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ABSTRACT

The effect of the 15th anniversary of China's accession to the World Trade Organization (WTO) and the expiry of several provisions of its WTO Accession Protocol was the object of heated debate between major trading partners in 2016. Yet the question of China's graduation to the market economy status, and its implications on the anti-dumping investigations in the importing countries, remains. This paper explores the divergent legal interpretations of China's accession agreement which allowed other WTO members to consider China as a non-market economy until the end of 2016, and the options available to importing countries to mitigate the negative effects of change in dumping methodology for Chinese goods. It concludes by recommending legal reforms necessary to counter unfair trade practices of non-market economies.

INTRODUCTION

Despite the much anticipated 15th anniversary of China's accession to the World Trade Organization (WTO) taking place on 11 December 2016, the debate over the country's possible gradation to the market economy status continues. The controversy appears to reach another peak with China on 12 December launching the WTO dispute consultations against the EU and the US for continuing to treat is as a non-market economy (NME).[1]

According to the provisions of China's Accession Protocol to the WTO, certain rules which have so far allowed importing countries to treat it as an NME for the purpose of the anti-dumping investigations expired on 11 December 2016. The differential treatment of Chinese goods envisioned under the Accession Protocol was justified by the fact that the country at the time of joining the WTO was still in transition towards the market economy, and thus, its domestic prices were distorted. The NME methodology, which permitted the investigating authorities in importing countries to disregard Chinese prices while calculating dumping margins, has proved to result in higher anti-dumping duties.[2] Being the world's most targeted country in the anti-dumping investigations, China has been arguing that the expiry of certain clauses of the Accession Protocol after 11 December 2016 creates a legal obligation to grant it a market economy status.

Yet the WTO members remain divided on the issue. Although various countries, mostly for political reasons, already recognised China as a market economy or agreed to do it as of 12 December, some of the most frequent users of the anti-dumping measures remain opposed to it, including the US and India. They argue that the interpretation of the Accession Protocol is highly controversial, and there is no specific rule which provides that China must be automatically granted a market economy treatment after December 2016. Finally, they also point that Chinese state continues to play a central role in the economy, which leads to distortions to the global trading system and allows Chinese producers to unfairly compete with industries from market-based economies. The problem is of particular relevance for India which has so far imposed the highest number of anti-dumping duties against China.

Although the matter appears to be technical in nature, as it relates to the specificities of calculating normal value (i.e., the price for which imported product is sold in its home country) of imported goods in anti-dumping investigation, any decision on this issue will have important

legal, economic and political implications. Chinese quest for the market economy status aligns with its economic policy objective to compete on an equal footing with its major trading partners. It has recently emerged as a single major emerging/developing economy which has been actively pursuing the preferential trade agreements and investment deals agenda, including its interest in the West-driven negotiations of the Environmental Goods Agreement and Trade in Services Agreement.

It is thus worthwhile to examine the issues related to the non-market economy status of China as well as diverging interpretations of the controversial clauses of its Accession Protocol. The paper also explores options available to importing countries under WTO law to mitigate the negative effects of change in dumping methodology for Chinese imports after 11 December and ensure that domestic industries are protected against unfair competitive practices of non-market economies/economies in transition.

WHAT IS A NON-MARKET ECONOMY?

Interestingly, WTO law itself does not define a 'market economy' or a 'non-market economy'. The determination whether an exporting country is a non-market economy is thus made in accordance with the domestic law of individual WTO members.

