施法律 1988 年实施重要调整,认为在中国这样仍属于计划体制然而经历转型的经济体,由于出现"资本主义泡泡"或"资本主义萌芽(capitalist bubbles)",也可能存在某些"具有市场导向性行业(market oriented industrieis: MOI)",因而相关法律需区别对待。1988 年 8 月美国颁布《1988 年综合贸易竞争法》,提出要对中国市场导向情况进行研究,包括研究市场导向对中国市场政策和价格结构的影响以及中国国内价格与世界价格的关系; 在美国相关法律实践中如何应对和容纳中国日益增加的市场经济导向的实施因素; 修改美国反倾销法以适应中国这样向市场导向经济转型的国家的需要<sup>28</sup>。这意味着转型国家无论是早先入关还是后来入世,沿袭早先"无条件推定方式"设置反倾销歧视性条款,从美国角度看已不合时宜了<sup>29</sup>。

上述体制演变观察视角对中国入世谈判具有重要意义。中国 1992 年就已确立社会主义市场经济体制改革目标,到上世纪 90 年代末中国入世谈判进入冲刺阶段时,中国经过 20 余年改革开放已初步建立市场经济体制架构。如贸易体制早已从几大国有贸易公司垄断外贸体制,转变为除了个别或少数商品外大都放开经营的体制。价格方面除了少数商品外,到上世纪 90 年代九成以上商品和劳务定价已经完全放开或基本放开。在企业构成方面国有企业比例大幅下降并且治理结构明显转变,充满活力的民营企业和外资企业早已成为中国经济增长的最重要动力。中国入世谈判时承诺继续深化改革和扩大开放。考虑中国实际情况,中美双边入世谈判与中国入世议定书,在对中国设置反倾销特殊方法时采取了前所未有的"可辩驳设定原则"。《入世议定书》虽规定 WTO 成员国在 15 年过渡期内对中国进口商品反倾销调查时可采用替代国特殊方法,同时通过两方面规则安排间接肯定中国具有摆脱特殊方法的权利:一是在过渡期内也允许中国企业、行业和政府抗辩,如果成功就采用市场经济一般性方法。二是过渡期后摆脱特殊方法并回归正常 WTO 规则。

## 7-3、争论的原因

中国入世议定书接受的特殊贸易规则,除了十五年期限的反倾销条款,还包括七年期纺织品特殊条款、十二年期特保条款、无期限反补贴特殊条款等。履行其他特殊条款并没有在

<sup>&</sup>lt;sup>28</sup> Omnibus Trade and Competitiveness Act of 1988/SEC. 1336. STUDIES. (a) STUDY OF MARKET ORIENTATION OF CHINA.—The Secretary of Commerce, in consultation with the heads of other appropriate Federal Secretary, shall undertake a study regarding the new market orientation of the People's Republic of China. The study shall address, but not be limited to—(1) the effect of the new orientation on Chinese market policies and price structure, and the relationship between domestic Chinese prices and world prices;(2) the extent to which United States trade law practices can accommodate the increased market orientation of the Chinese economy; and (3) the possible need for changes in United States antidumping laws as they apply to foreign countries, such as China, which are in transition to a more market-oriented economy.

<sup>&</sup>lt;sup>29</sup> 后文第8节对美国反补贴政策演变历史考察说明,推动这一立法原则转变的一个现实利益驱动因素, 是美国部分利益集团试图突破由20世纪80年代前期乔治城钢铁公司对华反补贴判例所确定的美国对转型 国家不采取反补贴方法的政策传统。

解读条款含义上出现不同意见长期分歧,唯有在解读反倾销"日落条款"上争论持久激烈,不同观点有八种之多。出现这个罕见现象主要有两点原因。

一是"自动承认说"早期流行,中国政府大力开展争取各国尽早承认我国市场经济地位外交攻势,一度产生先声夺人效果。首先应指出,由于第15条设定了提前局部终止反倾销特殊方法条款,我国入世后积极争取有关国家承认市场经济地位以便在局部场合提前终结反倾销特殊方法,是合乎逻辑与情理的举措。不过由于"日落条款"并非明确要求过渡期后WTO成员国一定承认中国市场经济地位,"自动承认说"确实缺乏充分法条依据。"自动承认说"经奥科纳文章高调质疑偃旗息鼓,这个带有戏剧性变化客观上鼓励国际法学界人士对解读"日落条款"采取更多质疑性分析立场,导致对有关条款过于技术性与怀疑性解读倾向,一些观点明显违背对法律条款全面与善意解读原则,形成诸说并存莫衷一是局面。换言之,如果没有"自动承认说"认知和政策实践的曲折过程,如果我国一开始就明确坚持"取消替代国方法"的正确立场,把要求WTO成员国履行"日落条款"义务与承认中国市场经济地位适当分开处理,有理由推测针对"日落条款"解读很难发生上述争辩难解的局面。

二是有关条款表述方式百密一疏不利于对有关条款解读达成合理共识。虽然全面分析目前条款与相关证据也能正确理解"日落条款"真实含义,然而有关法条表述细节可能确实存在某种瑕疵歧义。可以设想在"日落条款"表述的"(a)-(ii)"中去掉"(ii)",在陈述两种提前终止非市场经济方法之后规定:"无论如何,(a)项规定应在加入之日后 15 年终止",应有利于提升其表述精准度并釜底抽薪消除持久争论可能。从上文介绍情况看,美国当时与中国谈判入世条件基本立场是要求在十五年内保留反倾销特殊方法,因而与十五年后取消(a)款要求并无矛盾。依据中美谈判参与人员回忆,美国方面最初提供第 15 条文本初稿并未将(a)款区分为(i)与(ii)两目,后来应中方出于其他考虑要求下才分成(i)与(ii)两目行文表述30。由此可合理推测,针对整个(a)款表述"日落条款"在当时草拟议定书场合应不会面临很大困难,然而应有助于免除后来一些争论。国外有关研究讨论对我国入世文件文本提出不少质疑,个别论者缺乏依据和夸大其词的评论观点并不正确。不过就理解本文研究主题而言,确有必要探讨有关法条个别细节表述是否存在瑕疵问题。当然,应当明确指出,当时入世谈判面临巨大争议和压力背景下,我国入世谈判人员推敲审定几百页入世法律文件是艰苦复杂工作,个别场合出现百密一疏瑕疵完全可以理解。应注意把这方面情况置于特定历史情境理解,充分肯定入世战略成功历史意义以及我国参与人员的重要贡献。

#### 7-3、现状与前景

<sup>30 &</sup>quot;据参加中国入世谈判包括 1999 年中美双边谈判的文本核对工作的一位前辈回忆,第 15 条 (a) 项的最初案文系由美方提出,该案文并不是分成两目,而是合在一起的一段话。大意是:中国在很多方面已经是市场经济,但在某些方面还不是市场经济;在确定价格可比性时,如果中国企业不能证明其所在行业具备市场经济条件,则进口成员可以不使用中国产品的价格或成本。中方反对在案文中就中国是否为市场经济作出定性,要求删除"中国在很多方面已经是市场经济"等表述。中方还要求在否定性的条款(如果不能证明具备市场经济条件,则可用替代国价格)之前,增加肯定性的条款,即如果能够证明具备市场经济条件,则应使用本国价格或成本。美方同意了中方的这两点要求,于是将(a)项分拆成目前的序言、(i)目和(ii)目。这一谈判历史也印证前述观点,(a)项是一有机整体,序言和(i)目两者与(ii)目不可分割,(ii)目的失效必然造成前两者在实质上的失效"(任清:"'中国市场经济地位'的 2016 问题",财新网,2016 年 5 月 13 日)。

今年5月12日欧洲法院通过不承认中国市场经济地位决议引发中国官方回应,加上后续相关事件演进,标志经历十余年"日落条款"争议进入最后摊牌阶段。中国政府早先争取主要发达国家承认"市场经济地位"时,出于种种考虑对欧盟工作做得最多,欧盟议会上述立场无疑令人感到失望,"不具有任何建设性"评语准确表达这一点。随着"日落条款"截止期逐步逼近,有关争议最后必然要通过相关各方亮明官方立场加以了结。

目前全球经济正处于后危机时代的深度调整期,贸易增速近年下降并在去年出现大幅负增长;同时全球钢铁产业转移进入关键阶段,全球性产能过剩与贸易再平衡同时推进,给包括发达国家在内的各国钢铁业带来调整压力。欧盟等发达国家产业总体生产率虽然较高,然而国际竞争力相对演变处于弱势,在调整压力加大环境下倾向于抱怨指责出口表现较好的中国,并试图借助贸易保护主义解脱困境。这一形势下,利用"日落条款"争议做文章成为一个自然选择。

从中国政府回应欧洲法院议会观点看,中国官方有关这一问题政策立场已发生实质性调整:在早已放弃"自动承认说"基础上,近来进一步放弃说服主要发达国家提前承认中国市场经济地位,回归到要求WTO成员国在我国入世十五年到期后终止采用替代国特殊方法。外交部长王毅评论欧洲法院决议指出:"请遵守承诺",主张回到第15条约定内容并兑现承诺,在对中国出口实施反倾销调查时一劳永逸终止采用替代国方法。由于要求WTO成员国放弃替代国方法与"日落条款"内容一致,中国目前政策立场具有充分依据,在未来有关履行条约磋商方面处于主动有利地位。

由于可以理解的原因,中国官方对"自动承认说"认识转变过程不愿过多涉及;目前美欧策略则是利用这一情况纠缠此前曲折认知过程,刻意把落实"日落条款"承诺问题转换为中国市场经济地位议题以提升其话语权。例如在7月14日WTO货物贸易理事会正式会议上,中国提醒成员国中国入世议定书第15条(a)款规定将在2016年12月11日到期,WTO成员国应停止对中国使用"替代国"反倾销调查措施。对此美国代表有意把问题转换为是否承认中国市场经济地位议题,重弹美国届时不会自动承认中国市场经济地位的老调,并节外生枝论及中国铝业和钢铁行业产能过剩问题31。

虽然目前形势仍然扑朔迷离,然而随着中国政策立场发生两阶段务实调整,相关各方实际立场差距其实小于表面呈现的不一致程度;反过来看,早年围绕这一问题有关国家官方看起来没有直接争议的外交对话,其实遮盖了实质政策立场的较大差距分歧。各方在摊牌阶段如何出牌?持续十余年争论如何收场?今年底有关形势如何演变将会继续引发广泛关注,并对我国外部经贸环境甚至 WTO 多边规则未来前景带来影响。

从目前情况看,最可能演变前景是在 WTO 框架内求得解决。一种可能是中国坚持最近明确表述的"终止替代国方法"立场,并在"日落条款"截止期后对仍然采取替代国方法国家提出磋商,并保留在 WTO 框架内诉诸争端解决机制的权利。二是在中国终止"替代国方法"主张与欧盟维持"非标准方法"诉求之间寻求交集合作并达成某种共识。三是美欧等国承认中国市场经济地位同时保留对某些行业适用"特定市场条件"原则,但是有关"特定市场条件"举证责任转移到进口国。

## 8、反补贴特殊方法与争议

 $<sup>^{31}</sup>$  "美国回应中方 WTO 声明 拒绝 12 月授予中国市场经济地位",一财网,2016 年 7 月 15 日。

中国入世议定书第 15 条 (b) 款规定的反补贴特殊方法,虽没有像"日落条款"那样引发社会各界与国际社会广泛关注,然而在如何履行相关规则方面也存在争议。美国改变早先主要采用反倾销特殊方法处理针对体制转型国家贸易争端而对利用反补贴政策工具比较克制的传统政策方针,对我国未来反补贴政策环境将产生重要影响。随着"日落条款"到期后对中国企业反倾销将难以继续采用替代国方法,我国未来面临反补贴压力可能会趋势性上升,因而需结合研究我国入世第 15 条 (b) 款有关反补贴特殊方法规定及其影响。

## 8-1、反补贴区别性条款内容

反补贴是指一国政府依据WTO规则对某国出口企业涉及从政府获得补贴行为采取的规制性措施。WTO 反补贴协议对成员国反补贴措施做出了全面界定,对中国设置的反补贴区别性条款体现在前文引述我国入世议定书第 15 条(b)款中。(b)款首先肯定WTO 反补贴一般条款对中国适用性,但是同时规定"如此种适用遇有特殊困难,则该WTO 进口成员可使用考虑到中国国内现有情况和条件并非总能用作适当基准这一可能性的确定和衡量补贴利益的方法。在适用此类方法时,只要可行,该WTO 进口成员在考虑使用中国以外的情况和条件之前,应依据此类现有情况和条件进行调整。"

在如何解读(b)款内容含义方面也存在需要探讨商権之处。例如有观点认为"WTO 其他成员承诺,在中国加入之日后 15 年内完全取消对中国非市场经济的待遇和做法,即完全取消目前在对中国出口产品进行反倾销和反补贴调查时适用第三国替代价格的做法" <sup>32</sup>。其实细读有关法条可见,不同于针对反倾销区别性方法通过日落条款规定了十五年年有效期,(b)款反补贴条款没有规定截止日期。

又如认为获得市场经济待遇就能免除反补贴区别性方法也值得探讨。研究人员认为,在过渡期如果中国能自证市场经济地位和条件,"则 WTO 成员应根据《反倾销协定》和《补贴与反补贴措施协定》,在确定价格可比性时,采用中国的国内生产成本或价格分别计算倾销幅度或确定补贴金额"<sup>33</sup>。其实阅读(b)款内容可见,反补贴与市场经济地位问题无关,即便我国能自证市场经济地位或条件,仍可能面临反补贴特殊待遇。

再如认为在过渡期可以像实施反倾销条款那样直接采用替代国信息方法可能也不准确。 (b) 款最后一段话是"在适用此类方法时,只要可行,该 WTO 进口成员在考虑使用中国 以外的情况和条件之前,应依据此类现有情况和条件进行调整。"其中最后一句话"此类现 有情况和条件"应解读为中国国内的现有情况和条件,而在(a) 款赋予 WTO 成员在反倾 销时采用区别性方法没有这句对中国有利的限制性约定。这意味着 WTO 成员国实施反补贴 方法时,通常不能任意采用第三国成本价格作为基准衡量反补贴税幅度。

