POSITION PAPER

Free trade. Sustainable trade.

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TO ME OR NOT TO ME: CHINA'S STATUS AFTER 11 DECEMBER 2016

SYNOPSIS

Section 15 of China's Protocol of Accession to the WTO has been much debated in recent months. There are diverging views on whether it contains a deadline of 11 December 2016 after which all WTO members, including the EU, must no longer treat it as a non-market economy when conducting anti-dumping investigations against it. China is certain that its non-market economy status will shuffle off this mortal coil. Others are not convinced, with the EU industry in particular claiming it will suffer the slings and arrows of outrageous fortune. This paper examines the question of market economy treatment for China and explores ways any impact could be mitigated. It also looks at the effects on the EU should China not get what it sees as its right under the Protocol and the effect a successful result would have EU importers and retailers.

APPLIES ONLY TO ANTI-DUMPING	The treatment of China as a non-market economy only applies when the EU conducts an anti-dumping investigation against imports from China – specifically, it affects the way it assesses the normal value.
ANALOGUE COUNTRY SYSTEM DISTORTS DUMPING DUTIES	Rather than use domestic prices in China as the normal value, the EU refers to prices in a market economy third country and makes suitable adjustments. However, it is widely accepted that this method distorts the dumping margins upwards.
LEGAL SITUATION UNCERTAIN	There is no definitive legal evaluation of Section 15; some interpret it to mean WTO members must treat China as a market economy, others not.
EFFECTS CAN BE MITIGATED	Accepting that if the EU uses domestic prices to assess the normal value dumping duties will be lower than today's levels, those levels can be increased by applying a method similar to that employed in investigations against Russia or by using adjustments. In addition, the anti-subsidy regime will be unaffected.
CONSEQUENCES MAY BE NEGATIVE	China is certain it is due market economy treatment. It may take retaliatory measures against the EU if this does not happen such as; withdrawing form negotiations on the EU-China Investment Agreement, imposing anti-dumping measures and implementing measures that affect EU exports and companies doing business in China
SOME EU COMPANIES SUFFER FROM CHINA'S CURRENT STATUS	EU retailers and importers are responsible for paying anti-dumping duties. This can be very damaging – particularly for SMEs dealing with consumer products. Granting market economy status will most likely lessen this impact whilst still allowing the EU to take measures against raw materials and semi-finished articles.
COMMISSION MUST ISSUE POSITIVE PROPOSAL SOON	The FTA believes China's Protocol of Accession to the WTO does grant it as a market economy treatment as from 12 December 2016. The Commission should issue a proposal in this regard before the end of 2015 since the agreement of the Member States and European Parliament will be required to effect the change in legislation.

INTRODUCTION

Recently, there has been heated debate, and numerous articles by learned anti-dumping practitioners, on the above question. To understand the reason for the debate one must understand the consequences of China being treated as a market economy. To understand the reason for all the articles, one must refer to the (now infamous) Section 15 of China's protocol of accession to the WTO[1] paying particular attention to the second sentence of sub-paragraph (d). In essence, the debate hinges around whether WTO members, such as the EU, are obliged to treat China as a market economy from 12 December 2016.

1.0 BACKGROUND

Firstly, it is worth noting that the matter in hand affects only the manner in which the EU, and other WTO members, calculate the 'normal value' during an anti-dumping investigation against China. With that in mind, it is worth having a little background to that part of the anti-dumping system which is governed by the so-called "basic Regulation"[2].

1.1 ANTI-DUMPING DUTIES

After first receiving a complaint from EU producers that provides prima facie evidence that a country outside the EU is 'dumping' a product in the EU and that 'injury' is being caused as a result of that dumping, the EU Commission will conduct an anti-dumping investigation. First, it will determine whether the product is indeed being 'dumped'. For this, the export price is compared to the 'normal value' (which in its simplest form can be considered as the domestic market price) and the difference between the two is set as the dumping margin – although in reality it is far more complicated. Second, the Commission determines whether EU producers of the product are suffering injury. Third, having considered all other factors that could be causing that injury, whether that injury is being caused by the dumping. From this, an injury margin is calculated. The lower of these is set as the anti-dumping duty – normally in the form of an *ad valorem* duty – that is placed on the value of the imported product before it enters the EU (in addition to any normal customs duties). Within nine months a provisional duty is imposed (for which importers place a guarantee to pay) which is in place for six months. Following this, the investigation continues and usually results in definitive measures being imposed (which run for five years) at which point any provisional duties are collected – at the level of the definitive duty if that is lower[3].