The only reference to the non-market economy under the WTO rules can be found in the addendum to Article VI (Anti-dumping and Countervailing Duties) of GATT. The addendum was introduced in 1955 to deal with what was at that time existing Soviet bloc-type of monopolies. In order to address the dumping practices of socialist economies, the addendum allowed the importing countries to deviate from the regular dumping margin calculations procedure. The second paragraph of the addendum stipulated that "in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all

domestic prices are fixed by the State, special difficulties may exist in determining price comparability (...) and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate." This clause, thus, applies only to exports from countries which a) have a complete or substantially complete monopoly of its trade, and in which b) all domestic prices are fixed by the state. It has been reaffirmed by the Appellate Body in the recent Fasteners case[3] that only countries which meet these two strict conditions are covered by the provision. The Appellate Body stated that the addendum "appears to describe a certain type of NME [and] would thus not on its face be applicable to lesser forms of NMEs that do not fulfil both conditions".[4] With the transition of majority of former USSR countries to market economies, the paragraph is currently of limited use because in none of the WTO members is it true that all domestic prices are fixed by the State. Consequently, this provision addresses only a special type of non-market economies, which no longer exist.

In the absence of a WTO definition, the non-market economy status of a state is essentially determined in accordance with the national law of WTO members. The domestic laws of various countries set specific conditions which an exporting country has to meet in order to acquire a market economy status. The EU, for example, does not maintain a legal definition of NME, yet when assessing the status of other countries it takes into account the degree of government influence in the management of enterprises and allocation of resources, distortions in privatised economy, effective implementation of bankruptcy laws, IPRs, corporate governance rules, and existence of an open financial sector. The EU maintains a list of non-market economies which do not fulfil these criteria.[5] The last assessment of Chinese economy against these conditions was undertaken by the EU in 2011. It concluded that the Chinese government maintains substantial market distortions, restrictions on exports and imports, subsidies inputs, fixed domestic prices, strong

presence of state-owned enterprises with favoured credit access, and has not established a genuine financial market. Consequently, the market economy status has been rejected.

Under US law, the NME is defined as a foreign country that does not operate on market principles of cost or pricing structure, so that sales of merchandise in such country do not reflect the fair value of the merchandise.[6] Contrary to EU practice, the US does not maintain a single list of NMEs. Rather, the incumbent administration enjoys a broad scope of discretion deciding whether a foreign country is an NME, and such determination remains in effect until it has been successful challenged. The analysis of the type of economy is based on the following factors specified under the law: free currency convertibility; wages determined by labour market; openness to foreign investments; government ownership or control over means of production, allocation of resources and price; and output decisions of enterprises. The US considers that China does not meet the conditions required from a market economy, in particular the one related to currency convertibility. In 2011, the US observed that "China seems to be embracing state capitalism more strongly each year, rather than continuing to move towards the economic reform goals that originally drove its pursuit of WTO membership."[7] Today the US appears to maintain its consideration of China as a non-market economy for the purpose of anti-dumping investigations even after the December 2016 deadline.[8]

India's approach towards NMEs resembles the US' methodology. Indian law defines NME as any country "not operating on market principles of cost and pricing structure, so that sales of merchandise in such country do not reflect the fair value of the merchandise."[9] It specifies conditions which are taken into account by the authorities when assessing the market economy status, including state interference in firms' decisions regarding prices, costs, inputs of raw material or sales; barter trade; implementation of bankruptcy and property laws; and free exchange rate conversions. Prior

to 2002, India used to maintain a list of countries presumed to be NME for the purpose of anti-dumping investigations. After the amendment, the list was substituted by a legal presumption that 'any country' is an NME if in the preceding three years other WTO member or Indian investigating authority accorded it an NME treatment.

Consequently, in the absence of the WTO rules, the classification of a country as an NME depends on the domestic legislation of WTO members. The status of China's economy varies among different countries. Since China's accession to the WTO, due to its active foreign policy on this front, over 80 countries have already recognised China as a market economy, while others, including India, continue considering it as a non-market economy.[10]

CHINA'S WTO ACCESSION PROTOCOL: DIVERGENT INTERPRETATIONS

The controversy surrounding the issue of China's graduation to market economy status stems from the provisions of its Accession Protocol to the WTO. At the time of its accession to the Organization in 2001, it was recognised that China was not yet a full-fledged market economy. It was allowed a variety of transition periods to comply with WTO obligations and made several commitments in exchange for the WTO participation and, as a consequence, an improved market access for its exports to all remaining WTO members. Mainly, in Section 15 of the Protocol, it agreed that other countries can deviate from the regular dumping procedure when dealing with products exported from China.