(b) 款内容要点包括:第一,赋予 WTO 成员国对中国出口品实施反补贴调查获取价格成本数据时采用特殊方法权利。第二,中国方面对反补贴区别性方法不能通过自证属于市场经济或特定行业满足市场经济条件而取消。第三,对反补贴区别性方法没有像反倾销方法那样通过"日落条款"规定截止日期。第四,不同于在15年过渡期内实施反倾销区别性方法可能直接采用第三国情况作为价格成本标准,采用反补贴区别性方法时需依据中国国内情况和条件加以调整。

<sup>32 《</sup>加入世界贸易组织重要法律法规文件及释义》,中国法制出版社,2002年,第1789页。33 同32。

还需讨论的是,即便没有特殊条款,作为进口国的 WTO 成员国也可能采用非出口国的价格作为反补贴调查的价格基准,例如 2004 年美国对加拿大特定软木材反补贴调查中就使用了美国国内市场价格作为基准(黄东黎,2010)。然而中国入世议定书规定特殊方法仍会对我国面临反补贴形势带来显著影响。张斌(2013)研究美国 1980-2012 年间对意大利、加拿大、韩国、印度、巴西五国反补贴调查案,发现外部基准使用频率占到这些案件三成左右34。然而该研究发现美国对中国反补贴调查中采用外部基准适用情形更广泛。"除赠款、贷款和上游国企提供投入品、原材料外,还适用于政府提供土地补贴利益的度量"。"外部基准采用频率显著高于内部基准。由于认定中国的银行体系不存在实际运行的市场、土地一级和二级市场也均由政府控制,基准利率(适用赠款和贷款)和基准地价 100%来自外部,而政府通过国有企业提供原材料、投入品补贴利益的确定也均采用国际市场价格作为基准,只有基准电价全面采用国内基准。在可获终裁报告 29 起案件中。外部基准与内部基准之比约为 7:1"张斌(2013)。

## 8-2、美国对转型国传统反补贴政策

美国《1930年关税法》原第 303条对反补贴作出了一般规定,"任何国家、附属国、殖民地、省政府、或者政府的其他政治分支机构"直接或者间接进行补贴时,应该征收反补贴税。<sup>35</sup>从上述法条中"任何国家"一词表述看,美国反补贴法并未排除适用于非市场经济国家。然而 1983年美国发生的著名的乔治城钢铁反补贴案,通过一波三折过程确立了反补贴法不适用于非市场经济的先例,形成一段时期美国对转型国家实施"双反"调查主要采用反倾销而一般不采用反补贴的政策立场。

1983 年 11 月,美国乔治城钢铁公司等多家钢铁厂商指控来自波兰和捷克的碳钢丝杆享有政府补贴并申请反补贴调查。商务部在初裁中根据《1930 年关税法》第 303 条 "任何国家"规定,认定反补贴法同样适用于非市场经济(石培培,2012)。然而在终裁中商务部改变态度,裁定美国反补贴法不适用于非市场经济国家<sup>36</sup>。申请调查企业不服美国商务部裁定,将该案上告到美国国际贸易法院。1985 年该院审理后否定商务部裁定,认为反补贴法同样适用于非市场经济体,形成商务部与国际贸易法院观点截然对立的局面。

主张"补贴适用论"的美国国际贸易法院认为,非市场经济国家并非不存在补贴,只是在衡量这些国家补贴时存在技术困难。在对非市场经济适用反倾销法时,美国相关法律提供了替代国方法和生产要素法以衡量倾销幅度,反补贴法缺少这方面配套方法。国际贸易法院认为商务部需要建立针对非市场经济国家进口品补贴的计算衡量办法,而不是否定反补贴对

<sup>35</sup> [W]henever any country, dependency, colony, province, or other political subdivision of government ... shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country, dependency, colony, province, or other political subdivision of government, then upon the importation of such article or merchandise into the United States, whether ... imported directly ... or otherwise, ... there shall be levied and paid, in all such cases, in addition to any duties otherwise imposed, a duty equal to the net amount of such bounty or grant, however the same be paid or bestowed. (http://openjurist.org/801/f2d/1308/georgetown-steel-corporation-v-united-states)

<sup>34</sup> 理由包含涉案国金融体系存在国家垄断(巴西和韩国)、受补贴企业资信不良(此类情形在对巴西、意大利、加拿大和韩国钢铁产品案件中均存在)、涉案产品上游原材料市场国家或国有企业垄断(加拿大、韩国、印度)等(张斌(2013)

<sup>&</sup>lt;sup>36</sup> 801 F.2d 1308, 8 ITRD 1161, 4 Fed. Cir. (T) 143GEORGETOWN STEEL CORPORATION, et al., Appellees, the UNITED STATES, Appellant.Appeal No. 85-2805.United States Court of Appeals, Federal Circuit.Sept.18, 1986. para1.

非市场经济国家的适用性。案件进一步上诉到美国联邦巡回上诉法院,1986年9月上诉法院宣布,支持商务部认定美国反补贴法律措施不适用于非市场经济<sup>37</sup>。

美国商务部与上诉法院裁决认定反补贴不适用于非市场经济国家,显然并非仅仅由于衡量补贴的技术困难,而是至少基于另外两点更为深入全面的考量。第一,在中央计划经济国家,政府决定并控制企业何时、何地、以什么价格和支付方式出售何种产品,国家承担企业盈亏,政府对国营企业补贴实质上是自我补贴。这种由体制基本原则决定必然存在的补贴,在性质上不同于美国相关法律所针对的以市场经济体制运行特例形式存在的补贴<sup>38</sup>。第二,从贸易防卫角度考虑,美国可用反倾销法应对计划经济国家不合理低价出口,不采用反补贴措施不会损害美国利益<sup>39</sup>。于是这个历时近三年的乔治城钢铁公司案例,确立了一段时间美国一般不采用反补贴措施应对美国认为属于非市场经济国家的判例原则。直到 1998 年美国商务部规章前言中仍明确指出:"反补贴法不适用非市场经济国家原则已被联邦巡回法院在乔治城钢铁案件中确认,我们准备延续这种做法"<sup>40</sup>。

不过需要指出,确立上述原则并不意味着中国等转型国家出口企业真得可以完全免除来自美国的反补贴风险,实际上美国企业界和相关利益集团一直在不正面挑战上述法律立场前提下<sup>41</sup>,努力通过变通方式引入针对中国等转型国家反补贴措施。例如 1991 年美国拉科斯(Lasko)金属有限公司对中国进口摇头扇和吊扇申请发起反补贴调查,为与乔治城钢铁公司案件判例保持一致,该案件请求人要求商务部不要仅着眼中国整体经济制度性质,而应将中国风扇行业单独作为一个市场导向产业,从而摆脱反补贴方法不适用于非市场经济国家的立法原则,获得对中国企业适用反补贴法权利。

上文讨论"可辨驳设定方法"提到,根据美国《1988年综合贸易与竞争法》,对非市场经济进行反倾销调查时可适用"市场导向行业"测试法,允许满足条件企业使用其自身价值作为正常价值(高永富、张玉卿,2001)。这表明美国相关法律认可传统非市场经济体可能向市场经济转化,在转型过程中特定部门可能免受非市场经济扭曲,计算倾销幅度使用这类部门在非市场经济体整体环境中发生的实际价格和/或成本具有可行性。对于反补贴案例请求而言,既然一个市场导向的部门自身价格和成本可被用来衡量倾销程度,认定其发生补贴也是有意义的并可以适当量化(李先云,2007),因而反补贴法有可能适用于电风扇部门。

商务部认可了请求方对中国进口风扇适用反补贴法理由,以存在市场导向产业为依据将本案与乔治敦城钢铁案区别对待。然而一个行业要成为市场经济导向行业需具备多方面条件,包括被调查产品定价和产量必须实际上不受政府干预,被调查产品所属行业应以私有和集体所有制为主要特征,生产被调查产品无论是原材料还是非原材料的所有计入商品总值投入必须按市场决定价格支付等等。美国商务部认为中国的电风扇行业不符合这些条件,因而裁定

<sup>&</sup>lt;sup>37</sup> 801 F.2d 1308,8 ITRD 1161, 4 Fed. Cir. (T) 143GEORGETOWN STEEL CORPORATION, et al., Appellees, the UNITED STATES, Appellant.Appeal No. 85-2805.United States Court of Appeals, Federal Circuit.Sept.18, 1986. para2.

<sup>&</sup>lt;sup>38</sup> 801 F.2d1308,8 ITRD 1161, 4 Fed. Cir. (T) 143GEORGETOWN STEEL CORPORATION, et al., Appellees, the UNITED STATES, Appellant.Appeal No. 85-2805.United States Court of Appeals,Federal Circuit.Sept.18,1986.para 42, 46.

<sup>&</sup>lt;sup>39</sup> 801 F.2d 1308,8 ITRD 1161, 4 Fed. Cir. (T) 143GEORGETOWN STEEL CORPORATION, et al., Appellees, the UNITED STATES, Appellant.Appeal No. 85-2805.United States Court of Appeals, Federal Circuit.Sept.18, 1986.para47.

<sup>&</sup>lt;sup>40</sup> 19CFR Part 351: countervailing duties: final rule.

<sup>41</sup> 美国《1988年综合贸易和竞争法》早期文本建议当补贴可被合理认定和计算情况下将反补贴法适用于非市场经济国家。这一条款引发争议后被删除((布鲁斯•E.克拉伯著,蒋兆康译(2000):《美国对外贸易法和海关法》,法律出版社,2000年)。

反补贴法仍不能适用于中国电风扇产业(崔日明、李兵、赵勇,2006)。1993年针对我出口美纺织品反补贴指控,最终也因种种原因并未能获得成功(任冬、吕峰,2003)。

另外欧盟立法中并未规定不对非市场经济国家进行反补贴调查,不过欧盟在 2010 年之前从未对非市场经济国家适用国反补贴,因而反补贴法一般不适用于非市场经济国家成为某种实施惯例。美国与欧盟以外 WTO 成员国也大体沿袭采用了类似惯例。

## 8-3、美国修改对转型国反补贴法律

1999 年中美签订《中国入世双边协议》,其中"反倾销和补贴方法"部分规定"当我们针对中国采用反补贴法时,我们在衡量任何可能存在的补贴利益时可以考虑中国经济的特征属性<sup>42</sup>"。由此肯定了对中国企业采用反补贴特殊方法权利,也为后来美国修改有关法律埋下伏笔。在中国入世后出口竞争力提升新形势下,过去十年来美国多方谋求推进修改国内相关立法,转而对中国企业直接采用反补贴特殊方法,代表美国反补贴法的重大调整与转变。

2004年6月,加拿大边境服务署修改《特别进口措施法》相关内容,改变以往对中国市场经济地位问题态度,规定在对中国产品发起的反倾销调查及其复审中,将首先推定被调查中国行业是否为市场导向行业再决定能否实施反补贴调查。同年加拿大罕见地接连四次对中国企业发起反倾销反补贴合并调查,使得中国一直担心面临反补贴调查风险变为现实,"非市场经济地位"不再成为中国企业免除反补贴困扰的屏障。加拿大做法使美国主张使用反补贴法遏制中国进口的利益诉求得到鼓励,美国相关利益方多方推动相关修法程序,经过多方努力最终改变美国不对转型国家适用反补贴措施的传统法律与政策立场。

2005 年美国国会众议院共和党议员费尔·英格利希(Phil English)提交《美国贸易权利执行法案》提案。7月27日,美国众议院通过《美国贸易权利执行法案》。法案通过对《1930年关税法》第701(a)(1)节的修正,将反补贴税适用范围扩大到非市场经济国家。具体做法是在《1930年关税法》第701(a)(1)节中所有"国家"后面加上"包括非市场经济国家"字样,同时在第771节(5)(E)后加入"关于中华人民共和国,如果行政机关在计算补贴利益遇到重大阻碍时,可使用中国以外标准进行衡量,但应当充分考虑中国的实际情况,并相应调整标准"(黄东黎,2012)。但是此法由于被一些民主党参议员认为包含与共和党利益交换意图,在参议院投票中遭到不少民主党参议员反对未获通过,因而未能生效<sup>43</sup>。

2007 年美国参议院和众议院分别再度提出修法议案,一是英格利希携手民主党议员阿特·戴维(Artur Davis)提出《2007 年非市场经济贸易补救法案》 (Nonmarket Economy Trade Remedy Act of 2007)<sup>44</sup>。二是参议院议员提出"制止海外补贴法案"(Stopping Oversea Subsidies Act of 2007) <sup>45</sup>。两个议案都试图为对非市场经济国家适用反补贴铺平法律道路,然而均未

<sup>42 &</sup>quot;Moreover, when we apply our countervailing duty law to China we will be able to take the special characteristics of China's economy into account when we identify and measure any subsidy benefit that may exist." 中美世贸双边协议文本摘要,http://www.dayoo.com/gb/content/2001-11/07/content\_266759.htm

<sup>43</sup> 英格利希在自己所在的宾夕法尼亚州经济不景气,又面临中国进口商品冲击的背景下提出了《美国贸易权利执行法案》。起初法案并未获得众议院通过,但是当时小布什总统面临通过中美洲自由贸易区协定票数不够的困境,英格利希就以支持中美洲自由贸易区协定并帮助小布什拉票为交换希望通过他的提案。尽管众议院投票通过了该法案,但是参议院大部分民主党参议员不认同该法案,甚至斥其为骗局,因此大部分人投了反对票。

<sup>44</sup>驻美使馆经商参处:"美国会资深议员支持并考虑通过立法授权商务部对中国等非市场经济国家征收反补贴关税",2007年4月9日,http://us.mofcom.gov.cn/article/jmxw/200704/20070404550408.shtml

<sup>45</sup> Stopping Overseas Subsidies Act , http://capitolwords.org/date/2007/03/23/S3703\_stopping-overseas-subsidies-act/