1.2 NON-MARKET ECONOMIES

However, for countries the EU considers to be non-market economies (NMEs) a different method is used to assess the normal value.

1.2.1 THE DEVELOPMENT OF THE REGULATION

Article 3(6) of Regulation 459/68 (the first EU anti-dumping regulation) recognised that normal value may not be based on domestic prices for countries where trade was conducted on a basis of near or total monopoly and where domestic prices were fixed by the State[4]. On 5 August 1979, Regulation 1681/79 came into effect which introduced the "analogue country" method of assessing normal value for non-market economies (in particular, China). The legislation was significantly amended via Regulation 384/96 – although only minor changes were made to the analogue country method including reference to specific non-market economy countries.

[1] WTO document: WT/L/432 of 23 November 2001 – China acceded on 11 December 2001.
[2] Council Regulation (EC) No. 1225/2009 on protection against dumped imports from countries not members of the European Community
[3] Although provisional duties can be imposed by the Commission alone, definitive duties require the consent of Member States. This decision is taken using the 'double majority' voting system.
[4] The text was almost a direct transposition of Ad.2 of Article VI of GATT – see below.

Finally, on 1 July 1998, Regulation 905/98 came into effect which recognised that China and Russia specifically had fundamentally changed their economies and, as a result, introduced the concept of individual producers being able to have normal value calculated in the usual way if they could prove they operated under market economy conditions – although companies are rarely successful in this regard. For China (also Kazakhstan and Vietnam), it is this system which applies today.

1.2.2 THE ANALOGUE COUNTRY SYSTEM

When conducting anti-dumping investigations against countries it classifies as NMEs, the EU Commission considers that the domestic market prices are too unreliable to be used as the basis to calculate the normal value. Therefore, it uses an alternative methodology; it selects an appropriate third country market economy and the normal value is calculated based upon prices in that country.

Although attempts are made to choose an appropriate so-called 'analogue country', because that country needs to consent to the assessment it is often the case that the USA or EU is used – which can scarcely be called 'appropriate'. Adjustments are made to the normal value of the product in that country to take account of any differences but the Commission has a significant degree of discretion in this regard leading many commentators, including the FTA, to consider that the analogue country method is inadequate. As a result, it is generally accepted that this method results in a normal value, and therefore a dumping margin, that is higher than that which would result if the domestic prices of the country under investigation were used. Consequently, most conclude that were the EU to treat China as a market economy, dumping duties would be lower than the current average level of 45%[5] – potentially non-existent if dumping margins are found to be so low (i.e. at *de minimus* levels) that duties are not appropriate.

For this reason, many EU producers (in particular the Aegis Europe group) are opposed to the EU treating China as a market economy. They argue that China does not meet the five criteria set by the EU to qualify as a market economy and claim that if the EU was to grant China market economy status, it would permanently lose the ability to set proper [future] anti-dumping duties and that [upon review[6]] anti-dumping duties currently in force would be nullified[7]. Finally, based on a report by the US-based Economic Policy Institute they claim a potential loss of 3.5m EU jobs. The last of those claims is difficult to treat with any credibility as the conjectures drawn are so exaggerated. The first two claims are addressed below.

1.3 THE EU'S MARKET ECONOMY CRITERIA

In order for a country to be considered a market economy by the EU it must meet five criteria containing elements such as: (i) a low degree of government influence over the allocation of resources and decisions of enterprises; (ii) an absence of state-induced distortions for enterprises linked to privatisation; (iii) the existence and implementation of a transparent and non-discriminatory company law which ensures adequate corporate governance; (iv) the existence and implementation of a coherent, effective and transparent set of laws relating to property rights and a functioning bankruptcy regime; (v) the existence of a genuine financial sector which operates independently from the state.

The last EU assessment of China's market economy status (MES) was conducted in 2008 when the results of the first assessment from 2004 were confirmed; that it met only the second criterion. Negotiations have not progressed since 2011 and so it is this assessment that stands today. However, it is important to note that the EU's 2008 assessment clearly states: *"…this assessment is a technical exercise for the sole purpose of trade defence investigations…the conclusions should not be viewed as a judgment of the general functioning of the Chinese economy or a political judgment on whether a market economy per se exists in China."* In other words, MES is only relevant for anti-dumping investigations.

