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Article

Market economy status to China – Debate continues

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The EU Commission recently held a debate on the sensitive issue of granting 'market economy status' to China. Considering China's Accession Protocol, it may be noted that the final decision will have to be made by the European Parliament and EU Member States later this year.

Since 2001 when China joined the WTO, it has been treated as a non-market economy country. Because of the non-market economy treatment, in most anti-dumping investigations, China's domestic cost and selling price is not considered by the investigating authorities. Instead, the authorities take surrogate third country's cost and price as the benchmark to compare with China's export price, leading to extremely high dumping margins. For example, in the preliminary determination of certain Corrosion-Resistant Steel Products from China, India, Italy, Korea and Taiwan, dumping margin of Chinese producers, as determined by the USDOC, was 255.80%, while in respect of producers from other subject countries, the same was only 6.92% maximum[1]. In another case, pertaining to imports of certain Polyethylene Terephthalate Resin from Canada, China, India and Oman, dumping margin in case of Chinese producers was above 120%, while in case of producers from other subject countries it was found to be no more than 20%[2].

According to China such practice of treating it as a non-market economy has to come to an end by December 2016. Some voices across the globe however are of the view that China can still be treated as a non-market economy after 2016[3]. Here, it may be necessary to have a look at the relevant WTO Rules. This issue of Market Economy Treatment (MET) arises from Article 15 of China's Accession Protocol, which reads as:

"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

1 [A–570–026] issued on Federal Register / Vol.81, No.1, dated 4-1-2016.

2 [A–570–024] issued on Federal Register / Vol.80, No.199, dated 15-10-2015.

3 http://www.wileyrein.com/media/publication/159_China-Can-Still-Be-Treated-As-A-Nonmarket-Economy-After-2016.pdf

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 sales of that product.

...

(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."

Article 15(a) stipulates the general principle of the methodologies applied to Chinese exporters in anti-dumping investigations. Firstly, it provides two methodologies to determine normal value in principle, i.e. (1) Chinese prices or costs for the industry under investigation, and (2) a methodology that is not based on a strict comparison with domestic prices or costs in China. Then the rule provides (i) and (ii) to clarify under which condition what methodology is applied. According to Article 15(a)(i), if Chinese industry is able to establish that it is operating under market economy conditions, the investigating authority shall use Chinese prices or costs. Otherwise, Article 15(a)(ii) may be applied.

Article 15(d) provides three levels of limits when applying Article 15(a). First of all, importing WTO Member has to define 'market economy criteria' under the national law so that China is able to establish whether it has met all the relevant criteria. It may be noted that China is required to establish market economy conditions, as a whole, according to national law of the importing WTO Member, and such understanding is not automatically granted to China. It also requires WTO Member to pass national law to accept China's market economy status. Only then, sub-paragraph (a) shall be terminated.

Second level of Article 15(d) clearly stipulates the timeline for applying Article 15(a)(ii), i.e. after 11 December 2016, the importing WTO Members are not allowed to use a methodology that is not based on a strict comparison with domestic prices or costs in China.

According to the third sentence of Article 15(d), once a particular industry or sector establishes that market economy conditions

prevail in the industry according to the national law of the importing WTO Member, it is not required for the industry or sector to establish the same again in anti-dumping investigations initiated by such Member. It may be noted that grant of market economy status will only apply to this industry/sector and not to any other industry/sector.

Since China itself may not be accepted by some WTO Members as a market economy country after 11 December 2016, Article 15(a) will still be in force while sub-para (ii) thereof will expire. It will still be a burden on Chinese exporters to show that market economy conditions prevail in the industry and there seems to be no clear answer as to the methodology to be used if a particular industry or sector is not able to establish that market economy conditions prevail in that industry/sector.

In any event, grant of market economy status to China by the USA or the EU is not only a legal issue. It may be noted that in anti-dumping investigation initiated by the EU against China in respect of zinc oxide, although three companies were granted market economy status, the EU authority still did not accept raw material cost of Chinese exporters because it was considered that price of zinc in China was lower than market price. Similarly it may also be noted that though Russia has been granted market economy status by the EU, in some anti-dumping cases the EU authorities still consider Russia's cost of energy as distorted.

In addition, maintenance of proper accounting records is also a challenge for Chinese enterprises. If due to some reasons, a Chinese company is not able to demonstrate that they have a clear set of accounting records that are independently audited and in line with international accounting standards, its taxable income is taken as not correctly disclosed in the financial statements.

Conclusion

Since the European Union has postponed its decision on China's full market economy status, the answer to the question as to whether China would be recognized as market economy country, is blurred. However, there is no doubt that with the termination of the provision allowing application of surrogate price, industries may have better standing to be recognized as if working under market economy conditions. Since the deadline is approaching fast, producers in chemical, ceramic and textile industries who have been slapped with high anti-dumping duties, can start preparations so as to be able to establish that they are operating under market economy principles.