能获得美国立法机构通过。相关修法久攻不下局面直到金融危机后才出现转折性变化,主要受两方面因素影响 2012 年美国完成修改相关法律。

首先是后危机时期整体经济形势深刻演变,美国决策层意识到有必要进一步强化贸易保护主义手段。金融危机爆发后美国有观点认为,从上世纪80年代开始的过度"去工业化"与"金融化"是导致危机的重要原因,奥巴马政府为实现经济繁荣目标提出了"再工业化"战略与出口倍增计划。中国经济快速追赶与相对竞争力提升,被看作是美国实现"再工业化"和扩大出口战略的重要制衡因素,因而美国需要强化对中国的贸易保护措施。如奥巴马总统2012年2月28日国情咨文中描绘其再工业化战略图景时指责中国不按规则行事,并认为中国的补贴是不公平的<sup>46</sup>,并于当日发布总统令宣布成立了一个名为"跨部门贸易执法中心(Interagency Trade Enforcement Center)"机构<sup>47</sup>,负责调查中国等国的不公平贸易做法<sup>48</sup>。2012年是美国大选年,鉴于危机后美国经济复苏不如人意,民主党希望通过指责其他国家特别是中国为其政绩不佳开脱责任,共和党也希望借助打"抵制中国贸易牌"赢得国内利益集团好感以增加选票,国内外经济大环境有利于美国推动反补贴修法。

2012 年很快完成反补贴修法还与一桩针对中国轮胎进口反补贴案件裁决结果导致矛盾激化有关。2007 年 6 月美国轮胎制造商 Titan 指控中国非公路用轮胎因受到政府补贴向美国市场倾销,2008 年美国商务部裁定存在补贴并发布征税令。中国企业不服判决上诉至美国国际贸易法院,该法院依据传统反补贴立场判定不能在认定中国是非市场经济情况下同时征收反补贴税,要求美国商务部停止对涉案企业征收反补贴税。美国商务部不服判决,上诉至美国联邦巡回上诉法院(石培培,2012)。2011 年 12 月美国联邦巡回上诉法院就该案作出判决,裁定美国商务部不能在视中国为非市场经济国家情况下进行反补贴调查。上诉法院判决一旦生效,意味着美国商务部 5 年以来针对中国 23 起<sup>49</sup>反补贴调查全部属于非法,已征收巨额反补贴税也需退还,正在审理的 6 起"双反"案件也需终止。这一前景将使美国商务部陷入极为被动尴尬境地,同时意味着美国未来将难以利用反补贴措施限制中国产品对美国出口(赵艳敏,2013)。这个案例进展推动美国决策层加快修法,为针对中国企业实施反补贴措施提供国内法依据。

<sup>46</sup> 奥巴马提到"我将前往全世界任何地方为美国产品打开新市场。当我们的竞争对手不按规则行事的时候,我不会坐视不顾。我们对中国提起贸易诉讼的案例数量是上一届政府的近两倍,而且已经看到成效。由于我们制止了中国轮胎的倾销,一千多名美国人在今天得以有工作。可是我们需要再接再厉。有的国家听任我们的影片、音乐和软件被盗版现状存在是不对的,当外国制造商受到大量补贴而取得相对我们的优势是不公平的。"

<sup>47</sup> 该中心的职责主要包括三方面:第一,作为联邦政府下设的主要论坛为美国贸易代表办公室和其他机构协调美国贸易权利在国际和国内贸易法律下的执行;第二,与美国贸易代表办公室、其他与贸易责任相关机构以及情报机构交流美国的贸易伙伴可能破坏贸易协定的信息;第三,加强与美国工人、企业和其他利益相关方沟通,以促进更大程度地参与识别和减少或消除对外贸易壁垒和不公平对外贸易的行为。(Sec. 3. Mission and Functions. The Center shall:(a) serve as the primary forum within the Federal Government for USTR and other agencies to coordinate enforcement of U.S. trade rights under international trade agreements and enforcement of domestic trade laws;(b) coordinate among USTR, other agencies with trade related responsibilities, and the U.S. Intelligence Community the exchange of information related to potential violations of international trade agreements by our foreign trade partners; and(c) conduct outreach to U.S. workers, businesses, and other interested persons to foster greater participation in the identification and reduction or elimination of foreign trade barriers and unfair foreign trade practices.) (BARACK OBAMA, Executive Order -- Establishment of the Interagency Trade Enforcement Center, The White House Office of the Press Secretary For Immediate Release, February 28, 2012)

 $<sup>^{48}</sup>$  President Obama's 2012 State of the Union Address: An America Built to Last, http://www.politico.com/story/2012/01/obama-state-of-the-union-transcript-full-text-071920

<sup>49 23</sup> 起案例未包括两起已经作出无损害终裁的反补贴案。

上述背景下,美国两党两院等各方立场较快调整并达到一致,2012 年 3 月在一周内迅速通过新的立法《对非市场经济国家适用<1930 年关税法>的反补贴税条款及用于其他目的法案》(简称 H.R.4105 法案,或《1930 年关税法修正案》),认定美国反补贴法适用于非市场经济国家,并且该法案效力可溯及适用至 2006 年 11 月 20 日。该法案修订为美国对包括中国在内转型国家采取反补贴措施提供了法律依据,标志美国针对转型国家传统"双反"政策立场发生根本改变,是美国后危机时期贸易保护主义抬头的重要表现,显著增加了我国企业产品出口到美国的政策风险。

## 8-4、美国实施反补贴政策情况

随着美国反补贴政策方针调整,近十年来美国频繁推出针对中国出口的反补贴调查。据下一节讨论的案例汇总数据,2006年到2016年4月美国至少已对我国企业发起54起反补贴调查,平均每年超过5起。尤其是金融危机爆发后2009年达到9起,2014年全球经济增速放缓背景下达到7起,与2007年7起在案例次数上并列第二。值得关注的是,二十国集团杭州峰会确立了推动贸易自由化和反对贸易保护主义共识,然而会后美国很快对我国实施了两起反补贴调查和投诉。一是2016年9月7日,美国商务部对进口自中国的碳合金钢定尺板作出反补贴初裁,对所有涉案中国企业反补贴税率为210.5%50。二是9月13日美国政府向世界贸易组织投诉,称中方违反规定补贴小麦、玉米和大米价格51。

表 1 报告了过去十年美国对我国企业发起的 54 起反补贴调查情况。从最早于 2006 年 11 月 20 日对我国铜版纸出口反补贴调查立案,到美国 2012 年 3 月修法前后对我不锈钢拉制水槽的反补贴调查案,其间总共实施了 31 起反补贴调查。可见虽然上世纪 80 年代乔治城钢铁案判例对美国针对转型国家适用反补贴法构成制约,然而在 2012 年美国修改相关反补贴法之前,实际上频繁对中国企业实施补贴调查,美国商务部等有关部门对此从不同角度提出理由解释。

表 1	美国对我国企业反补贴案例	(2006年11	日-2016年4日)	
$\alpha$		(2000) 44 11	/1 = 4U1U <del>11</del> 4 /1 /	1

	立案日	涉案产品	初裁税率和结果	终裁税率和结果
1	2006.11.20	铜版纸	10.90% - 20.35%	7.4% - 44.25%,无损害
2	2007.6.28	环状焊接碳素钢管	0 - 16.59%	29.57% - 615.92%
3	2007.7.24	薄壁矩形钢管	0.27% - 77.85%	2.17% - 20.58%
4	2007.7.25	复合编织袋	2.57% - 57.14%	29.54% - 304.40%
5	2007.7.31	非公路用轮胎		2.45% - 14%
6	2007.10.12	未加工橡胶磁	70.41%	109.95%
7	2007.10.30	低克重热敏纸	0.57% - 59.50%	0.57% - 137.25%
8	2007.11.30	亚硝酸钠	93.56%	169.01%
9	2008.2.20	不锈钢焊接压力管	1.47% - 106.85%	1.10% - 299.16%

<sup>50</sup> 美方在初裁中将畸高税率归咎于中国应诉企业未全力配合调查,然而据中国企业反应,实际情况是美调查机关要求中国应诉企业提供大量无关信息,导致企业根本无法完成答卷,不能享有公平抗辩机会。中国商务部指责美国商务部裁决与刚刚闭幕的 G20 峰会上反对任何形式的贸易保护主义承诺背道而驰("违背 G20 承诺,美国对中国钢铁产品作出反补贴初裁",澎湃新闻网,2016 年 9 月 9 日 )。

51 美国政府当天发表声明,指控中国"通过设定最低收购价的形式非法补贴水稻、玉米和小麦种植户"。声明称,这些补贴行为违反了中国 2001 年加入 WTO 时的承诺,导致生产过剩,影响了美国农民在国际市场与中国竞争的能力。这是奥巴马政府第 14 次向 WTO 投诉中国,也是首次代表美国粮食出口商对中国采取重大法律行动("美国就农业补贴向世贸组织投诉中国",环球网,2016 年 9 月 14 日)。

10	2008.4.24	环状碳素管线管	18.89% - 31.65%	35.63% - 40.5%
11	2008.5.6	柠檬酸	1.41% - 97.72%	3.6% - 118.95%
12	2008.7.15	后拖式草地维护设备	0.95% - 254.52%	0.25% - 264.98%
13	2008.8.26	厨房用金属架	13.22% - 197.14%	13.30% - 170.82%
14	2009.4.29	石油管材	10.90% - 30.69%	10.36% - 15.78%
15	2009.6.17	混凝土结构用钢绞线	7.53% - 12.06%	8.85% - 45.85%
16	2009.6.19	钢格板	7.44%	62.46%
17	2009.6.26	钢丝层板	2.02% - 437.73%	1.52% - 437.11%,无损害
18	2009.7.30	带织边窄幅织袋	0.29% - 118.68%	1.56% - 117.95%
19	2009.8.18	镁碳砖	0.07%-0.88%,无补贴	24.24% - 253.78%
20	2009.10.7	无缝钢管	11.06% - 12.97%	13.66% - 53.65%
21	2009.10.14	铜版纸	3.92% - 12.83%	17.64% - 178.03%
22	2009.10.15	钾磷酸盐和钠磷酸盐	109.11%	109.11%
23	2010.1.27	钻管产品	15.72%	18.18%
24	2010.4.21	铝型材	6.18% - 137.65%	8.02% - 374.15%
25	2010.11.10	复合木地板	0 - 27.01%	1.5% - 26.73%
26	2011.3.30	钢制轮毂	26.24% - 46.59%	25.66% - 46.59%,无损害
27	2011.3.31	镀锌钢丝	21.59% - 253.07%	19.06% - 223.27%,无损害
28	2011.5.31	高压钢瓶	24.21%	15.81%
29	2011.11.8	晶体硅光伏电池	2.90% - 4.73%	14.78% - 15.97%
30	2012.1.18	应用级风电塔	13.74% - 26%	21.86% - 34.81%
31	2012.3.22	不锈钢拉制水槽	2.12% - 13.94%	4.80% - 12.26%
32	2012.10.18	硬木装饰胶合板	0.22% - 27.16%	无损害
33	2012.12.28	冷冻暖水虾	5.76%	18.6%,无损害
34	2013.9.19	三氯异氰尿酸	1.55% - 18.57%	1.55% - 20.06%
35	2013.10.24	谷氨酸钠	13.41% - 404.03%	申请方撤诉,终止调查
36	2013.10.31	取向电工钢	49.15%	127.69%,无损害
37	2013.11.14	无取向电工钢	125.83%	158.88%
38	2013.12.9	1,1,1,2-四氟乙烷	1.35% - 28.74%	无损害
39	2014.1.14	次氯酸钙	71.72%	65.89%
40	2014.1.23	晶体硅光伏产品	18.56% - 35.21%	26.64-49.79%
41	2014.2.21	碳钢合金盘条	10.30% - 81.36%	178.46-193.31%
42	2014.5.19	53 英寸内陆干货集装箱	7.13% - 10.46%	无损害
43	2014.7.21	乘用车和轻型货车轮胎	15.20% - 81.29%	30.61-107.07%
44	2014.9.22	无螺栓钢制货架	12.21% - 55.75%	13.73%
45	2014.12.3	三聚氰胺	147.62%-150.52%	
46	2015.2.21	非涂布纸	5.82-126.42%	
47	2015.3.31	PET 树脂	6.83-47.56%	
48	2015.6.24	镀锌板		
49	2015.6.24	耐腐蚀钢产品		39.05%-241.07%
50	2015.8.18	冷轧钢板		

51	2016.2.17	非晶硅织物	
52	2016.2.19	卡车及公共汽车轮胎	
53	2016.3.4	不锈钢板和带材	
54	2016.4.29	碳合金钢定尺板	

资料来源:案例 1-44 来源于杨荣珍(2015):《国外对华反补贴案例研究》,对外经贸大学出版社,2015 年。案例 45-54 根据中国商务部网站"贸易摩擦应对专题"报道整理, http://gpj.mofcom.gov.cn/article/zt\_mymcyd/。

例如在 2006 年铜版纸案例中美国商务部提出反补贴调查可适用于中国理由是:美国现 行反补贴法规定应适用于任何国家(any country),其中也应包括非市场经济国家。"中国的 经济发展已经达到我们可以适用另一种贸易救济手段(即反补贴)的阶段了"(杨荣珍,2015 年, 第28页)。在2010年铝型材案中美国商务部指出,1984年乔治城钢铁案仅确认了商务 部享有不对非市场经济国家适用反补贴法裁量权,没有禁止商务部对非市场经济国家适用反 补贴法。美国商务部还宣称,在确定补贴方法上现在已有办法确定中国政府授予一个国内生 产者的利益及其专项性,因此对中国适用反补贴法的障碍已经不复存在(杨荣珍,2015年, 第 131 页)。在 2007 年复合编织袋案反补贴调查时美国有关部门认为, 虽然中国还属于非市 场经济,但中国改革带来的变化使其已可以适用反补贴法 $^{52}$ 。另外还认为,中国是WTO《补 贴与反补贴措施协议》的签字国,根据美国《1930年关税法》第701节的规定,对其产品 适用反补贴调查的规定(杨荣珍,2015,第37页)。

但是美国晚近十年反补贴政策转型也面临困难,并受到中国据理抵制。困难之一在于美 国反补贴措施存在违背 WTO 规则避免双重救济要求。GATT1994 相关条款规定: "一成员对 另一成员的出口本国市场的产品,不能为抵消出口企业倾销或出口国补贴造成的同一种情形, 而对同出口国的同一产品同时征收反补贴税和反倾销税"。双重救济是指对同一涉案产品一 并征收两税时,两次抵消出口国同一行为造成的损害。在对非市场经济国家进行双反调查时, 由于计算反倾销幅度时利用替代国价格已将补贴计算在内,如果不对反倾销税进行相应调整 而是同时征收反倾销税和反补贴税,就会造成相当于对进口国的国内产业实施双重救济情况。 美国从 2006 年开始对中国企业发起的几十项反补贴调查中,很多都存在双重救济问题。