[5] Based on the residual rate of 45 measures in place against China (as of 1 October 2015) on which *ad valorem* duties are imposed.
[6] At the point of expiry an expiry review (during which the duties remain in force) may be conducted which can result in an extension to the term of duties. Although currently such a review cannot change the level of duties, this would change for future reviews if the EU were to consider China a market economy.
[7] See www.aegiseurope.eu

As mentioned above, individual Chinese producers wanting to have normal value assessed under the usual method have to show that they meet a, largely similar, set of criteria[8] covering issues such as: (i) decisions of firms regarding prices, costs and inputs, are made in response to market signals reflecting supply and demand, and without significant State interference; (ii) firms have one clear set of basic accounting records which are independently audited in line with international accounting standards; (iii) production costs and financial situation of firms are not subject to significant distortions carried over from the former non-market economy system (iv) firms are subject to bankruptcy and property laws which guarantee legal certainty and stability; (v) exchange rate conversions are carried out at the market rate.

Companies that succeed in receiving "MET" (market economy treatment) do not simply receive a zero anti-dumping duty (though this can occur) but do receive a lower duty rate than other companies. This is fully expected – after all, operating under market economy conditions does not preclude dumping; were that the case no duties would be imposed on any other country. However, the EU Commission has a significant degree of discretion when making its assessment of whether a company meets the five, extremely stringent, demands and it is rare that it makes a positive decision. Indeed, in recent years the FTA would argue that it has taken an overly restrictive approach to MET claims from Chinese producers thereby giving a false impression of the market economy status of China's industry. It is also important to note that the Commission does not assess all MET claims by Chinese companies but rather only those it decides should be included in a sample of Chinese producers it considers representative of the industry[9]. Therefore, it can be argued that there is no proper indication of what proportion of the Chinese industry operates under market economy conditions.

2.0 LEGAL EVALUATION

The current assessment of China's MES (for the purposes of trade defence measures) does not necessarily act as a barrier to the EU treating China as a market economy were it to be established that Section 15 does indeed impose such a requirement on WTO members. However, one thing is clear; should that requirement be established, it will not be "automatic". The EU is obliged to follow WTO provisions, even if it does not concur with those provisions, but WTO law does not apply directly to EU law; to comply with WTO law requires EU legislation. In this context, the basic Regulation will need to be amended to remove China from the special conditions placed on it under Article 2(7)(b). This legislative change will fall under 'co-decision', i.e. it will first require an approved proposal by the EU Commission and then will have to be accepted by the 28 Member States and the European Parliament.

Unfortunately, there is no clear legal decision, one way or another, whether WTO members are obliged to grant market economy treatment to China as from 12 December 2016. Whilst the Commission legal services have (allegedly) internally concluded in the affirmative, and the legal services within the European Parliament are currently considering the issue, there has been no guidance from the WTO – unless one considers the comments of the panel in *Fasteners*[10] (though this must be treated *obiter dicta*). Instead, one has to rely upon one's own interpretation of Section 15 or the many articles in legal journals.

It is clear from a strict legal interpretation of Section 15, that the second sentence of sub-paragraph (d) establishes that sub-paragraph (a)(ii) expires on 11 December 2016. What is not clear is whether the conditions under sub-paragraph (a)(i) remain in place and 'override' the fact that 15(a)(ii) no longer applies. Likewise, it is also unclear whether the third sentence of sub-paragraph (d) overrides the fact that 15(a)(ii) no longer applies as from 11 December 2016.

[8] Article 2(7)(c) of the basic Regulation.
[9] This practice was criticised by the ECJ in *Brosmann Footwear et al v Council* (C-249/10 P) which ruled that the basic Regulation did not permit the Commission to apply sampling to MET claims and instead obliged it to examine all claims. In response, the Commission amended the basic Regulation (see Regulation 1168/2012) to permit it to apply sampling.
[10] *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China* - Appellate Body Report WT/DS397/AB/R, paragraphs 283-291.

Were either of those points to be correct, from a practical point of view nothing would change; in order for the normal value to be calculated in the usual way (i.e. using Chinese prices) it would still need to be proven by individual producers that market economy conditions prevail in the industry or sector. This clearly makes no sense and the FTA does not believe that this was the intent of the original drafters of the text.