The ordinary methodology, applicable to all other WTO exporting countries, is set under the WTO Anti-Dumping Agreement. It requires an importing country to compare a value of the product sold in its territory (export price) with the value of the product in its home/exporting country (normal value) in order to determine if there was dumping (sale of goods

below their normal value). Due to distortions of prices on Chinese market, Section 15 of the Accession Protocol allowed importing countries to disregard Chinese prices and instead construct the normal value using alternative methods, e.g., taking into account prices in a third country. This alternative procedure was explicitly prescribed in subparagraph a(ii) of Section 15 of the Protocol. This particular clause expired on 12 December 2016, which gave rise to diverging opinions on how the importing countries should calculate the dumping margin for Chinese products after that date. The box on page 10 containing relevant parts of Section 15 highlights the expired provisions.

The drafting of the Accession Protocol is far from clear, which in effect sparked contradictory interpretations. It appears that once the Protocol was concluded it was commonly accepted that the WTO members would not apply the special procedure for calculating dumping margins after 2016. The US-China bilateral agreement on China's accession to the WTO, which formed the basis for the WTO Accession Protocol, explicitly stated that: "The U.S. and China have agreed that we will be able to maintain our current antidumping methodology (treating China as a non-market economy) in future anti-dumping cases without risk of legal challenge. This provision will remain in force for 15 years after China's accession to the WTO."[11] Similarly, the European Commission's official position at the time of China joining the WTO provided that "specific procedures for dealing with cases of alleged dumping by Chinese exporters, which may not yet be operating in normal market economy conditions, will remain available for up to fifteen years after China enters the WTO."[12] This position has been advocated by China. It claimed that, after the expiration of Section 15(a)(ii), it has to be automatically treated like a market economy for the purposes of anti-dumping investigations.

However, as the deadline approached, the novel interpretations of the consequences of the expiry of subparagraph a(ii) were put forward. It is argued that Section 15 does not state that China automatically becomes a market economy after December 2016.[13] Instead, it simply provides for the

termination of one clause of the Section which prescribed a procedure the WTO members could use to calculate dumping margins for products exported from China. It implies that all other clauses of Section 15 remain in force even after December, including the introduction to paragraph (a) and its first subparagraph. Under these provisions, the WTO members can still choose whether or not to use Chinese prices and to require Chinese producers to demonstrate that market economy conditions prevail in their industry in order to have their prices and costs taken into account. Also, paragraph (d), under which China is required to prove in accordance to the domestic law of WTO members that it is a market economy, stays intact. Consequently, the remaining provisions have been inferred to require China to demonstrate under the domestic law of an importing country that it is a market economy even after 11 December and, failing to do so, other countries are free to treat it as an NME. The contrary interpretation would nullify the meaning of the remaining provisions of Section 15. This position is supported by the WTO Appellate Body practice of interpreting treaties according to "the principle of effective treaty interpretation (which) requires us to give meaning to every term of the provision."[14]

In addition, the holistic approach to the interpretation of the Accession Protocol has been advocated. It was proposed to read Section 15, which permits importing countries to disregard distorted prices of Chinese products, as twinned with Section 9 of the Protocol, which contains Chinese commitment to allow its domestic prices for traded goods and services to be determined by market forces.[15] It was thus argued that both provisions are of reciprocal nature. As China has not complied with its obligation to remove distortions and allow prices to be set by the market, the importing countries should not be obliged to take such values into consideration when determining the dumping margin.

In light of these arguments, the concept of China's automatic graduation to market economy status 15 years from its accession to WTO was simply equated to "an urban myth that seems to have gone global",[16] even though it was not supported by the wording of Section 15.