针对美国通过反补贴修法助推贸易保护主义政策,中国积极利用 WTO 争端解决机制加 以应对以维护自身合理权益。例如 2012 年 5 月中国就美国对华油井管、铜版纸、钢制轮毂 等 22 类产品反补贴调查错误做法向 WTO 提起磋商请求。中方认为美国把中国国有企业看 作公共机构、在证据不充分情况下立案、将国有企业对下游企业投入品视为专项性补贴、使 用外部基准计算补贴利益、滥用可获得不利事实、认定土地使用权具有专向性等做法违反世 贸规则53。又如 2012 年 9 月中国就美国关税法修订案中违反世贸规则做法正式启动世贸争 端解决程序。起诉内容包括该法案生效时间确定为 2006 年 11 月远远早于其公布时间,违反 了 GATT 第 10.1 条54关于迅速公布贸易法规使各国政府和贸易商能够知晓的义务。另外美国

53 WTO: UNITED STATES – COUNTERVAILING DUTY MEASURES ON CERTAIN PRODUCTS FROM CHINA -REPORT OF THE PANEL, 14 July 2014

54 10.1 缔约国有效实施的关于海外对产品的分类或估价,关于税捐或其他费用的征收率,关于对进出

<sup>52 &</sup>quot;考虑到近年来中国经济与前苏联经济模式已有实质不同,美国在有关反补贴不适用于苏联式经济 的裁决不再适用于针对中国产品的反补贴调查。"

口货物及其支付转帐的规定、限制和禁止,以及关于影响进出口货物的销售、分配、运输、保险、存仓、 检验、展览、加工、混合或使用的法令、条例与一般援用的司法判决及行政决定,都应迅速公布,以使各 国政府及贸易商对它们熟悉。一缔约国政府或政府机构与另一缔约国政府或政府机构之间缔结的影响国际

商务部在二十五起"双反"调查中未能进行避免双重救济税额调整因而违反WTO规则。中国上述利用WTO规则维权行动虽未能完全实现中方起诉请求,然而中方不少诉求得到WTO专家组报告认可和上诉裁决支持,为中国未来继续领多边规则遏制美国等WTO成员国贸易保护主义冲动提供了有益经验。

美国通过调整反补贴法律强化其贸易救助能力,相当程度带有限制中国出口的政策意图, 折射在开放环境下美国经济相对竞争力走弱趋势和压力。"日落条款"到期后对中国实施反 倾销难以继续采用替代国方法,美国和其他发达国家挑起对中国贸易争端有望更多采用反补 贴方式。中国应当继续积极利用 WTO 规则维护自身合法权益,有效抵制美欧等 WTO 成员 国利用"双反"手段谋求贸易保护主义。同时要着力全面深化国内供给侧结构性改革,特别 是进一步推进要素价格、金融体制、国有企业等关键领域改革以完善国内市场体系,在提升 资源配置和经济运行效率同时增强我国应对外部反补贴和其他贸易争端的能力。

## 9、贸易影响的定量观察

由于一国在出口竞争力快速提升阶段难免遭遇外部经贸关系矛盾增加困难,加上我国入世特殊条款的限制作用与影响,进入新世纪后我国面临贸易争端趋势性增长局面。过去十几年间我国入世特殊条款——特别是反倾销特殊方法对我国出口实际影响如何?对此进行评估是与研究"日落条款"和市场经济地位相关的重要议题。准确估计入世特殊条款影响需要专题深入研究,本节通过观察入世以来我国"双反"相关数据对这一问题加以初步考察。

从定性角度看"双反"特殊条款无疑会给我国企业应贸易争端带来不利影响。表现之一是进口国在对中国出口商品进行反倾销起诉时,对我国具体行业及产品生产的市场行为认定经常表现出不符合实际的"歧视性"。如2003年美国商务部对中国彩电企业反倾销调查案件中,尽管长虹、创维、海尔等企业分别提交了中国彩电行业生产系市场行为的公司具体信息,但美国商务部仍以应诉人未提供有关覆盖实际上所有行业生产商记录信息为由加以拒绝55。2006年欧盟对原产于中国的垃圾袋与塑料袋进行反倾销立案调查时,共有108家中国企业申请市场经济地位待遇或分别待遇,最终只有10家获得认可56。又如2009年印度对原产我国的青霉素G钾盐和6-氨基青霉烷酸进行反倾销调查时,虽然中方5家应诉企业均申请了市场经济待遇,但印度有关部门在初裁中未给予任何一家中国企业市场经济地位待遇(周会青,2011)。

另外选择"替代国"与"类比国"衡量成本价格更会对中国企业应对贸易争端带来困扰。WTO对"替代国"与"类比国"并无统一标准,进口国经常不顾中国市场真实情况任意选择不恰当国家作为参考(刘希全,2011)。例如美国、法国等国家劳动力密集型产品生产成本明显高于中国,但却经常被选为中国的"替代国"或"类比国"。2009年欧盟对原产于中国的钼丝进行反倾销调查,选定美国作为计算中国涉案产品正常价值的"替代国"(顾春芳,2011)。2015年欧委会再次使用美国作为分别对原产于中国冷轧不锈钢进行反倾销调查

贸易政策的现行规定,也必须公布。但本款的规定并不要求缔约国公开那些会妨碍法令的贯彻执行、会违 反公共利益、或会损害某一公私企业的正当商业利益的机密资料。(GATT1994)

<sup>55</sup> Gary Clyde Hufbauer, Julia Muir: The US Case Against Chinese Autos and Auto Parts Is Not Likely to Curb Imports Dramatically, PIIE, September 25, 2012,

 $https://piie.com/blogs/realtime-economic-issues-watch/us-case-against-chinese-autos-and-auto-parts-not-likely-cur\ b\ _\circ$ 

 $<sup>^{56}</sup>$  商务部: "欧委会公布对原产于中国和泰国的垃圾袋和塑料袋的反倾销终裁决定", 商务部网站, 2006年  $^{10}$  月  $^{2}$  日。, http://www.mofcom.gov.cn/article/i/jyjl/m/200610/20061003328770.shtml

的"替代国"57。印度在2009年对原产于中国香豆进行反倾销调查时使用法国作为"替代国" (顾春芳, 2011)。不恰当"替代国"选取使得中国产品"正常价值"明显高估,造成对我 国在反倾销事实认定与反倾销税率的不利影响。

在定性分析基础上,还可以通过观察我国反倾销反补贴案例数量、结构与比例等方面情 况,对特殊条款现实影响进行定量讨论。由于反倾销是我国入世后面临贸易争端的主要形态, 下面首先比较系统观察我国过去十余年面临反倾销情况,然后简略观察美国对我国反补贴情 况,最后讨论贸易争端涉案资金总量规模。

第一,图2与图3报告反倾销立案与终裁数据显示,中国成为过去十余年遭遇反倾销最 多国家之一。2002-2015 年,针对我国反倾销立案数(Anti-dumping Initiations)857 次年均 61次,占全球同期反倾销立案总数比例平均值为28.1%;其中立案数最多年份为2008和2009 年各78次,占比最高为2007年37%。同期针对我国反倾销终裁(Anti-dumping Measures) 总数 627 次年均 45 次,占全球同期反倾销终裁总数比例平均值为 30.1%;其中终裁最多年 份为 2009 年 57 次, 占比值最高为 2007 年 43.4%。





40 20 10

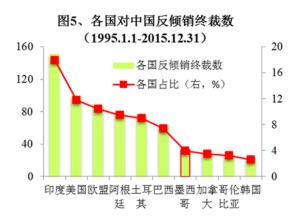
数据来源: 2002-2014 年数据来自 WTO,https://www.wto.org/english/tratop\_e/adp\_e/adp\_e.htm; 2015 年数据 来自 Bown, Chad P. (2016) "Global Antidumping Database," The World Bank, June, http://econ.worldbank.org/ttbd/gad/。

第二,从图 4 与图 5 报告反倾销立案与终裁数据分国别数据看,1995-2015 年间对中国 反倾销立案次数最多的前三个国家(地区)分别为印度、美国和欧盟,立案数分别为175、132 和 122 起;其后七个国家分别为巴西、阿根廷、土耳其、墨西哥、澳大利亚、哥伦比亚、南

<sup>57</sup> 中国商务部贸易救济调查局:"欧委会公布对中国冷轧不锈钢反倾销调查初裁决定", 2015-05-04, http://gpj.mofcom.gov.cn/article/zt\_mymcyd/subjectff/201505/20150500959871.shtml

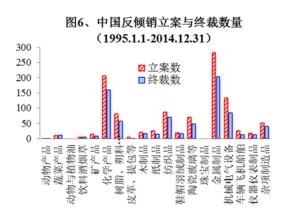
非;这十个国家(地区)立案总数 870,占针对我国反倾销立案 1150 起总数约 75.7%。同期对中国实施反倾销终裁最多的前三个国家(地区)也是印度、美国和欧盟、终裁数分别为 151、99 和 88 起;其后七个国家分别为阿根廷、土耳其、巴西、墨西哥、加拿大、哥伦比亚、韩国;十国(地区)共实施终裁数 667,占中国遭遇终裁 843 起总数约 79.1%。





数据来源: Bown, Chad P. (2016) "Global Antidumping Database," The World Bank, June,http://econ.worldbank.org/ttbd/gad/。

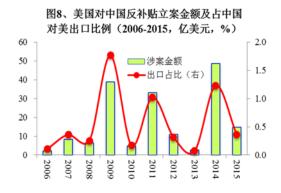
第三,图 6 报告反倾销立案与终裁数据分部门数据显示,1995-2014 年间中国遭受反倾销立案与终裁数量排名前三部门分别是金属制品、化学产品及机械和电气设备制造品,三部门遭遇反倾销立案与终裁数量占我国反倾销立案与终裁总数的59%。从全球占比情况看,在所报告的19个部门中有11个部门的反倾销立案与终裁数占全球反倾销立案与终裁总数的20%以上。



数据来源: WTO, <a href="https://www.wto.org/english/tratop\_e/adp\_e/adp\_e.htm">https://www.wto.org/english/tratop\_e/adp\_e/adp\_e.htm</a>。

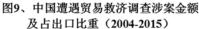
第四,图 7 数据显美国对实施我国反补贴情况,2006-2015 年间美国针对我国反补贴立案数共 50 次年均 5 次,立案最多年份为 2009 年达到 9 次。在反补贴调查中,美国经常以中国企业不合作为由,利用"不利可得事实(adverse facts availiable)"规则对中国征收高额惩罚性反补贴税,过去十年来平均惩罚性税率达到 264%,2007 年针对中国环状焊接碳素钢管反补贴案件更是开出 615.9%的天价反补贴税。图 8 数据显示,近十年美国对中国反补贴涉案金额总额 171.6 亿美元年均 17 亿美元,涉案金额最高年份为 2014 年 48.8 亿美元,涉案金额占中国对美国出口额十年平均比例为 0.56%,最高年份为 2009 年 1.77%。





数据来源:立案数、涉案金额、最高税率根据商务部贸易救济调查局网站数据整理而来,中国对美国出口、美国自中国进口数据来自 Wind.

第五,图 9报告 2004-2015 年我国面临各类贸易救济诉讼涉案金额,数据显示各类贸易救济涉案金额最高年份为 2012年 277亿美元,占我国该年出口总额 1.35%。次高年份为 2009年 127亿美元,占该年出口总额 1.06%。最低年份为 2004年 12.6亿美元,占当年出口总额 0.21%。十二年涉案金额占出口额比例简单平均值为 0.49%。





注释: 贸易救济调查金额数据来自商务部历年《国别贸易投资环境报告》,中国出口总额来自《中国统计摘要》。贸易救济调查包括"两反两保",即反倾销、反补贴、保障措施及特保调查。其中大部分是反倾销调查。

2016 年我国外部贸易争端形势同样不容乐观。据不完全统计,截止本文初稿完成的 9 月 27 日我国已经遭遇 19 个国家(地区)发起的贸易救济立案调查 69 起,其中反倾销立案 56 起,反规避立案 2 起,反补贴立案 12 起,保障措施立案 8 起,其中钢铁产品成为贸易摩擦最为严重领域,案件 28 起,占比 40.6%。分国别看印度以发起 19 起居首位,其次是美国 9 起,阿根廷 6 起,巴西和巴基斯坦各 5 起。同期对我国终裁案共 45 起,其中反倾销 36 起,反补贴 5 起,保障措施 2 起,反规避 2 起<sup>58</sup>。美国对原产于中国冷轧板发起的"双反"调查,依据所谓"可获得不利事实"裁定所有中国涉案企业 265.79%倾销税率和 256.44%补贴税率,该案备受媒体关注并引发中方质疑和批评。中国商务部贸易救济调查局负责人表示,这是美国意图将国内钢铁产业的困境转嫁国外,借机给予国内产业额外保护。美方在对中国产品的反倾销反补贴调查中采取了很多不公正做法,尤其是拒绝给予中国国有企业分别税率。美方做法严重损害了中国企业的抗辩权,中国企业被迫放弃应诉,美方借机人为裁定畸高税率(张 雯,2016)。

上述数据从反倾销等贸易争端发生频率、主要发起国、涉案金额占我国出口比重等不同方面,呈现了过去十余年我国面临贸易争端形势特点。需要指出,借助上述贸易争端数据来讨论我国入世议定书第 15 条不利影响,可能同时发生高估和低估两个方向偏差。一国经济在开放环境下进入快速追赶阶段,可贸易部门生产率与竞争力较快提升推动出口较快增长,无论该国是否在多边贸易框架内受到区别性待遇限制,都会不同程度面临贸易争端上升压力。上述贸易争端频次增加表现显然并非完全由于我国入世特别条款作用,因而用前者直接衡量后者影响存在高估偏差。另外贸易争端真实代价还应包括中国涉案企业、行业、主管部门以至国家领导人为化解争端所耗费的各类资源和隐性成本。就特定行业与企业而言,一旦遭遇反倾销调查可能面临生死存亡考验,用我国占出口总额百分比衡量有其局限性,因而通过上述数据讨论贸易争端代价方面也存在低估因素。