At the time, it was expected that China's reforms would allow it be perceived as a market economy by most countries within the next fifteen years. Regardless of how accurate that assessment has turned out to be, it is reasonably clear that its unique status with respect to the calculation of normal value sat uncomfortably within the WTO membership. Article VI of GATT 1994 which sets up the principle of dumping and the calculation of normal value, includes a derivation from the normal method to be applied that reflects text dating from 1955 and specifically recognises 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…"* assessing the normal value on the basis of domestic prices may not be appropriate[11] (this proviso is also referred to in the WTO Anti-Dumping Agreement (Article 2.7)). In 2001, it was recognised by many that China was continuing to progress toward a market economy[12]. At the same time, China's concerns about its treatment by other WTO members when conducting anti-dumping investigations was also considered and reflected by noting that those members had to comply with detailed criteria when implementing the alternative methods for calculating normal value[13]. Here, there is specific reference to Section 15(a)(ii). Since an expiry date (subsequently 11 December 2016) is attached to that sub-paragraph it is clear that the WTO intended this exceptional treatment should not continue beyond that date.

3.0 THE EFFECTS MAY BE MITIGATED

As noted above, should the EU treat China (or at least it producers, industry and sectors) as a market economy, in principle the normal value would be lower than levels calculated using the current system. However, that need not mean that those levels will be so low that the EU will be powerless to defend itself against unfair trade from China.

3.1 THE RUSSIA SOLUTION

On 8 November 2002, Regulation 1972/2002 removed Russia from the list of countries the EU considered to be non-market economies as a result of the progress made by Russia towards achieving market economy conditions (as concluded at the Russia-EU Summit of 29 May 2002[14]). It therefore allowed the normal value for Russian producers and exporters to be calculated under the usual method.

However, at the same time it also introduced first a clarification and second an important addition to Article 2 (that deals with the calculation of normal value) namely, under sub-paragraph (3):

> *"A particular market situation for the product concerned within the meaning of the preceding sentence may be deemed to exist, inter alia, when prices are artificially low, when there is a significant barter trade, or when there are non-commercial processing arrangements."*[15]

[11] The original EU legislation (Regulation 459/68) contained an almost direct transposition of this text. Following the agreement on the interpretation of Article VI GATT (and how members may calculate the normal value for countries falling within that text) that resulted from the Tokyo Round, the 'analogue country' system was introduced in the amended regulation of 1979 (1681/79).
[12] See WTO document Report of the Working Party on the Accession of China WT/ACC/CHN/49 of 1 October 2001, (para. 150).
[13] The Working Party clearly thought that when applying the analogue country system the third country should be *"…at a level of economic development comparable to that of China or were otherwise an appropriate source for the prices or costs to be utilized in light of the nature of the industry under investigation."* (para. 151(a)) – a point on which it could be argued the EU fails.
[14] See Russia-European Union Summit joint statement of 29 May (European Council 9424/02 (Presse 171)
[15] The first part of Article 2(3) permits the normal value to be calculated on the basis of the cost pf production plus a reasonable amount for selling, general and administrative costs (SGA) and for profits, or on the basis of export prices (provided those are representative) when a particular market situation does not permit a proper calculation.

And under sub-paragraph (5):

> *"If costs associated with the production and sale of the product under investigation are not reasonably reflected in the records of the party concerned, they shall be adjusted or established on the basis of the costs of other producers or exporters in the same country or, where such information is not available or cannot be used, on any other reasonable basis, including information from other representative markets"*

In other words, if the Commission determines that, despite being recognised as a market economy, prices in that country cannot be relied upon to calculate the normal value, it can use prices in a third country to do so – a situation not too dissimilar from the analogue country principle. For example, it will often determine that prices in (e.g. Russia) are artificially low because energy prices are controlled by the government and as such are *"not reasonably reflected in the exporting producers' records"*[16]. As a result, it decides that the costs need to be adjusted on the basis of costs in a third country. This results in a normal value, therefore a dumping margin, and subsequently (notwithstanding the lesser duty) a dumping duty, that is higher than if the actual costs found were used.