However, this position does not explain the practical implications of the expiry of subparagraph a(ii) which prescribes the procedure for disregarding Chinese prices while calculating the dumping margin. The remaining provisions of Section 15 do not provide for an alternative method that can be followed in the absence of subparagraph a(ii). Even though the introduction to the paragraph stipulates that an importing country can use "a methodology that is not based on a strict comparison with domestic prices or costs in China", such methodology must be "based on" rules provided in the expiring subparagraph a(ii). Thus, contradictory opinions were expressed. Some advocated that the substance of Section 15 lies in subparagraph a(ii) and without it the entire Section loses its relevance. Similarly, the question of whether or not China is a market economy would no longer be important, because its domestic prices in either case have to be taken into account by the investigating authorities.[17] While others, relying on a broad interpretation of the term 'based on' by the WTO Appellate Body in the earlier cases, argued that the introduction to paragraph (a) provides sufficient legal grounds for importing countries to disregard Chinese prices when calculating dumping margins.[18]

Section 15 of the Protocol has been the subject of interpretation by the WTO Appellate Body only in one earlier case. It was observed by the Appellate Body that "paragraph 15(d) of China's Accession Protocol establishes that the provisions of paragraph 15(a) expire 15 years after the date of China's accession (that is, 11 December 2016) [...] paragraph 15(a) contains special rules for the determination of normal value in antidumping investigations involving China. Paragraph 15(d) in turn establishes that these special rules will expire in 2016".[19] This decision has been invoked by the supporters of the view that after 11 December, Chinese prices cannot be ignored in anti-dumping investigations. On the other hand, others have argued that the Appellate Body has clearly misread the provisions of the Protocol and wrongly implied that the entire paragraph 15(a) expires, when in fact only one subparagraph of 15(a) expired in December, leaving remaining clauses still enforceable. Further,

the statement of the Appellate Body was distinctly *obiter dictum* (not the legally binding part) of the decision, thus, it is not a binding interpretation of Section 15. Finally, the case involved a different factual situation,[20] thus, its reasoning would have to be distinguished from the problem of calculating normal value for the Chinese imports. The imprecise interpretation of Section 15 by the Appellate Body thus casts little light on the final meaning of the Section.

The wording of Section 15 remains far from clear. On one side, it has been argued that with the termination of the described clauses, the entire Section referring to the calculation of the dumping margin loses its essence. Consequently, WTO members are obliged to abandon the non-market economy methodology when calculating dumping margins for Chinese imports. On the other hand, it was advocated that Section 15 must be read in the light of the provisions remaining in force post-December 2016 which provide sufficient legal grounds for the importing countries to disregard Chinese domestic prices in the anti-dumping investigations. It is difficult to predict which interpretation will prevail, as it appears that there are valid and sound arguments behind both positions.

Section 15 of China's Accession Protocol to the WTO

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 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.

CONTRASTING ALTERNATIVES

With the wording of Section 15 bringing more confusion than clarity, the WTO members seem to be adopting different approaches on the issue. In

practical terms, the deadline of 11 December meant that administering authorities in various countries had to choose either to preserve the status quo—i.e., continue disregarding Chinese prices while conducting anti-dumping investigations—or to adopt a new methodology.

The first option appears to be favoured by the US. In a recent statement, incoming US President Donald Trump explicitly declined China's market economy claim.[21] Moreover, recourse to trade defence instruments seems like the most convenient path to satisfy anti-globalisation sentiments growing in the West and to constrain Chinese economic power in case the Trans-Pacific Partnership Agreement ultimately fails. It appears that for the time being the US Department of Commerce has rejected China's market economy status and instead continues to apply existing methodology.[22]

Although no official statement has been made, a similar approach seems to be preferred by Indian authorities. This approach allows to impose higher taxes on imported goods and, in effect, protect domestic industry from unfair trading practices of Chinese competitors. Almost inevitably, however, it also resulted in China initiating a WTO action against countries that refuse to acknowledge its market economy status – so far, WTO dispute consultations have been launched against the EU and the US. Considering current delays in the functioning of the Dispute Settlement Body (DSB), such a dispute would probably take at least two years to be resolved. Also, DSB's decisions do not have a retroactive effect, thus, a country applying higher dumping taxes on Chinese goods, even if found wrong under WTO law, will be obliged to rectify its practice prospectively, i.e., lower the tariffs only for Chinese goods imported after the WTO decision becomes final. This thus allows to safeguard the interests of domestic industries for at least another couple of years. Yet, the WTO ruling favouring Chinese position would cast a negative light on the erred countries for disrespecting their obligations under the multilateral trading order.

