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Article

China: NME or ME?

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Recent WTO discussions have centered on the question of China's entitlement to Market Economy status (MES) post 11 December, 2016. China has always interpreted the clause to mean that post-2016, it would automatically be accorded MES. The Members of the WTO appear to be divided on the issue, with Brazil,[1] Japan[2] and EU leaning towards granting MES to China and the US, Canada, Mexico and India opposed to it. Some Members have already granted MES to China long ago.

The controversial Section 15 of the Chinese Protocol of Accession provides:

"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.

...

(d) Once China has established, under the national law of the importing WTO

[1] Brazil signed a Memorandum of Understanding with China, in 2004 *(Memorando de entendimento entre a República Federativa do Brasil e a República Popular da China sobre cooperação em matéria de comércio e investimento)*, recognizing China as a Market Economy. However, the extent of practical grant of MES is unknown.

[2] In 2007, Japan introduced a non-binding deadline to grant MES to China by December 2016, by way of amendment to its guidelines for procedures relating to anti-dumping. However, Japan has made no official commitment on the issue.

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."

Thus, if China establishes, 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 sub paragraph (a) shall no longer apply to that industry or sector. Further, in terms of Section 15(d), the provisions of sub paragraph *(a) (ii)* shall expire 15 years after the date of China's accession to the WTO. However, while the provisions of Section 15(a)(ii) shall expire in December, 2016, provisions of Section 15(a)(i) continue to be available and cannot be read out of China's Protocol of Accession. The latter provision places the initial burden on the producers to show that the market economy conditions prevail in the industry producing the like product and in case the Investigating Authority (IA) disregards the same, the burden of proof shifts to the IA. The IA would then be required to inform the reasons for not accepting that the industry of China is functioning under market economy conditions. As of now, the practical consequences of Non-MES to China are that an IA ignores Chinese producers' own costs and domestic prices when investigating whether to impose antidumping duties. The practice results in higher margins and more uncertainty for both Chinese producers and investigating countries' domestic importers.

This interpretational conundrum leads to two questions, firstly, whether China *can* be treated as a Non-Market Economy at all post December, 2016 and secondly, whether China *will* be treated as a Market Economy post December, 2016 by leading users of the Anti-Dumping (AD) provisions.

Regarding whether China *can* be treated as a Non-Market Economy at all post December, 2016, an understanding of the framework within which the deletion of Section 15(a)(ii) occurs is necessary. The provision is succeeded by the chapeau of paragraph 15(a) and subparagraph 15(a)(i). The chapeau refers to an "alternative methodology" whereas the alternative methodology provision stated in Section 15(a)(ii) will be deleted from December, 2016. Thus, if the domestic producers voluntarily provide enough evidence, subparagraph 15(a)(i) will come into play. Recalling that subparagraph 15(a)(i) uses the word *"shall"*, the importing Member under such circumstances has the obligation to use domestic prices or costs. Hence, this remaining

subparagraph will not be reduced to inutility after 2016. On the other hand, if domestic producers do not provide such evidence, it will be left to legal interpretation[3] of the value of the continuing phrase in the chapeau permitting the usage of an alternative methodology but without the benefit of a prescribed 'alternate methodology'.

The IA could resort to either the Second Ad Note of Article VI of GATT or Article 2.2 of the AD Agreement which provide an alternative to Members unwilling to grant China MES. The Second Ad Note to Article VI of GATT can only be used in case of complete monopolization of trade by a Member[4] and the case of China may not always meet this high threshold. However, Article 2.2 of the AD Agreement provides for using "third country prices" or "constructed values" where *domestic sales do not permit a proper comparison for any of the reasons listed, such as there are no sales of the like product in the* ***ordinary course of trade*** *in the domestic market of the exporting country or when, because of* ***the particular market situation*** *or* ***the low volume of sales*** *in the domestic market of the exporting country.* In fact, US DOC considered this approach in 2002 [when Russia graduated from its NME status], even mentioning the same in *Magnesium Metal from Russia,* when US DOC considered ignoring the actual price paid for energy by a Russian firm on the ground that the Russian energy market was overly regulated and insufficiently competitive.[5]

Regarding whether China *will* be treated as a Market Economy by leading users of the AD provisions, Members and industries remain divided. In the end, granting or not granting China MES is a politico-legal issue.