虽然存在局限性,上述数据对认识我国入世特殊条款实际影响,避免基于媒体对特定案例报道印象发生偏激判断结论仍有一定参考价值。总起来看入世以来虽然面临外部贸易争端加剧形势,然而涉案金额相对规模仍比较有限。2003 年以来,我国遭遇贸易救助涉案金额占出口总额比重通常在 0.5%以下。即使是危机爆发后贸易保护主义盛行的 2009 年和 2012年,涉案金额占出口比重也只有一个多百分点。可见入世特殊条款对我国出口企业带来考验,

<sup>&</sup>lt;sup>58</sup> 根据商务部贸易救济调查局"贸易救济调查"专题报道资料整理, http://gpj.mofcom.gov.cn/article/cx/cn/。

然而从总体看不利影响仍大体处在可控范围内,未能改变入世后我国开放经济加快追赶大趋势。

## 10、小结和评论

我国《入世议定书》第 15 条对反倾销特殊方法设定包含了 15 年截止期,履行"日落条款"与承认我国市场经济地位关系问题成为多年讨论议题,随着我国入世十五周年临近这一问题再次成为讨论热点。今年 5 月欧洲议会通过有关中国市场经济地位的决议并引发中国政府多方回应,标志这场十余年争论与外交博弈进入摊牌阶段。本报告系统梳理"市场经济地位"问题的来龙去脉,细致分析有关"日落条款"各种解读观点及其是非曲折,同时考察美国对我国"双反"传统政策立场与近年演变情况,结合晚近十多年我国贸易争端实际情况讨论入世特别条款对我国外贸影响。最后提出几点小结和评论。

第一,研究市场经济地位问题,不仅要重视分析其技术细节,同时要着眼其发生的大历史背景。所有争议源自中国入世特殊条款,对中国入世设置特殊条款从一个角度折射当代全球经济格局深刻演变。WTO意在"建立一个完整的、更可行的和持久的多边贸易体制",普惠性与一致性规则是WTO基本方针,然而中国成为第一个接受种种特殊规则后加入WTO的大国。这些特殊规则包括针对中国适用期12年的特殊保障机制条款,适用期7年的特殊纺织品保障措施,适用期15年的反倾销特殊方法以及没有期限规定的反补贴特殊条款等等。出现这一情况,既与中国转型体制历史演变特点以及美国等WTO成员国对此认知偏颇与博弈立场有关,也与中国作为当代最重要新兴大国对外竞争力较快提升对外部世界带来现实和预期调整压力有关。中国入世后引发有关市场经济地位问题争论,虽然与相关法律技术内容甚至偶然因素存在联系,从根本上看则是当代全球经济格局演变重构的产物,是中国作为体制转型大国融入全球多边规则并拓展其和平发展道路的必经历练。

第二,中国在十五年过渡期争取市场经济地位是必要合理的,不过"自动承认说"依据不够充分并在客观上带来不利影响。中国入世议定书确定入世15年内对中国企业反倾销可实施替代国特殊方法,同时又依据"可辩驳设定原则"规定,如果中国获得国内法包含有关市场经济标准的WTO成员国承认市场经济地位,便能提前终止反倾销特殊方法。基于这一规则,中国政府有关部门在中国入世后积极争取相关国家承认市场经济地位,以便在双边场合提前终结反倾销特殊待遇,无疑是合乎逻辑与情理的必要举措。然而考虑WTO成员国中仅有少数国家在中国入世时国内法包含有关市场经济标准,争取各国普遍承认中国市场经济地位是否必要则有待探讨。另外一度流行的"自动承认说"作为对"日落条款"解读虽有一定道理,然而毕竟存在理解不够准确甚至误解因素,以此劝说WTO成员国提前承认中国市场经济地位的外交努力是否适当也有待商榷。这个案例显示中国经济政策决策科学化水平仍有待进一步提高完善,从一个角度证明中国决策层近年提出的加强智库建设决策是必要和正确的。

第三,"日落条款"争议众说纷纭事出有因,"取消替代国方法"解读和政策立场言之成理并立论稳健。"自动承认说"面临质疑偃旗息鼓后,有关"日落条款"解读出现百家争鸣与诸说并起局面,系统梳理前后出现的不同解读观点竟有八种之多。客观分析对象内涵及有关法条上下文含义,比较合理解释应是"取消替代国特殊方法",同时意味着实质性"取消a款区别性待遇"。这个理解不仅有法条自身依据,更可以从美国高官政要多年来公开重复阐述针对中国反倾销特殊条款存在15年有效期限制观点中得到证实。这个本有确定含义的法条引发如此巨大争议主要有两方面原因:一是早先流行的"自动承认说"受到质疑后,连带引

发国际法学界对"日落条款"过于技术性和怀疑性的解释动机和倾向,客观鼓励形成诸说竞起莫衷一是局面。二是"日落条款"个别细节表述百密一疏瑕疵与歧义,不利于对有关条款解读争议较快达成合理共识。

第四,中国目前相关政策立场有利而主动。中国官方对"日落条款"理解和相关政策立场经历了实质性调整,在早已放弃"自动承认说"基础上近来进一步放弃说服主要发达国家如欧盟提前承认中国市场经济地位政策立场,转而回归到要求WTO成员国在"日落条款"截止期终止采用替代国特殊方法。由于要求WTO成员国放弃替代国方法与"日落条款"内容高度一致,因而中国目前政策立场具有比较充分合理依据,在未来有关履行条约磋商方面处于主动有利地位。目前美欧采取的策略则是利用中国官方在公开场合不愿过多涉及过往的处理方式,刻意把落实"日落条款"承诺转换为中国市场经济地位议题以提升其话语权。

第五,有关"日落条款"争议应有望在WTO框架内得到解决。随着中国政策立场发生两阶段务实调整,相关各方目前实际立场差距其实小于表面所呈现的不一致程度;反过来看,早年围绕这一问题有关国家之间似乎没有直接争议的外交对话,其实掩藏了实质政策立场较大差距分歧。随着"日落条款"截止期逐步临近,最为可能前景是在WTO框架内求得解决。一种可能是中国坚持最近明确表述的"终止替代国方法"立场,并在"日落条款"截止期后对仍然采取替代国方法国家提出磋商,并保留在WTO框架内诉诸争端解决机制的权利。二是在中国终止"替代国方法"主张与欧盟维持"非标准方法"诉求之间寻求交集合作,并达成某种共识。三是美欧等国在承认中国市场经济地位同时保留对某些行业适用"特定市场条件"原则,但是有关"特定市场条件"举证责任转移到进口国。各方在摊牌阶段如何出牌?持续十余年争论如何收场?今年底有关形势如何演变将会继续引发广泛关注,并对我国外部经贸环境甚至WTO多边规则前景带来影响。

第六,入世特殊条款对我国出口增长带来不利影响,然而未能改变我国经济入世扩大开放后快速追赶大趋势,事实证明上世纪末我国实施入世开放战略是正确成功的。系统观察我国入世以来面临反倾销与反补贴调查立案数与终裁数情况,可见发生频率与涉案金额都呈现总体上升趋势,我国遭遇贸易争端占全球同类案例比例也高居各国榜首。这一时期发生较多贸易争端主要原因应是中国经济快速追赶与竞争力加强带来的反弹效应,然而入世特殊条款为争端发起国提供便利也应产生显著影响。不过就这一时期各类贸易争端涉案金额相对我国出口总额相对比例而言,入世以来在1.35%和0.21%之间变动,简单均值接近0.5%。可见入世特殊条款不利影响大体处于可控范围内,未能改变我国经济入世扩大开放后快速追赶大趋势。另外应认识"日落条款"的积极意义。入世前美欧等发达国家对我国企业反倾销调查一直采用歧视性方法,"日落条款"第一次借助多边规则在我国入世十五年截止期后终结上述历史性制约,对我国企业外部经贸环境长期改善具有积极作用。

第七,随着"日落条款"到期后终止反倾销替代国方法前景趋于明朗,美国等WTO成员国限制我国出口有可能将越来越多采用反补贴措施。从主要应对反倾销到更多应对反补贴,有望成为后"日落条款"时期我国外部经贸环境变化的演变趋势之一,对此我国需相应调整应对政策。在全球经济格局大调整大重组时代,我国要更加旗帜鲜明地坚持自由贸易与积极推动经济全球化方针,反对少数国家尤其是个别发达国家实施各种贸易保护主义政策。要在全面评估后"日落条款"时期外部经贸环境演变特点基础上,总结早先应对"双反"及其他贸易争端的经验教训,更积极有效地利用WTO体系内部协调与调解机制,维护我国合法权益并制衡少数国家贸易保护主义冲动。国内应以十八届三中全会全面深化改革和扩大开放决定为基本方针,切实推进供给侧结构性改革,特别是加快推进土地等要素价格、金融体制、

国有企业等关键领域改革以完善国内市场体系,在提升资源配置和经济效率同时增强我国应对外部反补贴和其他贸易争端的能力。

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### 附录1、中国入世议定书第15条英文文本

#### 15. Price Comparability in Determining Subsidies and Dumping

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

- (a) In determining price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement, the importing WTO Member shall use either Chinese prices or costs for the industry under investigation or a methodology that is not based on a strict comparison with domestic prices or costs in China based on the following rules: (i) If the producers under investigation can clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product, the importing WTO Member shall use Chinese prices or costs for the industry under investigation in determining price comparability; (ii) The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product.
- (b) In proceedings under Parts II, III and V of the SCM Agreement, when addressing subsidies described in Articles 14(a), 14(b), 14(c) and 14(d), relevant provisions of the SCM Agreement shall apply; however, if there are special difficulties in that application, the importing WTO ember may then use methodologies for identifying and measuring the subsidy benefit which take into account the possibility that prevailing terms and conditions in China may not always be available as appropriate benchmarks. In applying such methodologies, where practicable, the importing WTO Member should adjust such prevailing terms and conditions before considering the use of terms and conditions prevailing outside China.
- (c) The importing WTO Member shall notify methodologies used in accordance with subparagraph (a) to the Committee on Anti-Dumping Practices and shall notify methodologies used in accordance with subparagraph (b) to the Committee on Subsidies and Countervailing Measures.
- (d) Once China has established, under the national law of the importing WTO Member, that it is a market economy, the provisions of subparagraph (a) shall be terminated provided that the importing Member's national law contains market economy criteria as of the date of accession. In any event, the provisions of subparagraph (a) (ii) shall expire 15 years after the date of accession. In addition, should China establish, pursuant to the national law of the importing WTO Member,

that market economy conditions prevail in a particular industry or sector, the non-market economy provisions of subparagraph (a) shall no longer apply to that industry or sector.

### 附录 2、奥科纳文章引发的博客讨论

伯纳德 奥科纳博客 2011 年 11 月 27 日在 VOX 网站发表"中国不会自动获得市场经济地位"博客文章后,该文当天就被 International Economic Law and Policy Blog 转载,随后一个月前后多位专家和相关人士就此讨论,对"日落条款"含义从不同角度提出很多解释观点。本附录收录有关讨论部分内容。

#### 1, "When Will China's NME Status End"?

#### International Economic Law and Policy Blog

http://worldtradelaw.typepad.com/ielpblog/2011/11/when-will-chinas-nme-status-end. html(2016年6月5日下载)

Posted by Simon Lester on November 27, 2011 at 07:58 PM | Permalink

Over at VOX, trade lawyer Bernard O'Connor argues that the end of China's NME status might be further off than many people think:

There is nothing in the WTO rules, or elsewhere, to provide that China automatically gets market-economy status in 2016. The idea that it will is a misunderstanding shared by many in China, the EU and the US.

Chinese premier Wen Jiabao, speaking at the September 2011 World Economic Forum at Dalian mentioned the "2016 deadline" when he asked, once again, the EU to grant China market-economy status. The supposed deadline is repeated by most Chinese trade and commerce officials. Last month, Business Europe, the European confederation of industries, stated with concern in a report on 'Rising to the China Challenge' that China will automatically be granted market-economy status in 2016. The participants in the China-US Strategic and Economic Dialogue seem to accept that there is a deadline as does one of the leading EU books on trade law (Van Bael and Bellis 2011). Every one seems to agree.

But despite all these affirmations, there is no deadline. There 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.......

There is one provision of the Chinese WTO Accession Protocol dealing with dumping. This is Article 15. It addresses techniques in the comparison of costs and prices in antidumping procedures. There is nothing providing that market-economy status can be automatic.

The 2016 myth seems to have been born in paragraph (d) of Article 15. This paragraph provides that China must establish whether it is a market economy according to the law of the importing WTO member. If it can establish that it is a market economy then some of the transitional provisions on comparison

methodologies will terminate. However, there are no dates in relation to China establishing that it is a market economy.

The paragraph further provides that one specific comparison methodology set out in one subparagraph of the Article will expire, in any event, fifteen years after Chinese accession. China became a WTO member in Doha in December 2001. Add fifteen years and you get 2016.

This provision does not say that China will get market-economy status. It just says that a very specific provision of Article 15 will cease to apply. The other parts of Article 15 continue to apply. And to interpret the expiry of one subparagraph as a deadline for the granting of market-economy status is not only to read into the Article something that is not there, but it is also to negate all the other provisions, something that international treaty interpretation simply does not allow. The expiry of one subparagraph does not change the rest of the law. .....

On the basis of analysis carried out in the US and in the EU it is unlikely that China would be considered a market economy according to the normal standards applicable in EU law. And Article 15 of the China WTO accession protocol requires that the evaluation be carried out on the basis of the law of the importing WTO member.

If China wants to be treated as a market economy it has to prove to the EU that it is one by satisfying the five criteria. The granting of market-economy status to China is not automatic now or in 2016 or afterwards.

If you want to see the specific language, the accession protocol is here: http://www.worldtradelaw.net/misc/ChinaAccessionProtocol.pdf

#### **COMMENTS**

#### Vitaliy Pogoretskyy said...

In my view, the NME status is an abstraction, which does not have any global definition. What China's Protocol of Accession Articles 15(a)(ii) and (d) mean is that after the expiry of 15 years (in 2016) China will be subject to normal anti-dumping techniques provided in the ADA Article 2.2, no matter whether it is recognized as a market economy under the national laws of some WTO Members or not. These techniques exclude the possibility of using a 'surrogate country' in the dumping determination. This does not seem to apply to subsidies rules, since they fall under Article 15(b) of the Protocol.