Finally, there is also fear of potential Chinese retaliation, resulting in a trade war, against countries which do not acknowledge its new status. This possibility is reinforced by the earlier instances of China taking retaliatory moves against its partners' trade defence measures. For example, China has been accused of initiating anti-dumping investigations against imports of European wine or US poultry and car parts in retaliation for the EU's duties on Chinese solar panels and US increased tariffs on China's tires.[23] Both the EU and the US are concerned about consequences of China closing its doors to foreign investors and products. The EU Trade Commissioner estimates that approximately three million jobs in Europe depend on the sale of goods and services on the Chinese market.[24] Although the potential effects of retaliatory measures directed even at a single industry should not be ignored, India's investments in China remain rather limited; also the country is not India's major export destination.

On the other hand, the experiences of countries which have already granted China a market economy treatment under their internal legislation proves that such a move leaves their domestic industries vulnerable to competition with Chinese dumped products. Most of the early recognitions of China's market economy status were a precondition for the trade agreement with China.[25] Among those countries, Australia is one of the frequent users of anti-dumping measures. Australia granted China a market economy status in 2005, in the course of the FTA negotiations, expecting that the benefits of an improved access to Chinese market would outweigh potential losses from reduced dumping duties.[26] As a result, without adequate trade defence measures, Australia has been struggling with a surge of imported products from China.[27] The change of Chinese status has been strongly opposed by the trade unions in both the US and Europe, who fear that increase of imports from China will further result in job losses at home. In February 2016, thousands of steel workers, suffering from the overcapacity and overproduction in Chinese steel sector, organised a protest in Brussels, calling on authorities to reject claims for market economy treatment.[28] To counter the negative effect of

Chinese-dumped steel on its domestic industry, India has also introduced additional tariffs on the product.[29]

The Indian government has been studying potential implications of Chinese graduation to market economy status.[30] Although no specific impact assessment has been circulated, it appears that India has a lot at stake, should China cease to be treated as an NME. China has been the most frequently targeted state by India's anti-dumping measures. According to WTO statistics, in the period from 1995 to 2015, out of a total number of 770 anti-dumping investigations initiated by India, the highest number (178 cases) were directed at products from China. In the same time frame, the US started 130 and the EU, 125 investigations against Chinese exporters.[31] Consequently, it is unlikely that India's investigating authorities are going to treat China as a market economy for the purpose of anti-dumping investigations launched after December 2016.[32]

A MIDDLE PATH

Between these two polar reactions, the middle path appears to have been paved by the EU. The European Commission has recently proposed an internal reform strengthening trade defence mechanism in order to address the effects of the expiry of dumping provisions of China's WTO Accession Protocol.[33] The advocated reform is intended to improve the room for manoeuvre for the administrative authorities, while respecting the EU's WTO obligations. It states that the new methodology "would be used to address situations where market conditions do not prevail, [...] where there are massive production overcapacities in exporting countries, [...] where there are market distortions, or where the state has a pervasive influence on the economy".[34]