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Trade Remedy News

Trade remedy measures by India

Product	Country	Notification No.	Date of Notification	Remarks
Aluminium Radiators, Aluminium Radiators sub-assemblies and Aluminium Radiator core	China	F. No. 14/24/2015-DGAD	1-1-2016	Anti-dumping investigation initiated
Castings for wind operated electricity generators	China	1/2016-Cus. (CVD)	19-1-2016	Definitive Countervailing duty imposed
Caustic Soda	Iran, Saudi Arabia and USA	F. No. 15/19/2015-DGAD	22-1-2016	ADD Mid-Term Review initiated
Elastomeric Filament Yarn	China, South Korea, Taiwan and Vietnam	F. No. 14/29/2015-DGAD	27-1-2016	Anti-dumping investigation initiated
Hydrogen Peroxide	Bangladesh, Taiwan, Korea, Indonesia, Pakistan and Thailand	F. No. 14/3/2015-DGAD	14-1-2016	Anti-dumping investigation initiated
Melamine	China	2/2016-Cus. (ADD)	28-1-2016	Definitive anti-dumping duty continued after sunset review
Mulberry Raw Silk of Grade 3A and below	China	1/2016-Cus. (ADD)	28-1-2016	Definitive anti-dumping duty imposed
Phenol	EU, Singapore and Korea RP	F. No. 14/13/2014-DGAD	12-1-2016	Anti-dumping duty recommended
Plastic processing or injection moulding machines	Chinese Taipei, Philippines, Malaysia and Vietnam	F. No. 14/3/2014-DGAD	7-1-2016	Anti-dumping duty recommended
Polypropylene	Singapore	F. No. 15/14/2014-DGAD	27-01-2016	Anti-dumping duty recommended pursuant to sunset review
Styrene Butadiene Rubber of 1500 series and 1700 series	EU, Korea RP and Thailand	F. No. 14/10/2015-DGAD	14-1-2016	Anti-dumping investigation initiated
Tyre Curing Presses for Tyres	China	F. No. 15/22/2014-DGAD	5-1-2016	Anti-dumping duty recommended pursuant to sunset review

Trade remedy measures against India

Product	Country	Notification No.	Date of Notification	Remarks
Corrosion-Resistant Steel Products	USA	[A-533-863] 81 FR 63	4-1-2016	Preliminary dumping margin determined at 6.64 - 6.92 percent

WTO News

EU disputes Colombia's measures affecting imports of spirits

On 13 January 2016, the EU has notified the WTO that it has initiated a WTO dispute proceeding against Colombia regarding certain measures put in force by the latter affecting import of spirits. The EU said that Colombian authorities at a national and departmental level accord discriminatory and WTO-inconsistent treatment to imported alcoholic beverages in a manner that affects exports of spirits from the European Union into Colombia. As per the document WT/DS502/1, dated 18-1-2016 circulated by the EU, Colombia taxes spirits having higher alcohol per volume at a higher rate while taxing the spirits (whether imported or domestic) having lower alcohol, at a lower rate of tax. According to EU, though Colombian fiscal regime on spirits is on its face origin neutral, it results in the unjustified imposition of a higher fiscal burden on like or directly competitive and substitutable imported spirits than the one applied on domestically produced spirits. The Colombian provisions are hence alleged to be in violation of Article III:2 of the GATT, 1994. Similarly, EU alleges that certain unjustified market restrictions over the introduction and sale of spirits have been brought in force by Colombia which are in violation with various other provisions of the GATT.

Meanwhile, Colombia in another dispute has on 22-1-2016, notified its intention to appeal against the findings of the panel in the dispute *"Colombia – Measures relating to the importation of textiles, apparel and footwear"* (DS461). The dispute involved certain Colombian measures which according to Panama resulted in import duties in excess of those set forth in Colombia's Schedule of Concessions. Colombia however states that Articles II:1(a) and (b) of the GATT do not apply to illicit trade. It terms imports at 'artificially low prices' in order to launder money, as 'illicit trade'.

EU fasteners - Appellate Body issues compliance report

On 18 January 2016, the Appellate Body issued its compliance report in the dispute *"European Communities — Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China"*. The Appellate Body dismissed the European Union's claims on appeal that the Panel erred in finding that China's claims under the Anti-Dumping

Agreement fell within its terms of reference under Article 21.5 of the DSU. The Appellate Body upheld the Panel's finding that China's claims were within the Panel's terms of reference. The dispute related to compliance of the DSB Appellate Body Report by the EU which according to China was not fully and correctly implemented by the EU. The claims exclusively pertained to the conduct of the anti-dumping review investigation by the EU. The Appellate Body also upheld the Panel's finding that the Commission's injury determination was inconsistent with Articles 3.1 and 4.1 of the Anti-dumping Agreement. It may be noted that the dispute was initiated way back in July 2009 by China with Appellate Body finding the EU provisions not in conformity with the WTO Rules, in 2011. EU had in October 2012 reported compliance of the recommendations and rulings of the DSB.