EU has been facing a sensitive period for its Steel industry, and will look to safeguard the same but is required to counter balance the potential influx of foreign investment expected from China. More importantly, the granting of MES spells prosperity for the bilateral relationship with China that every Member is looking to protect and the promise of which has been an effective incentive for China's progress towards being a Market Economy.[6]

US has conducted a hearing[7] before the US-China Economic and Security Review Commission to review the national security implications of trade and economic ties between the United States and the People's

[3] The interpretation of Section 15 (a) of China's Protocol of Accession has been partially discussed in the AB Report in *EC-Fasteners (China)*, DS397. However, the issue under challenge was widely different from the one under consideration here.

[4] EC – Fasteners (WT/DS397/AB/R), Para. 285, Footnote 460

[5] *Magnesium Metal from the Russian Federation,* 70 Fed. Reg. 9041 (February 24, 2005).

[6] Laura Puccio, *"Granting Market Economy Status to China : An analysis of WTO law and of selected WTO members' policy", December, 2015* [available at: http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/571325/EPRS_IDA(2015)571325_EN.pdf]

[7] *Hearing on China's Shifting Economic Realities and Implications for the United States* [documents available at: http://www.uscc.gov/Hearings/hearing-china%E2%80%99s-shifting-economic-realities-and-implications-united-states]

Republic of China by the granting or not granting of MES to China. The Fourth Panel therein was concerned with the *Evaluation of China's Non Market Economy Status* and received testimonies. The trend of the testimonies advises against granting MES to China for a variety of reasons. It is foreseen that once the status is granted, China will be under no pressure to continue to move towards MES and Investigating Authorities around the world will have no mechanism with which to genuinely measure the differences in the markets in China and another country. Gary Claude Hufbauer[8] makes a very valid counter argument, that the United States would lose more than it gains from withholding full-fledged MES, it would ruin bilateral relations with China with negligible profits to select industries that initiate AD proceedings only.

India cannot withhold the grant of MES from China for very long either, especially considering the geopolitical tensions that arise from its territorial proximity with China and also its competitive relation with the country.

On an overall balance, it appears that countries will continue the practice of using non-market economy methodology on a case by case basis, while *prima facie* granting MES to China.

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Trade Remedy News

Trade remedy measures by India

Product	Country	Notification No.	Date of Notification	Remarks
Amoxycillin	China	F. No. 14/06/2015	27-4-2016	Anti-dumping investigation initiated
Barium Carbonate	China	14/2016-Cus. (ADD)	21-4-2016	Definitive anti- dumping duty imposed
Cold rolled/cold reduced flat steel products of iron or non-alloy steel, or other alloy steel	China, Japan, Korea RP & Ukraine	F. No. 14/12/2016	19-4-2016	Anti-dumping investigation initiated
Hot Rolled and Cold Rolled Stainless Steel Flat Products	China	F. No. 14/18/2015	12-4-2016	Countervailing Duty Investigation initiated

[8] Hufbauer, *"Statement on Market Economy Status"*, February 24, 2016, [available at: http://www.uscc.gov/sites/default/files/Panel%204_Hufbauer%20statement_022416.pdf]