I do think that this deadline of 15 years is important for China, since the surrogate-country technique is a widely used tool, applied by the US and the EU against imports from China as well as from other socialist and post-Soviet countries. It is often argued that this tool is legitimate and is based on the ADA Article 2.7 and the Ad note to GATT Article VI (a so-called NME provision). In a range of my publications I have argued that the latter provision is not applicable anymore. It refers

to the case of imports from a country that has a complete or substantially complete monopoly of its trade and where ALL domestic prices are fixed by the state. This is a situation that does not represent the modern trade realities. Consequently, after the expiry of the deadline, China will become subject to normal anti-dumping rules. This is perhaps what they call 'market economy', and of course this is a landmark event for China (as well as for its importers).

#### Reply November 28, 2011 at 06:46 AM, Anon said...

Ummm, read the Protocol, Bernard. After 2016, importing Members will no longer be allowed to use a methodology to determine normal value that "is not based on a strict comparison with domestic prices or costs in China". In other words, importing Members will need to determine normal value in accordance with Article 2 of the AD Agreement. I suppose the importing Member could take its chances under the ad note to GATT Art. VI, but (1) China clearly does not meet the requirements of this provision (as Vitaliy Pogorestskyy notes above), and (2) China would unleash massive trade retaliation on anyone who tried. China's NME status expires on December 11, 2016.

#### Reply November 28, 2011 at 09:59 AM

#### Concerned Citizen said in reply to Anon...

Read the Protocol more closely yourself, Anon. On December 11, 2016, paragraph 15(a)(ii) will expire but 15(a)(i) will remain in force. That provision states that "If the producers under investigation can clearly show that market economy conditions prevail in the industry producing the like product . . ., the importing WTO Member shall use Chinese prices or costs . . . ." Thus, after December 11, 2016, the importing WTO Member must use Chinese prices or costs only if China shows that market economy conditions prevail in the relevant industry.

#### Reply November 28, 2011 at 11:15 AM, Anon said...

#### Concerned Citizen,

You need to break down para. 15 and read it in context, as the treaty interpreter would. Para. 15(a)(i) describes one condition under which the importing Member "SHALL use Chinese prices or costs" to determine normal value. Para. 15(a)(i) provides no authority to use an NME methodology to determine normal value. It specifies when the importing Member must use normal methodologies to determine normal value, even prior to 2016.

Para. 15(a)(ii) describes what happens if the condition in 15(a)(i) is NOT met. In that event, the importing Member may "use a methodology that is not based on a strict comparison with domestic prices or costs in China". It is this authority that expires in 2016, per para. 15(d). Once this This is where the authority (权力) to use an NME methodology actually resides. (When this) provision expires, importing Members will

no longer have a legal basis to use "a methodology that is not based on a strict comparison". No such authority is conferred under para. 15(a)(i).

Hope this helps to clear matters up.

Reply November 28, 2011 at 11:49 AM, Vitaliy Pogoretskyy said...

I agree with Anon. Otherwise, what would be the purpose to introduce the exception in Article 15(a)(ii)? It should be borne in mind that the whole Protocol is an EXCEPTION to ADA's normal rules and cannot be read in a too liberal manner.

#### Reply November 28, 2011 at 04:34 PM, Julia Qin said...

It should also be clarified that because GATT and ADA do not provide any legal basis for using surrogate methods to a transitional economy, after the former Soviet republics acceded to the WTO, the US, EU and other WTO members ceased to apply their domestic NME AD laws to them. Without section 15 of the China protocol, the US and EU would have been required to do the same to China from the date of accession.

It is rather unfortunate that a specific antidumping method has been elevated to the means of characterizing a country's economic system. Talking about politicizing trade issues.

Reply November 28, 2011 at 09:27 PM, Concerned Citizen said in reply to Julia Qin...

As a factual matter, it is simply not true that after the former Soviet republics acceded to the WTO, the US, EU, and other WTO members automatically ceased to apply their domestic NME AD laws to them.

#### Reply December 01, 2011 at 12:12 PM, Donald Clarke said...

A query for Anon, Vitaly, or Julia: Your interpretation of the intent of 15(d) of the Protocol makes sense. But if your interpretation is correct, then it seems that 15(d) is badly worded, to say the least, because it leaves 15(a)(i) in effect forever. Your argument is that after 15 years, whether or not producers can show that market economy conditions prevail, the importing WTO member shall use Chinese prices or costs. But that's not what 15(a)(i) says, and it remains in effect. In other words, what 15(d) really should have said is that "the provisions of subparagraph (a) shall expire". But it's hard to argue that that statement has the same meaning as "the provisions of subparagraph (a)(ii) shall expire", isn't it?

Reply November 29, 2011 at 12:05 PM, Anon said...

Don,

It would not be the only provision of the Protocol that is poorly drafted. China's Protocol of Accession is a drafting disaster and, frankly, an embarrassment to the

WTO. (Let's hope Russia's is better.) The best one can do is try to interpret it in accordance with the Vienna Convention.

I think it helps to begin with 15(a) itself (the "chapeau", in a sense). It refers to two methods that an importing Member may use to calculate dumping margins: (1) "use ... Chinese prices or costs for the industry under investigation", or (2) "use ... a methodology that is not based on a strict comparison with domestic prices or costs in China". It concludes by saying that the importing Member shall use these two methodologies "based on the following rules", i.e., the rules set out in 15(a)(i) and 15(a)(ii).

As I said above, 15(a)(i) defines a circumstance in which the importing Member "shall use Chinese prices or costs". I think we would agree that this refers, in effect, to "normal" methods of calculating dumping margins under Article 2 of the AD Agreement (such as they are). Para. 15(a)(ii) defines the circumstance in which the importing Member can use "a methodology that is not based on a strict comparison with domestic prices or costs in China". I think we would agree that this refers to what is commonly known as an "NME methodology".

These are the two "rules" that govern the choice of methodology. The purpose of 15(a)(i) is to indicate when the importing Member must use a "normal" dumping methodology, even prior to 2016. The purpose of 15(a)(ii) is to indicate when the importing Member is allowed to use an NME methodology. The expiration of the latter does not convert the former into an implicit authorization to continue to use an NME methodology. Para. 15(a)(i) was clearly intended to benefit the producer by requiring the importing Member to use a normal methodology under certain circumstances. It would flip that provision on its head to read into it a right of importing Members to use an NME methodology.

Should para. 15(d) have referred to both paragraphs, or to 15(a) in general? Yes, that would have been clearer. But it would be inconsistent with the principle of effective treaty interpretation to convert 15(a)(i) into an indefinite right to use an NME methodology, when that clearly was not its purpose.

#### Reply November 29, 2011 at 01:18 PM, Julia Qin said...

As I recall, para. 15 of the Protocol was drafted by the USTR and became part of the bilateral agreement between the US and China in Nov. 1999. The provisions of the bilateral agreement were adopted by the Protocol without revision.

The drafting disaster, to use Anon's phrase, stems in part from this bilateral negotiation of WTO rules (as opposed to market concessions). China lacked the legal competence to negotiate the highly technical legal provisions of the Protocol those days. And more importantly the Chinese leadership apparently did not appreciate the importance of legal provisions, focusing on the economic deal instead.

Russia is a very different story. I expect the Russia protocol will be well-drafted. For one thing, they were not so eager to join the WTO as China did, which gave them much more bargaining power and time to mullover the details. Their team should be legally competent and they have the lessons from China.

#### Reply November 29, 2011 at 08:38 PM, Donald Clarke said...

Many thanks to Anon and Julia. The intention of the drafters seems pretty clear. Still, you've got to admit that you get a pretty bizarre result: after 2016, 15(a)(ii) in effect disappears, leaving only 15(a)(i), which says that if the producer proves that market economy conditions prevail (i.e., burden on the producer), the normal methodology must be used. And you're saying that this should be interpreted to mean that even if the producer fails to prove that market economy conditions prevail, the normal methodology must still be used. Please understand that I'm not really disagreeing with your argument; I just want to point out that it leads to this weird result. Of course, not accepting your argument leads to an even weirder result, since it requires the conclusion that 15(d) is totally meaningless. Sigh.

### Reply November 30, 2011 at 11:32 PM, Henry Gao said in reply to Donald Clarke...

I don't think this will happen, because post 2016, the burden of proof will be shifted back to the normal WTO rules, which means that the investigating authorities will have to prove the existence of NME before they can invoke any NME methodology. Thus, post 2016, the producers do not have to prove the MES at all. Thus, the question of what will happen if they cannot prove will never arise.

### Reply December 01, 2011 at 01:07 AM, Donald Clarke said in reply to Henry Gao...

Thanks, Henry. But what you say here in effect just restates what I find puzzling in the first place: \*why\* does the burden of proof shift back to normal WTO rules, when 15(a)(i) (which calls for something other than normal WTO rules) still survives? What I hear the other specialists saying is that in fact, there's a mistake in the drafting, and 15(a)(i) doesn't survive.

#### Reply December 27, 2011 at 12:12 AM, Vitaliy Pogoretskyy said...

There is a clearly systemic problem here in WTO law, since without this exception to normal anti-dumping rules in China's Protocol, there are limited tools to adjust trade with China to the normal market conditions. For example, whereas the same exception can be found in the accession documents of VietNam, I did not find there any similar expiry date. I think that this problem requires a deeper assessment and perhaps the amendments to the AD Agreement. Clearly, Article 2.7 and Ad Note to GATT Article VI are not the option anymore.

#### Reply December 01, 2011 at 07:58 AM, Julia Qin said...

The NME status of Vietnam for AD purposes expires on December 31, 2018. See para. 255(d) of the Working Party Report on Vietnam accession.

#### Reply December 01, 2011 at 08:53 AM, Concerned Citizen said...

One must not also forget that Article 2.2 of the AD Agreement also allows for alternative methodologies when warranted by the "particular market situation." See Catharina E. Koops, An analysis of the EU's treatment of Non-Market Economies in safeguard and antidumping investigations (Aug. 17, 2005) at 53.

Reply December 01, 2011 at 12:16 PM, Vitaliy Pogoretskyy said...

To Julia,

True, thanks.

To Concerned Citizen,

There are other publications on this subject as well. I have mentioned two of them in my reply to Simon Lester in 'More on Non-Market Economies'.

However, I do not think that the current AD Agreement allows any deviation from the methods of 1) comparison with a comparable price of the like product when exported to an appropriate third country, and 2) the constructed normal value (with reference to the COUNTRY of ORIGIN). If there are no sales of the like product 'in the ordinary course of trade' in the domestic market of the exporter, these are the only two options available for the anti-dumping authority, provided by the ADA Article 2. The insufficiency of the ADA is obvious, but in my view, this is a problem which should not be overcome by treaty interpretation.

#### Reply December 01, 2011 at 01:02 PM

#### 2. More on the End of China's NME Status

 $http://worldtradelaw.typepad.com/ielpblog/2011/12/more-on-the-end-of-chinas-n\\me-status.html$ 

Christian Tietje and Karsten Nowrot have posted a short policy paper discussing the legal issues surrounding the treatment of China as an NME. Here's an excerpt:

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.

#### 3. And Yet More on the End of China's NME Status

http://worldtradelaw.typepad.com/ielpblog/2012/01/and-yet-more-on-the-end-of-chinas-nme-status.html

Back in November, I mentioned a blog post by trade lawyer Bernard O'Connor arguing that the end of China's NME status might be further off than many people think. There was some good discussion of these issues in the comments to that post. Then in December, I mentioned a paper by Christian Tietje and Karsten Nowrot on this same issue. Bernard now has a response to that paper. The full paper is here. Here is an excerpt:

The Myth of China and Market Economy Status in 2016

There have been some comments on an earlier blog which highlighted the myth of automatic Chinese MES in December 2016. In particular, one respected commentator suggests '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 targeting by an antidumping proceeding on the basis of analogous third party methodology.'

This Tietje and Nowrot analysis makes good points. And the points deserve substantive comment. However, the comment goes beyond what the 'myth' blog proposed. The myth blog sought to make the point a) that there is nothing in the China Accession Protocol granting MES automatically and b) China will have to show that it is a market economy under the domestic law of the importing WTO Member, even after 2016. The Tietje and Nowrot Policy Paper agrees with this proposition from a theoretical perspective. They state: Article 15 of the Accession Protocol of China to the WTO 'itself does not explicitly bestow NME-status on China'. And further on:

'Again, the second sentence of paragraph 15(d) of the accession protocol itself does not explicitly grant China MES from the "magic" date onwards.'

The question now raised by Tietje and Nowrot is: What anti-dumping instruments can a competent authority use after 11 December 2016 when the provisions of Article 15(a)(ii) have expired? The Teitje and Nowrot answer is: '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.'[5] Thus they move from the theoretical possibility of the continuation of non market economy status to the practical conclusion that importing WTO Members will have to rely on normal WTO anti-dumping rules.

### 4. Trade lawyer Bernard O'Connor has more to say about China and market economy status:

http://worldtradelaw.typepad.com/ielpblog/2012/05/china-and-market-economy-status-iii.html

#### Introduction

In a first note (published on VOXEU and re-posted on World Trade Law net) I looked at whether China was automatically entitled to Market Economy Status (MES) in 2016 on the basis of the Accession Protocol of China to the WTO. This note concluded that there was nothing in the Protocol which entitled China to automatic recognition as a market economy. In a second note (published on World Trade Law net) I examined the thesis that the expiry of Article 15(a)(ii) of the Protocol would de facto oblige WTO members to consider China as a market economy. The note concluded that the de facto argument had many flaws given the extent to which other substantive elements of Article 15 remained and were required to be implemented.

This third note speculates on the approaches that the EU Commission would be entitled to take in relation to China given the text of Article 15 of the China Accession Protocol.