To address the controversial interpretation of Section 15, the new framework proposes to eliminate the list of the NMEs from the EU legislation. However, the domestic industry, requesting an initiation of the anti-dumping investigation, will be able to establish that the market

distortions exist in an exporting country which would allow the EU investigating authorities to disregard exporter's prices. In consequence, it shifts the burden of proof, i.e., market distortions will have to be proved by the domestic industry seeking protection, contrary to the current situation, established under Section 15, where China is presumed to be a non-market economy and exporters need to prove the opposite in order to benefit from the market economy treatment. As such the legislation would be country neutral. It will resemble the arrangement existing under Canadian law, where the burden to prove that Chinese exporters operate under non-market economy conditions falls on the complaining Canadian industry. This methodology will most probably resort to Art 2.2 of WTO Anti-dumping Agreement (ADA) which allows importing countries to disregard the in-country prices of exporter and instead use third country prices or constructed values if "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 the sales in the domestic market of the exporting country, such sales do not permit a proper comparison". It would thus permit to disregard Chinese internal prices, if it is established that no 'ordinary course of trade' or 'a particular market situation' prevails in China.

The methodology based on this Article is frequently used by the US and the UE in the anti-dumping investigations against imports from Russia. Yet, Russia has contested the EU's practice before the WTO.[35] Further, the recent WTO ruling in the EU - Biodiesel case,[36] providing an important guidance as to what extend the investigating authorities can rely on this method, is directly relevant in the current debate over the future investigations of Chinese imports. In this case, the Appellate Body found that the EU anti-dumping authorities acted inconsistently with the WTO law by disregarding the costs of Argentina's producers because domestic prices of raw material were artificially low due to state interventions. In light of this decision, the investigating authorities in the importing countries will be required to exercise 'reasonable restrain' when relying on the methodology set up under Article 2.2 of the ADA.

Another major aspect of the EU modernisation of its trade defence instruments is the removal of the systematic application of the so-called Lesser Duty Rule (LDR). According to the LDR, the anti-dumping duty should only be imposed to the amount necessary to remove the injury caused to the domestic industry of the importing country. It thus results in lower duties being imposed on the imported goods. The application of LDR is encouraged but is not mandatory under the WTO law. It is up to the WTO member to apply the rule to its anti-dumping investigations; e.g., the US, Canada, China do not follow it. The EU intends not to apply the LDR in cases of massive overcapacities or where exporters benefit from raw material distortions, dual pricing or export taxes. It is important to note that India has consistently been a strong supporter of the LDR. In 2005, it submitted a proposal for the reform of the WTO law by making the rule compulsory. India's domestic legislation, the Anti-Dumping Rules, provides for a mandatory application of the LDR, with no exceptions prescribed. Although some studies suggest that the removal of the LDR would not entirely mitigate the negative effects of changing China's status,[37] yet it will definitely result in higher duties imposed on its dumped goods. Also, there is risk of trade diversion of Chinese products to countries which, due to persistent application of LDR, maintain lower level of duties. For example, in the case of imports of Chinese-dumped cold rolled steel products, which are currently under the anti-dumping investigation in India,[38] the EU duty rate was reduced by the application of LDR to the level of 21.4 percent, in comparison to the US duty of 266 percent.[39]

The reform will also level the playing field for exports benefiting from trade-distorting subsidies, by strengthening the EU anti-subsidy legislation. Specifically, the proposal indicates that the new legislation would allow to counter the subsidies discovered in the course of the investigations, not only those specified in the initial complaint to initiate an investigation. Further, it should use to the full advantage the existing anti-subsidy methods provided under WTO law. Although, it has been argued that WTO anti-subsidy instruments, designed to counter specific

subsidies, do not remedy the damage caused by general subsidies which are frequently practised by Chinese state,[40] it is definitely an option worth exploring. Especially since the Accession Protocol itself provides special rules to counter anti-competitive effects of Chinese subsidies.