Product	Country	Notification No.	Date of Notification	Remarks
Hot-rolled flat products of alloy or non-alloy steel in coils	China, Japan, Russia, Korea RP, Brazil and Indonesia	F. No. 14/9/2016	11-4-2016	Anti-dumping investigation initiated
Measuring Tapes	Chinese Taipei, Malaysia, Thailand and Vietnam	16/2016-Cus. (ADD)	2-5-2016	Definitive ADD imposed
Methyl Acetoacetate	USA & China	F. No. 14/7/2014	1-4-2016	Anti-dumping duty recommended
Methylene Chloride	China & Russia	F. No. 14/33/2014	30-3-2016	Anti-dumping duty recommended
Normal Butanol	EU, Malaysia, Singapore, South Africa and USA	13/2016-Cus. (ADD)	13-4-2016	Definitive anti-dumping duty imposed
Poly Vinyl Chloride (PVC) Paste/Emulsion Resin	Korea RP, Taiwan, China, Malaysia, Thailand and EU	F. No. 15/19/2016	26-4-2016	Anti-dumping duty recommended
Polytetrafluoroe thylene or PTFE	Russia	F. No. 15/2/2015	12-4-2016	Anti-dumping duty recommended to be continued
Synchronous Digital Hierarchy Transmission Equipment	China & Israel	15/2016-Cus. (ADD)	26-4-2016	Definitive anti- dumping duty imposed
Tyres - New/ unused pneumatic radial tyres for buses and trucks	China	F. No.14/14/2015	3-5-2016	Anti-dumping investigation initiated
Unwrought Aluminium	All countries	F.No. D-22011/10/2016/ Pt II	21-4-2016	Provisional Safeguard duty recommended

Trade remedy measures against India

Product	Country	Notification No.	Date of Notification	Remarks
Frozen Warmwater Shrimp	USA	[A-533-840] 81 FR 20351	7-4-2016	Anti-dumping duty Administrative Review initiated
Polyethylene Terephthalate Resin	USA	81 FR 27977 [C-533-862 & A-523-810]	6-5-2016	Countervailing duty and anti-dumping duty orders issued
Stainless steel bars and rods	EU	2016/C148/05	27-4-2016	Expiry Review of CVD measures initiated

WTO News

South Africa launches Safeguard duty investigation on flat-rolled products of iron or steel

On 4 April 2016, South Africa notified the WTO's Committee on Safeguard that it has initiated a safeguard investigation on certain flat-rolled products of iron, non-alloy steel or other alloy steel. The application was made by the South African Iron & Steel Institute on behalf of its members — largely Arcelor Mittal SA, which has a 70% market share. The period of investigation is 1 January 2012 to 31 July 2015.

WTO members raise concerns on Indian minimum import pricing measures

Amid global slump in the steel sector leading to overcapacity, Japan along with other WTO members raised their concerns about India's new measures imposing minimum import prices (MIPs) on more than 170 iron and steel products. According to the WTO's report, Japan finds such MIP's as inconsistent with Article XI of the General Agreement on Tariffs and Trade (GATT). India's new Safeguard investigation concerning imports of hot-rolled flat steel products was also found to be a matter of concern at the WTO's Goods Council on 15-4-2016. Chinese Taipei, Canada, Australia, the EU and Korea also agreed with Japan on the MIPs and the Safeguard duty. India however declined violation of any WTO commitment and was of the view that it was premature to raise concerns about the MIPs since they had not been discussed first in the WTO's market access and Safeguards committees.

Meanwhile, WTO Members in the series of meetings in the last week of April also discussed the problems in the global steel sector which are prompting governments to increase their use of trade remedy measures to protect local producers. It was noted that 41 new anti-dumping investigations targeting steel imports

were triggered in 2015 as compared to 23 in 2012 and 2013 respectively.

India appeals panel report in solar cells dispute

India has notified its decision to appeal certain issues of law covered in the panel report in *India - Certain Measures relating to Solar Cells and Solar Modules* (DS456) brought to the WTO by USA, and certain legal interpretations as developed by the Panel in the said dispute. In its communication dated 20-4-2016, India requests the Appellate Body to reverse the related findings, conclusions and recommendations of the panel. According to India, panel erred in its finding that Article III:8(a) of the GATT 1994 is not applicable to the domestic content requirement (DCR) measures. The document WT/DS456/9 circulated on 25-4-2016 by the Indian delegation, also states that Panel erred in not considering India's arguments that solar cells and modules are indistinguishable from solar power generation. Panel's finding that the exception under Article XX(j) is not applicable to the DCR measures, was also challenged by India in its appeal to the Appellate Body, which also requests the Appellate Body to reverse the Panel's conclusion that the DCR measures are not justified under Article XX(d) of the GATT 1994.