#### How to determine normal value if market economy conditions prevail

Article 15(a)(i) of the China WTO Accession Protocol provides:

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;

This provision seems rather straight forward. An entitlement to have Chinese prices used is dependent on the producers showing that market economy conditions prevail in the industry producing the like product with regard to three activities: manufacture, production and sale. The text clearly indicates that the market economy

conditions must prevail in all three activities. Thus, market economy conditions in relation to sales alone would not be sufficient. The difference between manufacture and production is not clear but both concepts seem to cover the costs of inputs. Therefore, it would seem that the market economy conditions must prevail in all aspects of the industry's activities.

How a single producer or group of producers is required to establish that market economy conditions apply in a particular industry is not clarified. As is often the case the WTO rules allow a degree of discretion to the Competent Authority to implement the provision and thus set the standards.

A key consideration is the meaning of the word 'prevail'. Prevail means something less than universal. But would 90% of producers operating in market economy conditions (across the full range of the industry's activities) be sufficient or would some other threshold be appropriate. And how would State Owned Enterprises (SOEs) operating within national economic development plans be considered for the purposes of this exercise. Could it be argued that the very presence of SOEs (or that the SOEs had a particular market share of the like product) in a sector means that market economy conditions could never be found for that industry? In this regard, the US considers that the presence of SOEs does not necessarily exclude the findings of market economy conditions to the extent that state ownership in the industry under investigation is not "substantial". This is probably the correct approach as the WTO does not consider ownership in and of itself an issue for trade defense purposes. However, given the specific circumstances of state capitalism in China, it would seem difficult to find MES in a sector in which SOEs operate.

A second element to be considered is that the producer will have to show that the prices or costs are those 'for the industry under investigation'. This triggers the question whether the producers' own costs and prices must be used for price comparison or whether some sort of blended industry wide prices must be used. If a producer or producers can show that market economy conditions do prevail in the particular industry, an individual producer might argue that its own costs and prices reflect the industry-wide costs and prices. However some proof of this would be necessary. Thus the producer might be required, on the basis of the text, to provide in any event the industry wide costs and prices. This might or might not be a difficult task. If the market provides benchmark prices for inputs as in most market economies it won't be a problem. If these don't exist then it is probably indicative that market economy conditions don't prevail for that industry. In fact this could be a threshold test for the finding of a market economy for an industry or sector.

A possible difficulty with the requirement to use industry wide prices is that an individual producer might lose or gain in the calculation of its normal value. Depending on whether the producers' costs and prices are higher or lower than the industry average there might be a benefit or a loss. A similar issue currently arises when sampling is used: non-sampled cooperating exporters get, at most, the weighted

average dumping margin of the sampled exporters. If their individual prices and costs are to be considered, they would obtain a higher or lower margin. This difficulty is equally inherent in the use of industry-wide data but it does not cause problems in the law. In any event, the requirement to use the industry average costs and prices is enshrined in the Accession Protocol.

That being said, it cannot be totally ruled out that the Competent Authority could allow for the individual producer to show that its costs and prices are legitimately below the industry average thus introducing a sort of lesser costs and prices rule (mirroring the EU's lesser duty rule) and a rule ignoring the producer's costs and prices if they are higher in favour of the industry average. This could be a sort of WTO double plus, the use of which could be conditional as the EU Commission is currently considering for the lesser duty rule.

Another difficulty concerns the determination of the average industry costs and prices for the purposes of comparing prices: how is any one producer going to show what those prices are. And how is a Competent Authority going to verify those averages? Would, on both sides, desk research into Chinese industry publications (if available) be sufficient?

Currently, the EU does not require that individual producers show that market economy conditions prevail in the industry as a whole. They are only required to show that MET applies to them individually. This seems to be out of line with WTO law and causes all sorts of administrative difficulties when sampling is used (as is often the case in TD actions against China) as has been seen in the recent Brosmann case before the EC Court of Justice. In addition, in determining normal value the EU does not take the industry costs and prices but the individual producer costs and prices. It is probable that the EU will have to change its practice of treating all producers individually so as to be in line with the Protocol and WTO law in general. Thus some change to the current practice in relation to Chine appears to be necessary.

#### What if market economy conditions do not prevail?

The real problem arises for a Competent Authority if the producer cannot show that market economy conditions prevail in the industry in question. In these circumstances the producer is not entitled to have the industry-wide costs and prices used and the Competent Authority is not obliged to use them. So what costs and prices can be used?

Currently, competent authorities use a methodology based on Article 15(a)(ii). For the most part, competent authorities interpret this to allow the analogue country method. However, as has been seen in the previous notes, this subparagraph will expire in December 2016.

In the absence of Article 15(a)(ii) but the continuation of Article 15(a)(i), the Competent Authority could consider using the costs and prices of the producer in question. But these prices are by definition not market prices because the producer has

not been able to show that market economy conditions prevail in the industry within which it operates. To use those prices would distort the very purpose of the general AD rules which is to make a fair comparison between a 'market based' normal value and the export price.

Allowing the use of individual costs and prices does not seem to be in line with the object and purpose of the Accession Protocol. It is clear from Article 15(d) that this subparagraph (and, in extension, the Article as a whole) is concerned with economy wide (first sentence) or industry wide (third sentence) conditions and not the conditions of an individual producer. And in fact this economy or industry wide approach is more logical. If market economy conditions do not prevail in the economy or in the industry how can it be reasonably sustained that one individual producer within that context stands out alone as a true market economy player. This seems implausible. And, if found, is likely to be very rare.

Where market economy conditions do not prevail for the whole economy or the relevant sector and where an individual producer cannot obtain MET, the current practice is to use the costs and prices of one or more producers in an analogue country to determine what the 'market based' normal value would be and to impute it to the individual exporters from the non market economy. The objective of using the analogue country is to be able to make a fair comparison in a market economy context.

Does the expiry of Article 15(a)(ii) preclude that approach in the future (as has been claimed by a number of commentators)? This issue was addressed to some degree in the second note. However that article did not speculate on approaches that a competent authority might take.

In the search for a solution reference should be made to the Chapeau of Article 15(a) which provides that a methodology other than a strict comparison can be available. Does this have any meaning once 15(a)(ii) has expired? Given the impossibility of the situation that a competent authority faces if a producer has not been able to show that market economy conditions prevail, should some meaning be given to this? The Chapeau says that that the Competent Authority 'shall use' one method or another. Further reference must be made to Article 15(d) which, as has been seen above, deals with economy-wide and industry-wide market economy conditions. It does not provide for individual MET. The solution must be found by looking at Article 15 as a whole.

Currently the EU examines dumping for Chinese producers on an individual basis. Sampling does allow the Commission to group producers together but this is an administrative convenience rather than a change to the fundamental approach taken (and confirmed by Brosmann). When an individual producer cannot show MET then the costs and prices of one or more individual producers in an analogue country is used. So the costs of these producers replace an individual Chinese producers costs and prices. Again the fact that the same costs and prices might be attributed to a whole

series or even all of the individual Chinese producers does not change the EU's individualistic approach.

One solution for the competent authority in 2017 is to move away from an individualistic approach and to fall in line with the economy-wide and industry-wide approach found in Article 15. The text of Article 15 clearly obliges this approach. The test in Article 15(a)(i) is not individualistic. It is not an individual producer that must show market economy conditions. The word used is 'producers' in the plural. And the test is industry-wide. This is also reflected in Article 15(d).

A non individualistic approach would mean that when the EU finds that market economy conditions do not prevail in the industry in question (on the basis of Article 15(a)(i)) and yet must determine market based costs and prices so as to find a true market based comparator for the determination of dumping, it should look to the costs and prices of the like product industry in the global or another market. Thus the EU should not use one or more individual producers in an analogue country but industry-wide costs and prices in a regional or global market in which market economy conditions prevail. This means in practice that the EU will still be able to use an external benchmark for costs and prices. The difference between the current practice and the post 2106 practice is that the examination will be industry wide and not based on the prices of one or more individual producers.

Article 15(a)(ii) provides that when the producers cannot show that market economy conditions prevail competent authorities can use a methodology not based on a strict comparison of domestic costs and prices in China. The lacuna created by the expiry of that provision needs to be filled within the context of the general WTO anti-dumping rules and the whole of Article 15 of the Protocol of Accession. Abandoning an individual producer approach, both when determining if market economy conditions prevail in China and in choosing an appropriate alternative normal value when MET does not prevail, allows the gap to be filled in line with the theory of anti-dumping law and the text of the Protocol.

### 附录 3、美国官方对中国反倾销特殊方法存在 15 年期限表述

### 1) USTR Charlene Barshefsky Press Remarks Following Negotiations with China on the WTO, *The Washington Post*, November 15, 1999

"Two of the most important unresolved issues from last spring had to do with special rules on import surges and on the application of a particular anti-dumping methodology called the 'non-market economy' methodology. Last spring, China took the view that there must be a very restrictive phase-out of these provisions. We certainly agreed with China at that time, that these provisions should not exist in perpetuity, but we believed that they did need to exist for a reasonable period of time. With respect to what was called the 'special safeguard rule' which is an anti-import surge rule into the United States, that provision will exist for 12 years. With respect to the application of the 'special anti-dumping' methodology, that provision will exist for 15 years."

### 2) Letter from President William J. Clinton to the Speaker of the House of Representatives and the President of the Senate, January 24, 2000

"The agreement also protects against dumping. China agreed that for 15 years after its accession to the WTO, the United States may employ special methods, designed for non-market economies, to counteract dumping."

### 3) Testimony of USTR Charlene Barshefsky before the Senate Finance Committee, February 10, 2000

"The agreement with China includes a "product-specific safeguard in the event of import surges, an agreement to continue using 'non-market economy' dumping methodologies for fifteen years."

### 4) White House Fact Sheets on Industry Sectors of US-China Deal: Antidumping: Non-Market Methodology, February 15, 2000

China has agreed that current U.S. practice under its antidumping law with respect to non-market economy countries can apply to imports from China for 15 years after its accession.

- The methodology used by the Department of Commerce (Commerce) to determine whether imports from China are being dumped will remain unchanged.
- Chinese industries will continue to have the burden of proving to Commerce that market economy conditions prevail in their industry to avoid application of the non-market economy methodology.
- China also continues to have the opportunity to establish that market conditions prevail in a particular sector or the economy as a whole and that our non-market economy methodology should not apply. Commerce is charged with evaluating any such claims.

### 5) Testimony of USTR Charlene Barshefsky before the House Ways and Means Committee, February 16, 2000

"Non-Market Economy Dumping Methodology - China's WTO entry will guarantee our right to continue using our current 'non-market economy' methodology in anti-dumping cases for fifteen years after China's accession to the WTO...

"..We strengthen our guarantees that auto production and jobs in the United States will be secure. On the import side, we include in the agreement a 'product-specific safeguard' available to all industries for 12 years -- in this case, a guarantee that if auto imports from China should rise so as to cause market disruption, we can impose emergency limits; and a guarantee we will be able to employ special 'non-market economy' methods of calculating and counteracting dumping for fifteen years."

### 6) Testimony of US Special Trade Negotiator Peter Scher to the Senate Agriculture Committee, March 1, 2000

"Overall, this agreement represents a comprehensive set of trade commitments. It covers food and agriculture, manufacturing, and services industries such as telecommunications, finance, the professions and others. It includes a product-specific safeguard in the event of import surges, an agreement to continue using 'non-market economy' dumping methodologies for fifteen years, and much more. In every case, the commitments are specific and enforceable; will be fully phased-in over a short period of time; and hold China to the same standard we expect of all new WTO members, if we provide China with permanent NTR."

# 7) White House Press Release, "The U.S.-China WTO Accession Deal: A Clear Win for U.S. High Technology, Greater Openness And U.S. Interests," March 1, 2000

"The Agreement Contains Strong Provisions Against Unfair Or Market-Distorting Chinese Trade. The Agreement guarantees our right to the special antidumping methodology we apply to non-market economies for 15 years after China's accession to the WTO. China has also agreed to a twelve-year product specific safeguard that ensures that the U.S. can take effective action in case of increased imports from China that cause market disruption in the United States. This applies to all industries, including high technology, permits us to act based on a lower showing of injury, and to act specifically against imports from China."

### 8) Remarks of USTR Charlene Barshefsky to the Economic Club of Washington, March 16, 2000

"It provides, for a 12-year period, a special remedy to discipline market-disrupting import surges from China. And it strengthens our antidumping laws by guaranteeing our right to use a special non-market economy methodology to address dumping for 15 years after China's accession to the WTO."

### 9) Remarks by USTR Charlene Barshefsky at Los Angeles Town Hall, March 23, 2000

"It provides, for a 12-year period, a special remedy to discipline market-disrupting import surges from China. And it strengthens our antidumping laws by guaranteeing our right to use a special non-market economy methodology to address dumping for 15 years after China joins the WTO."

### 10) Speech by USTR Charlene Barshefsky at American University, April 3, 2000

"And we secured stronger guarantees of fairness for American workers and businesses, through specific measures against unfair trade practices, import surges, and investment practices intended to draw jobs and technology to China. These include state enterprise policies, forced technology transfer, local content, offsets and export performance requirements; for twelve years, a special remedy for market-disrupting import surges from China; and strengthening of our antidumping laws by guaranteeing our right to use a special non-market economy methodology to address dumping for 15 years after China's accession to the WTO."

# 11) Testimony of Deputy Treasury Secretary Stuart Eizenstat before the Joint Hearing of the Subcommittee on International Economic Policy, Export and Trade Promotion and the Subcommittee on East Asian and Pacific Affairs of the Senate Foreign Relations Committee April 6, 2000

"We can treat them – and this was one of the most contentious issues, Senator. They wanted to be treated as a market economy. Treating them as a non-market economy gives us a much greater control in terms of very tough anti-dumping procedures, and they, in the end, allowed us to do that for 15 years."

### 12) Speech by USTR Charlene Barshefsky at the Wharton School of the University of Pennsylvania, April 6, 2000.

"It provides, for a 12-year period, a special remedy to discipline market-disrupting import surges from China. And it strengthens our antidumping laws by guaranteeing our right to use a special non-market economy methodology to address dumping for 15 years after China's accession to the WTO."

### 13) Speech by USTR Charlene Barshefsky to the National Women's Democratic Club, April 11, 2000

"It provides, for a 12-year period, a special anti-import surge remedy to discipline market-disrupting import surges from China. And it strengthens our antidumping laws by guaranteeing our right to use a special non-market economy methodology to address dumping for 15 years."

