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DUMPING/COUNTERVAILING DUTIES

EU Proposal for New Antidumping Methodology Pending as China Requests WTO Consultations With EU, U.S. After Protocol Provision Expires

BY PAUL ROSENTHAL AND MELISSA BREWER

The Chinese government wasted no time initiating a dispute at the World Trade Organization against the U.S. and the European Union the day after a provision in its WTO accession protocol expired. The provision permits other WTO members to disregard Chinese prices when determining unfair trade tariffs.

By disregarding Chinese prices, the agency charged with determining these duties avoids the distortion of Chinese prices caused by the Chinese government's role in the economy. Pursuant to the Chinese accession agreement, this provision expired on Dec. 11, 2016. On Dec. 12, China took the first steps towards lodging a formal WTO dispute by filing a request for consultations with the EU (DS516) and the U.S. (DS515).

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One issue certain to take center stage during this process is the divergent approaches of the EU and the U.S. over the implications of the expiration of China's protocol provision.

The stakes could not be higher for the U.S. industries that rely on the antidumping law to ensure that foreign imports entering the U.S. are fairly priced. The U.S. has approximately 100 antidumping duty orders against imports of Chinese products, more than any other trading partner, with triple digit duties applicable to a number of products.

These orders encompass a variety of goods and industrial sectors, including steel, aluminum, chemicals, minerals, textiles, and various agricultural products. By comparison, there are fewer than 20 antidumping duty orders on India—the country with the second highest number of U.S. trade orders on its products. Certain U.S. industries are facing particular crises at the hands of unfairly traded Chinese goods.

Chinese steel makers, for example, continue to overproduce and expand production capacity with the detrimental effect of creating excess supply and driving down world prices. The market distortions caused by China hurt many other industries in the U.S. and around the world.

Terms of China's Accession to WTO. China became a member of the World Trade Organization on Dec. 11, 2001. Among the many commitments made during the accession process, China promised to modernize its

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economy by lessening state intervention and government influence.

Specifically, China committed to allow the trading of goods and services to be determined by market forces, to lessen restrictive measures and increase market access, and to promote greater transparency in trade procedures and practices.

In the spirit of these commitments, China's accession protocol reflects its agreement that WTO members need not rely on Chinese costs and prices when determining unfair trade tariffs to account for the distortive nature of the government's role in the economy. Specifically, in antidumping proceedings, the protocol terms provided that WTO members may disregard Chinese domestic costs and prices if Chinese producers ''cannot clearly show'' that market economy conditions are prevalent in that industry.

The protocol places the burden on Chinese producers to demonstrate that market economy conditions prevail in the industry under investigation. In other words, the operating assumption under the protocol's terms is that nonmarket conditions prevail unless and until a producer can prove otherwise with respect to a particular industry.

China's protocol provides that of the two provisions in Article 15 that allow WTO members to disregard Chinese costs and prices, the second provision automatically expired 15 years after China's accession, *i.e.*, on Dec. 11, 2016. The first provision, however, remains intact and requires a WTO member to use Chinese prices *only when* Chinese producers can show that market economy conditions prevail in their industry.

U.S. and EU Reactions to the Expiration of China's Accession Protocol Provision. In recent months, the EU has been exploring alternative options for post-Dec. 11 trade with China. On Nov. 9, the European Commission released a proposal to the European Parliament and the European Council that would establish a new antidumping methodology to capture market distortions associated with state intervention in a country's economy. In a significant move, the proposed amendment would eliminate the list of nonmarket economy countries, which includes China, from current legislation. Under this new, country-neutral approach, the EU could continue to resort to the use of an alternative methodology in unfair trade proceedings, *i.e.*, base the normal value calculation on a constructed value, when it finds that ''prices or costs are not the result of free market forces because they are affected by government intervention.'' The proposed legislation provides various factors that would be examined in this new analysis, including:

- That the market in question is to a significant extent served by enterprises which operate under the ownership, control or policy supervision or guidance of the authorities of the exporting country;

- The state presence in firms allowing the state to interfere with respect to prices or costs;

- The existence of public policies or measures discriminating in favor of domestic suppliers or otherwise influencing free market forces; and

- The access to finance granted by institutions implementing public policy objectives.

The proposed legislation is currently before Council and Parliament and will work its way through the legislative process, which could take several months or longer. Further, the new methodology would apply prospectively to new investigations. The proposed legislation is clear that the new approach would apply only to cases initiated on or after the amended provisions enter into force.