This method is not without criticism. In *UAN*[17] and *Ammonium Nitrate*[18], the Commission applied the above provision to calculate the price of gas based on the export price at Waidhaus, rather than the price actually paid by the producers. Both instances were challenged at the European Court on the grounds that the Commission had incorrectly applied the principle of adjustment and had incorrectly used a method intended for non-market economies. However, the General Court ruled[19] that the Commission was entitled to apply the provision established under Article 2(5) and use prices other than those in Russia, as the gas prices could not be considered reasonable.

The method's compliance with the WTO Anti-Dumping Agreement was also questioned in the abovementioned cases. It was argued that it did not correctly implement the provisions of Article 2.2.1.1 of the WTO Agreement. However, the General Court ruled that since the offending part of Article 2(5) was not included in Article 2.2.1.1 of the WTO Agreement, the applicants could not rely on an interpretation of that Agreement.

Russia has also filed a complaint against the practice with the WTO[20], noting the abovementioned anti-dumping measures in its request, and claiming that it is contrary to Article 2.2.1.1 (in addition to other articles within the Anti-Dumping Agreement). The outcome of those panels is some years off, however, in *China-Broilers*[21] the Panel ruled that although there is a presumption under Article 2.2.1.1 that *normally* the records of the party concerned are used to calculate the cost of production for constructing normal value, *"…the investigating authority retains the right to decline to use such books if it determines that they…do not reasonably reflect the costs associated with the production and sale of the product under consideration"* (although the reasons for doing so must be stated).

Therefore, it would appear that the EU is within its rights to use the method. Since similar distortions are frequently found in China, such as in *OCS*[22] where state controlled prices of raw materials was discovered and production was influenced by Industrial Plans, it could do likewise when conducting investigations against China (should it decide to treat it as a market economy).

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[16] See, for example, *Welded Tubes and Pipes* (Council Regulation No. 1256/2008 – OJ [2008] L343/1) and *Seamless Steel Pipes* – OJ [2012] L357/1)
[17] *Urea and Ammonium Nitrate* (Council Regulation No. 1911/2006 – OJ [2006] L365/26 and Council Regulation No.1251/2009 – OJ [2009] L338/5)
[18] *Ammonium Nitrate* (Council Regulation No. 236/2008 – OJ [2008] L75/1 and Council Regulation No. 661/2008 – OJ [2008] L185/1)
[19] See *EuroChem MCC v Council* (T-84/07) also *Acron v Council* (T-118/10) and *Acron & Dorogobuzh v Council* (T-235/08) and *EuroChem MCC v Council* (T-459/08)
[20] On 23/12/13 – see WT/DS474/1 for which a panel has been established, and 07/05/15 – see WT/DS494/1.
[21] *China - Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States* – Panel Report WT/DS427/R
[22] *Organic Coated Steel Products* (Commission Regulation No. 845/2012 – OJ [2012] L252/33

3.2 ADJUSTMENTS

As mentioned above, the dumping margin is the difference between the normal value and the export price. It has already been described how the calculation of the normal value can be adapted to take account of the EU classifying China as a market economy legally, but treating it as an NME in practice. Adaptations to the export price are also possible although the effects are relatively minor.

However, there is considerable room for adjustment when it comes to the comparison of the normal value and export price – as described under Article 2(10) of the basic Regulation. This provides for at least ten factors[23] that may be considered when a fair comparison cannot be made between the two. Not only is the burden of proof (which is high) placed on the interested party claiming adjustment, as in other areas, the EU has a significant degree of discretion in making adjustments. In addition, despite the fact that Article 2(10) provides for factors other than the ten specified to be considered, the EU regularly refuses requests for adjustments to be made outside this list.

This provides the possibility to retain the level of the dumping margin it has already calculated, or increase it – for example, when non-refundable VAT is discovered the EU will increase the normal value by the same amount[24] – an approach confirmed by the European Court[25].

3.3 COUNTERVAILING (ANTI-SUBSIDY) MEASURES

On numerous occasions EU producers requesting measures against Chinese imports have noted that the Chinese industry is heavily subsidised (indeed this claim has been repeated in its recent activities as an argument against the possibility that China receive market economy treatment). In fact, the Commission itself often finds subsidisation when conducting anti-dumping investigations (see above).

Therefore, it is important to emphasise that Section 15 deals only with the calculation of normal value when a WTO member conducts an anti-dumping investigation against China – or Chinese companies. When conducting an anti-subsidy investigation the normal value is not calculated; rather the amount of subsidies (and subsequently the injury to the EU producers, and whether the former is responsible for the latter). In other words, treating China as a market economy would not have any impact on the outcome of anti-subsidy investigations.