More DSB compliances - The United States has also on 14-1-2016 submitted its compliance report in accordance with Article 21.6 of the DSU in the dispute *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India* (DS436). According to WT/DS436/14/Add.2, dated 15-1-2016 the US Trade Representative has requested that the USITC issue a determination that would render its action in that proceeding not inconsistent with the DSB's recommendation and rulings.

In another dispute famously known as US COOL, the USA has repealed the US Country of Origin Labelling scheme which was held as violative of the WTO provisions (DS384, DS386). This dispute also has a chequered history with consultation starting in 2008 and the DSB compliance panel finding in May 2015 that even the revised scheme was in violation of the provisions.

Chinese subsidies notification questioned by Canada, US and Japan

Canada, USA and Japan have questioned China in the Committee on Subsidies and Countervailing Measures, as to when the latter would comprehensively notify subsidies provided at the sub-central level. Documents dated 25-1-2016, communicated by the aggrieved countries, note that Article 25 of the Agreement on Subsidies and Countervailing Duties (Subsidies Agreement) specifically requires that Members include in their notification information on any subsidies granted or maintained within their territory, which includes subsidies at both the central and sub-central levels, and that China has never notified a sub-central program. Japan in this regard also notes that China in October 2011 and then in October 2015 explained to the SCM Committee that local programmes would be notified as soon as possible. Further, according to G/SCM/Q2/CHN/54 and G/SCM/Q2/CHN/55 by Canada and Japan respectively, for many of the notified Chinese programmes, there are no figures on the amount of support provided. China was also requested by Japan to at least specify subsidies with especially large amount (e.g. subsidies with a budgeted amount exceeding a billion RMB/per year).

FTA News

Trans Pacific Partnership (TPP) Agreement and other FTAs

One of the biggest multinational regional trade deals, the Trans Pacific Partnership Agreement has been recently signed by 12 countries. It presently covers US, Japan, Malaysia, Vietnam, Singapore, Brunei, Australia, New Zealand, Canada, Mexico, Chile and Peru which according to some sources account for 40% of the world trade. The Member countries now have two years to ratify the agreement before it comes into force. Other than reduction in tariff, the deal promises common rules for labour, environment and rules to combat bribery and corruption. It may be noted that seven of the above countries are also negotiating trade deals with India. Meanwhile, in other part of globe, EU is also active in pursuing a trade deal with USA, Trans Atlantic Trade and Investment Partnership Agreement (TTIP) which aims to improve the regulatory convergence to facilitate trade and investments, reduce the non-tariff barriers, and open-up the service market across the Atlantic ocean. It is believed in some quarters that the standards now set by the EU and USA in the deal will soon become the benchmark for future global rules. EU just like the USA is also looking towards East and is eager to conclude trade deals with smaller economies. Recently, EU-Ukraine trade deal has been implemented from January 2016.

Ratio Decidendi

Anti-dumping duty – Re-opening of investigation in the absence of provisions

European Court of Justice has held that even in the absence of provisions expressly providing for reopening an investigation after an anti-dumping regulation has been declared invalid by the Court, regulation enacted after re-opening the investigation was not invalid. Considering various precedents, the Court was of the view that it is not necessary that the option of reopening the procedure should be expressly provided for by the legislation.

The Court in its earlier judgement had held that the Commission had not examined whether one of the countries listed in the Eurostat statistics available during the investigation could constitute an analogue country. Holding that the authorities had hence not shown due diligence required in order to determine value on the basis of the prices paid for the like product in a market economy third country, the Court had declared the regulation imposing anti-dumping duty as invalid. The authorities however re-opened the investigation and imposed anti-dumping duty again under a separate regulation.

Answering the question of invalidity of the second regulation, in the absence of provisions for re-opening the investigation, the CJEU

held that the authorities were entitled, in order to give effect to the earlier judgment, to reopen the procedure only from the stage of the investigation relating to the determination of the normal value, even if such an option is not expressly provided for in the Basic Regulation. It was noted that the irregularity did not affect the procedure in its entirety, but was only in relation to the determination of that normal value.

The Court further rejected the contention that the subsequent regulation was invalid because the investigation was closed more than 15 months after it was initiated, and that the investigation was not based on an updated reference period. [*CM Eurologistik GmbH* v. *Hauptzollamt Duisburg* – Judgement dated 28-1-2016 in Joined Cases C-283/14 and C-284/14, CJEU]

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