Meanwhile, the USA has on 15-4-2016, in the Goods Council, expressed concern over India's 'Compulsory Registration Order' (CRO) for certain electronic products, which requires foreign products be re-tested in an Indian laboratory to demonstrate their compliance with Indian standards even though these norms are identical to existing international standards. In particular, it stated that, the list of products subjected to the CRO continues to be expanded and updated through a website rather than through a formal regulatory process involving stakeholder notice and comments.

Brazil files disputes against Indonesia and Thailand

Brazil has on 4-4-2016 requested consultations with Indonesia and Thailand. Dispute against Indonesia concerns latter's measures applied to bovine meat imported from Brazil, (DS506) while that against Thailand concerns subsidies allegedly provided by Thailand to its sugar sector (DS507).

Brazil is of the view that Thailand's quota and price control system and its supplementary payments to cane growers constitute export subsidies in violation of Thailand's obligations under the Agreement on Agriculture. According to document WT/DS507/1, dated 7-4-2016, circulating communication from delegation of Brazil, Thailand also provides subsidies to convert substantial agriculture land from rice to cane production and to develop additional capacity to manufacture cane into sugar. In case of Indonesia, Brazil is of the view that Indonesia has maintained and adopted restrictive rules and procedures which effectively prohibit or restrict Brazilian bovine meat from entering the Indonesian market.

Ratio Decidendi

Anti-dumping – Reliance on post-investigation period data for determination of 'threat of injury'

The Court of Justice of the European Union has held that EU institutions are entitled, in certain circumstances, to take post-investigation period data into consideration. It was held that in investigations intended to determine presence of threat of injury which, by its very nature, requires a prospective analysis, post-investigation period data may be perused. The Court in this regard observed that existence of a threat of injury must be established as at the date of the adoption of the anti-dumping measure. It was also noted that Article 3(9) of the Basic Regulation requires that the finding of a threat of material injury is to be based on facts and not merely allegation, conjecture or remote possibility and that the change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent.

Holding that the post-investigation period data may be used to confirm or invalidate the forecasts in the provisional regulation, the Court however cautioned the authorities inasmuch as it stated that EU institutions' use of post-investigation period data cannot escape review by the EU judicature. Finally, the CJEU upheld the General Court's Order which had found that the post-investigation period evidence relied on by the EU institutions were not capable of supporting the conclusion that there was a threat of injury and that, consequently, the Council had committed a manifest error of assessment in that regard. [*Arcelor Mittal Tubular Products Ostrava A.S.* v. *Hubei Xinyegang Steel Co. Ltd.* – Judgment dated 7-4-2016 in Joined Cases C-186/14 P and C-193/14 P, CJEU]

ADD and CVD – Scope of product under consideration, exclusion to 'finished goods'

The United States Court of International Trade has upheld that findings of the authorities below that 'patio screen door kit' without the 'screen' is not a 'final finished good' excluded from the scope of the Orders imposing anti-dumping duty and countervailing duty. The ADD and CVD Orders excluded 'finished goods' containing aluminum extrusions that were imported unassembled in a 'finished goods kit'. The Court hence rejected the contention of the importer that its screen door without a screen, basically an empty aluminum door frame, was nevertheless, a finished final good or finished product within the meaning of the 'finished goods kit' exclusion. US DoC's conclusion that Plaintiff's goods are not 'finished goods kits' because they lack all the necessary components to assemble a complete patio screen door was found to be correct by the Court here. [*Circle Glass Company* v. *United States* - Slip Op. 16-39, decided on 20-4-2016, US CIT]

Similarly, the court declined to grant exclusion to 'kits' where the DoC had determined that the goods were actually rearranged and repackaged into kits after

importation, meaning thereby that they were not 'finished goods kits'. The Court in this regard noted that the importer did not show that the components required to assemble a booth (out of aluminium extrusions) are arranged together in the shipping container or marked in a way that communicates that each box belongs to an individual kit, or that the distributor maintains its inventory of components to prevent mixing of parts between kits, which in turn might suggest the components were kits at the time of importation. The importer had imported the components together in the same shipment but packaged like parts together (i.e., poles with poles, beams with beams, and buckles with buckles). [*Districargo, Inc. v. United States* - Slip Op. 16-38, decided on 20-4-2016]

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