It would seem, therefore, that the most obvious route for the EU to take in order to combat what it sees as unfair trade, should it be concluded that it is obliged to treat China as a market economy under the auspices of Section 15 yet at the same time taking the view that it does not meet its self-defined market economy conditions, would be to conduct an anti-subsidy investigation.

Anti-subsidy investigations have been conducted against China but these are significantly lower in number than anti-dumping investigations. Some commentators have suggested this is a result of the ease at which anti-dumping measures can be applied to Chinese imports owing to the EU treating China as a non-market economy and using the analogue country method to assess normal value. However, it is clear from these investigations that subsidisation does occur in China. This can been seen in *OCS*[26] where subsidies on raw materials, land use rights, water and electricity, and preferential tax policies were found, resulting in countervailing duties of 44.7% being imposed[27].

[23] Physical characteristics; import charges and direct taxes; discounts, rebates and quantities; level of trade; transport, insurance, handling, loading and ancillary costs; packing; credit; after-sales costs; commissions; currency conversions; and other factors.
[24] See *Magnesia Bricks* (Commission Regulation No. 824/2009 (recital 37) – OJ [2009] L240/7
[25] *Dashiqiao Sangqiang v Council* (C-15/12 P)
[26] *Organic Coated Steel Products* (Commission Regulation No. 215/2013 – OJ [2013] L73/16
[27] In parallel, an anti-dumping investigation was conducted which concluded with a residual duty of 58.3% (reduced to 13.6% once the countervailing duty was removed).

4.0 THE CONSEQUENCES OF NOT TREATING CHINA AS A MARKET ECONOMY

It has been clear for some time, and not only to those involved with anti-dumping, that China has placed great importance on achieving market economy status. China has also made it clear that Section 15 of their Protocol of Accession "automatically" imposes a condition on WTO members to treat it thusly as of 12 December 2016. With this in mind it is perhaps worthwhile looking at the possible political and economic consequences should China not get what it expects.

4.1 POLITICAL

Relations between the two trading blocks are good in general but sometimes conflict. This will almost certainly deteriorate if the EU does not change the basic Regulation so that China is treated as a market economy. Already China protests the number of EU imposed trade defence measures and what it sees as a restrictive approach to safety and other regulatory issues, whilst the EU accuses China of retaliatory methods such as frivolous anti-dumping investigations and other trade restrictive measures that impact on EU exports and EU companies operating in China. The EU is also frustrated that since 2004 China has not progressed towards meeting any of the remaining four criteria necessary to achieve market economy status and in addition the lack of cooperation on the side of China since 2010 (no working party meeting has taken place since 2011).

Despite the fact that China also stands to gain from a successful conclusion to the negotiations for the EU-China Investment Agreement, arguably (when one considers the sizeable trade deficit) the EU stands to gain more by being able to access the Chinese market under less restrictive and more protective conditions. Therefore, some commentators have raised the possibility that China could delay or pull out of these negotiations.

4.2 ECONOMIC

Many countries, the EU and USA among them, have used the anti-dumping instrument as a political tool. As noted above, China has initiated anti-dumping investigations against EU imports which the EU has claimed were without foundation. In mid-2013, €647m[28] of EU wine exports were potentially affected by a Chinese anti-dumping investigation. This was widely believed to have been initiated in retaliation for the solar panels investigation – and is widely believed to have been terminated, without duties being imposed, owing to the significant number of undertakings agreed by the EU in that investigation. However, when one considers that exports for the twelve months before the investigation was initiated totalled €751m, it could be argued that even the threat of measures had a negative effect on EU exports.

EU exports to China are on the increase – indeed, China is one of the fastest growing markets for the EU. The potential damage that could be caused to EU exports cannot be ignored when considering whether the EU treats China as a market economy as from 12 December 2016.

4.3 LEGAL

China will have essentially two avenues to take against the EU: (i) action before the EU Court or (ii) action before the WTO.