### 14) Speech by USTR Charlene Barshefsky at the United States Military Academy, West Point, NY, April 12, 2000

"It provides, for 12 years, a special product-specific safeguard to address market-disrupting import surges from China. And it guarantees our right to use a special non-market economy methodology to address dumping for 15 years."

### 15) Testimony of Treasury Secretary Lawrence Summers before the House Ways & Means Committee, May 3, 2000.

"The agreement includes a provision recognizing that the U.S. may employ special methods, designed for non-market economies, to counteract dumping by Chinese exporters for 15 years after its accession."

### 16) Testimony of Commerce Secretary Bill Daley before the House Ways & Means Committee, May 3, 2000

"As I mentioned earlier in my testimony, we have maintained our ability to apply our non-market economy methodology to China for 15 years."

### 17) Testimony of USTR Charlene Barshefsky before the House Ways & Means Committee, May 3, 2000

"China's WTO entry will guarantee our right to continue using our current 'non-market economy' methodology in anti-dumping cases for fifteen years after China's accession to the WTO."

### 18) Testimony of USTR Charlene Barshefsky before the Senate Banking Committee, May 9, 2000

"China's WTO entry will guarantee our right to continue using our current 'non-market economy' methodology in anti-dumping cases for fifteen years after China's accession to the WTO."

### 19) Treasury Secretary Lawrence Summers Testimony before the House Banking Committee, May 11, 2000

"The agreement includes a provision recognizing that the U.S. may employ special methods, designed for non-market economies, to counteract dumping by Chinese exporters for 15 years after its accession."

### 20) White House Fact Sheet: Labor Aspects of PNTR: Benefits for American Workers and Farmers, May 12, 2000

"The Agreement gives the U.S. strong protections against unfair trade practices, including dumping. The U.S. and China have agreed that we will be able to maintain our current anti-dumping methodology (treating China as a non-market economy) in future anti-dumping cases. This provision will remain in force for 15 years after China's accession to the WTO."

### 21) White House Fact Sheet: Permanent Normal Trade Relations With China: A Strong Deal for America and Ohio, May 12, 2000

"The agreement includes a provision recognizing that the U.S. may employ special methods, designed for non-market economies, to counteract dumping for 15 years after China's accession."

### 22) Testimony of USTR Charlene Barshefsky before the House Committee on Agriculture, May 17, 2000

"China's WTO entry will guarantee our right to continue using our current 'non-market economy' methodology in anti-dumping cases for fifteen years after China's accession to the WTO."

### 23) Testimony of Commerce Secretary William H. Daley before the House Committee on Agriculture, May 17, 2000

"China has agreed to guarantee our right to continue using our current methodology (treating Chinas a non-market economy) in antidumping cases for fifteen years after China's accession to the WTO."

### 24) Senator Slade Gorton (WA), Debate on China PNTR, *Congressional Record*, September 19, 2000, p. S8698

"Two of the most significant items negotiated by the United States were the import surge mechanism and the antidumping provisions...The Anti-dumping provision will remain for 15 years and will be used by the U.S. should an influx of Chinese products flood our market."

### 25) Senator Jay Rockefeller (WV), Debate on China PNTR, *Congressional Record*, September 19, 2000, p. S8703

"China has also agreed to grant U.S. industries the right to apply non-market methodology in anti-dumping cases for the next 15 years."

### 26) Statement of USTR General Counsel Peter Davidson to the US-China Economic and Security Review Commission, August 2, 2001

"Perhaps the most important of these mechanisms involves the antidumping laws. These are the laws that we use the most frequently to protect U.S. industry and workers against low-priced, injurious imports from China. Historically, in antidumping cases involving Chinese products, we have used a special methodology -- known as the 'non-market economy,' or NME, methodology -- to make the key measurement when calculating the amount of dumping that is taking place. Although this methodology has long been a part of U.S. law, it is not expressly incorporated in the WTO rules. We achieved a significant concession when we were able to gain China's agreement that we (and other WTO Members) could continue to use this methodology for 15 years after China's accession to the WTO."

27) China's Membership in the World Trade Organization, Message from the President of the United States Transmitting a Report Certifying That the Terms and Conditions for the Accession of the People's Republic of China to the

# World Trade Organization are at Least Equivalent to Those Agreed Between the United States and the People's Republic of China on November 15, 1999, H. Doc. No. 107-146, November 13, 2001

Issue Area	U.SChina Bilateral Agreement of November 15, 1999	China's Final Accession Package
Antidumping	The U.S. will be able to maintain its current antidumping methodology (treating China as a non-market economy) in future antidumping cases for 15 years after China's accession.	This provision has been incorporated into the final accession package without substantive change. An additional commitment included in the final accession package addresses status and reviewability of existing antidumping orders.

## 28) Background Information on China's Accession to the World Trade Organization, Office of the United States Trade Representative, December 11, 2001

"For 15 years after China's accession to the WTO, the United States and certain other WTO members will continue to have the ability to utilize a special non-market economy methodology for measuring dumping in anti-dumping cases against Chinese companies."

### 29) Testimony of Jeffrey A Bader, Assistant United States Trade Representative for China, Hong Kong, Mongolia, and Taiwan, before the House Committee on Ways and Means, July 10, 2001

"[W]e [have] achieved international consensus on Working Party Report provisions on numerous issues crucial to assuring market access and fair trade with China--inter alia, technical barriers to trade (standards), *anti-dumping*, safeguards, administration of tariff-rate quotas, intellectual property rights, industrial subsidies, and the transitional mechanism to monitor China's implementation of its commitments."

"The special anti-dumping provision we negotiated allows us to use non-market economy methodology in judging prices of imports from China for 15 years."

### 30) USTR Fact Sheet: Background Information on China's Accession to the World Trade Organization, December 11, 2001

"For 15 years after China's accession to the WTO, the United States and certain other WTO members will continue to have the ability to utilize a special non-market economy methodology for measuring dumping in anti-dumping cases against Chinese companies."

### 31) US General Accounting Office, GAO-03-04, World Trade Organization: Analysis of China's Commitments to Other Members, October 3, 2002

"...commitments allowing WTO members to use alternative methodologies when applying antidumping provisions to Chinese imports last for 15 years (until 2016)."

### 32) 2002 USTR Report to Congress on China's WTO Compliance(服从,承诺)

"Even though the terms of China's accession agreement are directed at the opening of China's market to WTO members, China's accession agreement also includes several safeguard mechanisms designed to prevent injury that U.S. or other WTO members' industries and workers might experience based on import surges or unfair trade practices. These include a unique, China-specific safeguard provision allowing a WTO member to restrain increasing Chinese imports that disrupt its market (available for 12 years), a special textiles safeguard (available for 7 years) and the continued ability to utilize a special non-market economy methodology for measuring dumping in anti-dumping cases against Chinese companies (available for 15 years). The Administration is committed to maintaining the effectiveness of these mechanisms for the benefit of affected U.S. businesses, workers and farmers."

#### 33) 2003 USTR Report to Congress on China's WTO Compliance

"Even though the terms of China's accession agreement are directed at the opening of China's market to WTO members, China's accession agreement also includes several mechanisms designed to prevent or remedy injury that U.S. or other WTO members' industries and workers might experience based on import surges or unfair trade practices. These include a unique, China-specific safeguard provision allowing a WTO member to restrain increasing Chinese imports that disrupt its market (available for 12 years), a special textile safeguard (available for 7 years) and the continued ability to utilize a special non-market economy methodology for measuring dumping in anti-dumping cases against Chinese companies (available for 15 years). The Administration is committed to maintaining the effectiveness of these mechanisms for the benefit of affected U.S. businesses, workers and farmers."

#### 34) 2004 USTR Report to Congress on China's WTO Compliance

"Even though the terms of China's accession agreement are directed at the opening of China's market to WTO members, China's accession agreement also includes several mechanisms designed to prevent or remedy injury that U.S. or other WTO members' industries and workers might experience based on import surges or unfair trade practices. These include a unique, China-specific safeguard provision allowing a WTO member to restrain increasing Chinese imports that disrupt its market (available for 12 years, running from the date of China's WTO accession), a special textile safeguard (available for 7 years) and the continued ability to utilize a special non-market economy methodology for measuring dumping in anti-dumping

cases against Chinese companies (available for 15 years). The Administration is committed to maintaining the effectiveness of these mechanisms for the benefit of affected U.S. businesses, workers and farmers."

# 35) US General Accounting Office, GAO-06-231, U.S.-China Trade: Eliminating Nonmarket Economy Methodology Would Lower Antidumping Duties for Some Chinese Companies January 10, 2006

"...the accession agreement also specifies that this provision [allowing use of NME methodology] will expire 15 years after the date of the agreement--that is, by the end of 2016."

#### 36) 2006 USTR Report to Congress on China's WTO Compliance

"Even though the terms of China's accession agreement are directed at the opening of China's market to WTO members, China's accession agreement also includes several mechanisms designed to prevent or remedy injury that U.S. or other WTO members' industries and workers might experience based on import surges or unfair trade practices. These include a unique, China-specific safeguard provision allowing a WTO member to restrain increasing Chinese imports that disrupt its market (available for 12 years, running from the date of China's WTO accession), a special textile safeguard (available for 7 years) and the continued ability to utilize a special non-market economy methodology for measuring dumping in anti-dumping cases against Chinese companies (available for 15 years). The Administration is committed to maintaining the effectiveness of these mechanisms for the benefit of affected U.S. businesses, workers and farmers."

#### 37) 2007 USTR Report to Congress on China's WTO Compliance

"These include a unique, China-specific safeguard provision allowing a WTO member to restrain increasing Chinese imports that disrupt its market (available for 12 years, running from the date of China's WTO accession), a special textile safeguard (available for 7 years) and the continued ability to utilize a special non-market economy methodology for measuring dumping in anti-dumping cases against Chinese companies (available for 15 years). The Administration is committed to maintaining the effectiveness of these mechanisms for the benefit of affected U.S. businesses, workers and farmers."

#### 38) 2008 USTR Report to Congress on China's WTO Compliance

"These include a unique, China - specific safeguard provision allowing a WTO member to restrain increasing Chinese imports that disrupt its market (available for 12 years, running from the date of China's WTO accession), a special textile safeguard (available for 7 years) and the continued ability to utilize a special non - market economy methodology for measuring dumping in antidumping cases against Chinese companies (available for 15 years). The Administration is committed to maintaining

the effectiveness of these mechanisms for the benefit of affected U.S. businesses, workers and farmers."

#### 39) 2009 USTR Report to Congress on China's WTO Compliance

"Even though the terms of China's accession agreement are directed at the opening of China's market to WTO members, China's accession agreement also includes several mechanisms designed to prevent or remedy injury that U.S. or other WTO members' industries and workers might experience based on import surges or unfair trade practices. These mechanisms include a special textile safeguard (which expired on December 11, 2008, 7 years after China's WTO accession), a unique, China-specific safeguard provision allowing a WTO member to restrain increasing Chinese imports that disrupt its market (available for 12 years, running from the date of China's WTO accession), and the continued ability to utilize a special nonmarket economy methodology for measuring dumping in anti-dumping cases against Chinese companies (available for 15 years). The Administration is committed to maintaining the effectiveness of these mechanisms for the benefit of affected U.S. businesses, workers and farmers."

### 40) Remarks by Commerce Secretary Gary Locke at US-China Joint Commission on Commerce and Trade, Hangzhou, China, October 28, 2009

"...under the terms of its accession to the WTO, China will be declared a market economy in the year 2016."

#### 41) 2010 USTR Report to Congress on China's WTO Compliance

"These mechanisms include a special textile safeguard (which expired on December 11, 2008, 7 years after China's WTO accession), a unique, China-specific safeguard provision allowing a WTO member to restrain increasing Chinese imports that disrupt its market (available for 12 years, running from the date of China's WTO accession), and the continued ability to utilize a special non-market economy methodology for measuring dumping in anti-dumping cases against Chinese companies (available for 15 years). The Administration is committed to maintaining the effectiveness of these mechanisms for the benefit of affected U.S. businesses, workers and farmers."

#### 42) 2011 USTR Report to Congress on China's WTO Compliance

"These mechanisms include (1) a special textile safeguard (which expired on December 11, 2008, 7 years after China's WTO accession), (2) a unique, China-specific safeguard provision allowing a WTO member to restrain increasing Chinese imports that disrupt its market (available for 12 years, running from the date of China's WTO accession), (3) the continued ability to utilize a special non-market economy methodology for measuring dumping in anti-dumping cases against Chinese companies (available for 15 years) and (4) the ability to use methodologies for identifying and measuring subsidy benefits to Chinese enterprises that are not based

on terms and conditions prevailing in China (without expiration). The Administration is committed to maintaining the effectiveness of these mechanisms for the benefit of affected U.S. businesses, workers and farmers."

#### 43) 2012 USTR Report to Congress on China's WTO Compliance

"These mechanisms include (1) a special textile safeguard mechanism (which expired on December 11, 2008, 7 years after China's WTO accession), (2) a unique, China-specific safeguard mechanism allowing a WTO member to restrain increasing Chinese imports that disrupt its market (available for 12 years, running from the date of China's WTO accession), (3) the authority for WTO members whose national laws contain market economy criteria as of the date of China's WTO accession to utilize a special non-market economy methodology for measuring dumping in anti-dumping cases against Chinese companies (this China-specific authority expires after 15 years, running from the date of China's WTO accession) and (4) the authority to use methodologies for identifying and measuring subsidy benefits to Chinese enterprises that are not based on terms and conditions prevailing in China (without expiration). The Administration is committed to maintaining the effectiveness of these mechanisms, to the extent that they remain available, for the benefit of affected U.S. businesses, workers and farmers."

### 44) President Obama's annual report in 2012 to Congress on China's WTO compliance

"China's accession agreement also includes provisions establishing several mechanisms... designed to prevent or remedy injury that U.S. or other WTO members' industries and workers might experience based on import surges or unfair trade practices. These mechanisms include...the authority for WTO members whose national laws contain market economy criteria as of the date of China's WTO accession to utilize a special non-market economy methodology for measuring dumping in antidumping cases against Chinese companies (this China-specific authority expires after 15 years, running from the date of China's WTO accession)."