AEGIS EUROPE

Short background on MES China

When China joined the WTO in 2001, it had not completed the transition to becoming a market economy. For this reason, China made various commitments to continue its transition to a market economy and in particular agreed in its Protocol of Accession to the WTO to ensure that all prices were determined by market forces. In the absence of market based prices, special provisions were introduced in Section 15 to address price comparability for anti-dumping investigations. Section 15 (below) allows other WTO members to apply non-market economy (NME) methodologies to imports from China until the transition to market economy is completed.

While the consequences of the expiration of subparagraph 15(a)(ii) are politically and legally under debate, the least one can say is that there is no clear legal obligation to grant China MES in 2016. Moreover, to this day China has not made the transition to a market economy. In particular, the EU has established that China meets no more than one of the five cumulative technical criteria[1], regarding the use of non-market trading.

In fact, China continues to direct and distort its economy to such an extent that it cannot be characterised as a market economy for TDI purposes. This is despite its firm WTO Protocol commitment to make its prices and costs fully market based:

- In key sectors, the European Commission has found numerous examples of ways in which the Chinese government continues to direct and distort its economy to promote domestic producers and their exports.

- Examples of those distortions have been seen with regard to the supply and pricing of raw materials, energy, land and equipment, with regard to preferential financing, loan repayments and grants, and debt for equity swaps, government-organised technology acquisitions and R&D, and numerous other results of government interference.

Granting MES to China under these circumstances, while it is still a distorted economy, would devastate key EU sectors.

- Granting MES to a country that does not have a market economy would prevent the EU from addressing the true level of dumping of imports from that country.

---

[1] The five (cumulative) criteria are as follows :

1. a low degree of government influence over the allocation of resources and decisions of enterprises;
2. no state-induced distortions in the operation of enterprises linked to privatisation and the use of non-market trading or compensation system;
3. a transparent and non-discriminatory company law which ensures adequate corporate governance (application of international accounting standards, protection of shareholders, public availability of accurate company information);
4. laws which ensure the respect of property rights and the operation of a functioning bankruptcy regime; and,
5. a genuine financial sector which operates independently from the state and is subject to sufficient guarantee provisions and adequate supervision.

- Anti-dumping measures based on the pretense that China is a market economy will not be adequate to counter the distortions in China, which would effectively mean that the EU would no longer provide a level playing field for operators in these key sectors

- The consequences would be devastating for economic sectors that are motors of EU jobs, innovation and growth. For sectors such as ceramics, bicycles and solar modules, the consequences would be fatal for hundreds of SMEs.

- China has built up overcapacities in favoured sectors through its Five Year Plans. Each time a new sector is added to these plans puts the EU sector at risk because of the State-directed buildup of massive production overcapacities.

- The fact that other major economies (the US, Japan, India, Canada, among others) also do not recognise China as a market economy only magnifies the likely effect that a premature unilateral grant of MES to China would have on the EU economy.

Taking into account that the impact on jobs and growth should be the principle concern in addressing the issue, AEGIS Europe believes that the European Commission should carefully proceed with a deep and comprehensive impact assessment before considering the adoption of any proposal to modify the EU basic anti-dumping regulation with regard to the treatment of Chinese producers, with particular attention to the effects on EU manufacturing jobs, investment and competitiveness of EU SMEs.

Indeed, the Commission's own Better Regulation Guidelines require that a full impact assessment be carried out prior to any proposal to revise existing legislation which would have a major economic, social or environmental impact, in a situation where there is policy discretion. As there is no clear legal obligation to grant China MES, and in any event as the Commission considers legislative changes to amend the anti-dumping instrument, there is clearly policy discretion involved here.

In addition, we strongly want to stress the fact that the European Commission needs to cooperate with the EU's major trading partners – and in particular the US – in order to coordinate a common approach in the framework of the WTO:

- A unilateral EU decision to grant MES would have a negative effect on other agreements already in force or being negotiated (such as TTIP)

- Because of the consequences of a unilateral grant of MES, and with the policy space the EU legislator has within the EU legal order, the EU must – before doing anything – seek coordination with at least its major trading partners (even if others have different legislative / administrative procedures with regard to a grant of MES).

The European Commission should work together with the European Parliament and the Council on the issue.

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 Member 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.