Action before the EU Court will first require that the EU imposes anti-dumping duties after 11 December 2016 on the basis of a normal value calculated using a methodology that does not use Chinese prices (i.e. the analogue country method). A Chinese producer affected by the duties could then claim that the EU has not correctly implemented WTO law. However, this is unlikely to meet with success; the EU Courts have

[28] Source: Eurostat

consistently ruled that WTO law does not directly apply to the EU. Instead, EU legislation must be adapted in order to be compliant with said law and in the absence of such, it is the EU legislation that applies[29].
It would be more likely that China would request consultations before the WTO with a view to opening a Dispute Settlement Panel. This could be filed "as such" (as from 12 December 2016) on the basis that the EU legislation has not been changed to treat China as a market economy, or "as applied" once the EU has imposed duties on Chinese imports using the analogue country system following an anti-dumping investigation. In the FTA's opinion, the former is most likely.

Notwithstanding the fact that the conclusion of the above will be several years coming, not least if an appeal is filed and a report by the Appellate Body is needed, it would appear that in order for a definitive answer to be reached, this is what would be required.

5.0 THE EFFECT OF CHINA BEING TREATED AS A MARKET ECONOMY FOR EUROPEAN IMPORTERS OF CONSUMER PRODUCTS

An oft-quoted figure is that anti-dumping measures against China account for "only" 1% of total imports from China. The FTA does not dispute the facts of this. However, it does dispute the impression this message gives. If, for example, a company retails or imports ceramic tableware from China on which anti-dumping duties are subsequently imposed (and here it should be noted that it is the EU company that bears the costs of the duties, not the Chinese supplier[30], despite the fact that it has not been party to the dumping, merely importing low cost products) that company does not care that its imports account for a fraction of 1% of total Chinese imports. As far as it is concerned, 100% of its business has been affected.

The consequences of this, particularly for SMEs, can be very damaging. Using the principle that provisional duties paid (owed) throughout the six months they are in force are essentially unavoidable – owing to the simple fact that contracts are in place and a change of supply cannot be conducted at ease – the FTA has calculated that in 19 of the 25[31] measures currently in force against products which could be considered as "consumer products", €217m in duties were paid (for ceramic tableware alone the total was €54m).

If China were to be treated as a market economy with the normal value being calculated on the basis of domestic prices then duties imposed on consumer products, where arguably the impact of distortions to energy and/or raw material pricing have a lesser influence, would likely be imposed at a lower level thereby reducing the impact on EU importers, retailers (and ultimately consumers). There is even a possibility that no duties at all would be imposed.

However, this should not be misunderstood as a "get out of jail free card" allowing China to dump without facing the consequences. Rather, it would be the result of a more accurate and legitimate assessment of the level, or existence, of dumping. In any event, prices in China are rising (in parallel with increased production and wage costs) and this will also result in a reduction of the dumping margin. Admittedly they are not at the level of those in the EU, nor can they be expected to be, but low prices do not necessarily represent dumped prices.

[29] See, for example *Rusal Armenal v Council* (C-21/14 P)
[30] A practice known as 'absorption', and contrary to Article 12 of the basic Regulation; the consequence of which is a re-investigation and new duties that are potentially double that of the original.
[31] As of 1 October 2015: in one case provisional duties were not imposed, for three cases the CN codes listed cover products much wider that those affected by duties, one (bicycles) is subject to an exemption scheme, and one (solar panels) was subject to a high number of undertakings. In each case the residual duty was used. Source for import volume: Eurostat.

CONCLUSION

From a purely legal standpoint, there seems to be no clear answer regarding China's status after 11 December 2016. On the one hand it would appear that the status quo remains – on the other, that WTO members will no longer be permitted to treat China as a non-market economy.

Whilst it is likely that if Chinese companies are treated *per se* as operating under market economy conditions the normal value and therefore the dumping margin (and subsequently dumping duty) could decrease, it is also clear that the basic Regulation and the discretionary powers of the EU provides for these to be adjusted. In effect, the EU could legally treat China as an ME but in practice produce similar results as now.

Regardless of whether the EU treats China as a market economy, the option to utilise countervailing (anti-subsidy) measures remains unchanged.

The political and economic fallout that would almost certainly occur if China does not get what it sees as its right under its Protocol of Accession, could have serious consequences for EU companies.

With the above in mind, the FTA calls upon the EU to accept that Section 15 of China's Protocol of Accession does indeed grant it market economy status in the limited area of calculating normal value in anti-dumping investigations as from 12 December 2016. This will require a change to the basic Regulation – which can only be effected upon the agreement of both the 28 Member States and the European Parliament. Since this process can take many months to complete, the Commission should issue a proposal by the end of 2015.

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