Firstly, it addresses the issue of Chinese state-owned enterprises (SOE), which are calculated to dominate almost 40 percent of the Chinese market. Section 10.2 of the Protocol stipulates that "subsidies provided to state-owned enterprises will be viewed as specific if, inter alia, state-owned enterprises are the predominant recipients of such subsidies or state-owned enterprises receive disproportionately large amounts of such subsidies". Consequently, by virtue of the Protocol, Chinese subsidies to SOE can meet the specificity requirement of actionable subsidies under WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement) and, thus, could be countered by countervailing duties. Secondly, Section 15(b) of the Accession Protocol authorizes importing country to disregard Chinese data and instead use alternative, including third-country, benchmarks when calculating the amount of Chinese subsidies. Contrary to the similar methodology for anti-dumping provided in Section 15(a)(ii), this provision is not limited by any expiry date. It thus allows to apply the non-market methodology in calculating the subsidy on Chinese market without any time limit. The WTO members have so far been rather cautious in taking recourse to anti-subsidy instruments against China's imports, primarily due to its NME status. The Appellate Body in its earlier decisions warned against potential double remedy, which can arise when an importing country counters the same benefit granted to an exporter from a NME under the parallel anti-dumping and anti-subsidy investigations.[41] It appears that following removal of NME presumption in dumping investigations, the anti-subsidy mechanism could be extended to cover goods from China. Despite being a frequent user of the anti-dumping measures, India has rarely countered subsidies of exporting countries. In the period between 1995 and 2015, India initiated only two countervailing investigations, in both cases against goods from China.[42]

Finally, the deterrent effect of trade defence measures stems not only from the final duties but also from the mere threat of prospective tariffs being imposed in the near future. The expectation of rapid culmination of the anti-dumping proceedings can in itself dissuade importers from buying products covered by the scope of the investigation. Thus, the domestic investigations should be conducted in a swift manner, ensuring that the authorities respond to the threat of dumped products without undue delay.

The proposed EU legislation attempts to obtain the objectives of the two contradictory approaches to the problem of Chinese graduation to the market economy. On the one hand, it strengthens the trade defence instruments, ensuring that domestic industry remains protected from unfair trade practices. It has been estimated that the envisioned reform will result in anti-dumping duties on Chinese products only negligibly lower comparing to the taxes calculated on the basis of the existing NME methodology. Consequently, it substantially reduces the number of EU jobs put at risk by the competition of Chinese exports.[43] At the same time, the proposal completely eliminates the distinction between non-market and market economies. It thus removes the presumption of Chinese NME status.

CONCLUSION

The question concerning future treatment of Chinese imports, involving the calculation of dumping margins on the basis of non-market or market economy status, is not purely a matter of legal interpretation of the Accession Protocol or an assessment of economic implications of such decision. In addition to these considerations, any position taken in this matter will also have important political implications and consequences on the bilateral relations with China.

The decision to deny China automatic market economy treatment following 11 December 2016, apart from potential retaliatory measures,

already resulted in China brings a WTO dispute against the US and the EU. A WTO finding in favour of China would undermine the credibility of countries which so far have been portrayed as supporters of the multilateral trading system. On the other hand, before changing China's status, the WTO members should ensure that their trade defence instruments are strengthened to provide necessary protection to domestic industries. Similarly to the EU reforms, India could also consider amendments to its domestic legislations i.e. Customs Tariff Act and Rules.[44] These changes should include removal, or at least introduction of exceptions, to the Lesser Duty Rule, a mechanism for domestic producers to establish "particular market condition" in the exporting country which allows for cost adjustments as prescribed by Article 2.2 of WTO ADA, more frequent recourses to anti-subsidy instruments as well as shortening of the investigation proceedings.

The controversy over acceptable methodologies of calculating dumping duties for Chinese exports demonstrates that WTO is not equipped to deal with the non-market economies/economies in transition. The existing trade defence instruments were created with the intention to counter unfair trade practices of market economies. As long as the distortions to competition caused by the economies in transition, which joined the GATT/WTO in the past, could be marginalised due to their limited share in global trade, the impact that China – the world's biggest exporter – has on the trading system cannot be overlooked. Consequently, this may be a right time to consider restarting the negotiations on the global competition rules, abandoned by the WTO in 2004,[45] which would provide a long-term solution to the unfair trade practices of non-market economies/economies in transition. ORF

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