In contrast, the U.S. government's inaction on Dec. 12, and in recent weeks, signals that no change to the current antidumping methodology applied by the Commerce Department for China cases is imminent. In fact, the U.S. government has continued to express concern over the lack of China's economic reforms and warns that China has not done enough to demonstrate that market economy conditions are prevalent. The U.S. will find it impossible to shift its approach in unfair trade proceedings to begin relying on Chinese prices.

Possible Effects on Trade in U.S., EU in Near Future. The divergent approaches of the EU and the U.S. creates a complicated dynamic between the two major traders. While both WTO members are now subject to the early stages of a dispute with China, each may defend a distinct interpretation of what the protocol provision's expiration requires, if anything.

The EU's seemingly aggressive legislative proposal, if ultimately passed into law, signals that the EU interprets the expiration of the protocol provision to require some degree of affirmative action by WTO Members. The EU's willingness to eliminate the list of nonmarket economies from current EU law, a proposal that is facing significant backlash from various domestic EU industries, reflects a view that is more political than that dictated by the text of the protocol.

By contrast, the U.S.'s post-Dec. 11 inaction signals that it will advocate for a different interpretation of the meaning of the protocol provision's expiration, namely that no change in U.S. law or practice is necessary. The U.S. approach has a strong basis in the remaining language in Article 15 that requires a WTO member to use Chinese prices only when Chinese producers can show that market economy conditions prevail in their industry.

The basis for the application of a nonmarket economy methodology in the U.S. versus the EU presents a key distinction. The EU's proposal stems from its current legal designation of China as a nonmarket economy. Currently, EU law codifies the list of nonmarket economies, including China, that are subject to the EU's nonmarket methodologies.

Part of the EU's legislative proposal is to eliminate this list, such that no country is specifically designated as a nonmarket economy, and instead to apply a country-neutral methodology that relies on factual findings with respect to government intervention in countries, industries, and/or particular sectors.

U.S. law, by contrast, does not designate any particular country as a nonmarket economy. Instead, the law provides six statutory criteria that the Commerce Department analyzes to reach a factual determination that a country is a nonmarket economy. *See* 19 U.S.C. § 1677(18). If the Commerce Department concludes that a country is a nonmarket economy, that finding remains in force until the agency receives a request to reexamine the criteria. A finding of nonmarket economy status is not subject to judicial review in U.S. court. The

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Commerce Department most recently conducted the statutory analysis for China in 2006 and concluded that the facts supported a continued finding to treat China as a nonmarket economy.

No party, including the Chinese government, has requested that the Commerce Department revisit this analysis in recent years. The U.S. government's recent public statements regarding the current state of government intervention in China's economy certainly signal that graduation to market economy status for China is unlikely if the Commerce Department receives a request to revisit its 2006 analysis and findings.

Although the U.S. and EU interpretations of the provision's expiration appear to differ, their outcome may be the same. Absent an announcement to modify the status quo, the U.S. will continue to apply its current nonmarket methodologies to China such that only U.S. market participants will feel no immediate impact on trade.

The EU, under its proposed methodology, is likely to continue to treat China or particular Chinese industries or sectors as subject to state intervention, and to resort to nonmarket methodologies, if the various enumerated factors are satisfied in new cases. It remains unclear, however, how the EU will implement the legislation in practice if ultimately it is enacted. Unsurprisingly, the Commission's proposal is written in general terms and grants much discretion to the administering authority in applying its provisions.

For example, the legislation does not appear to require a conclusion that *all* four criteria be satisfied to find that state intervention is present. Perhaps satisfaction of one or more of the factors would be sufficient to demonstrate state intervention, depending on the precise facts of a case.

In some sense, the EC's proposal mirrors the current U.S. approach—rather than rely on a legal designation, the EU will engage in a factual inquiry based on enumerated criteria to reach a conclusion regarding state intervention. Arguably, the EC's proposed legislation would bring EU law and nonmarket economy practice into conformity with its WTO obligations in a way that closely resembles U.S. law and practice.

Further, because the proposed legislation would apply prospectively only, its effect on EU market participants may not be immediate. The EU would apply the new methodology to cases that are initiated after the law enters into force, such that parties would need to wait until the completion of a new investigation (a process that can take up to one year from initiation to completion) to understand how the new analysis will be implemented.

Next Steps in the WTO Dispute. Despite the seemingly aggressive nature of the EU's proposal, its attempts to fend off a dispute with China clearly have failed. As the European Commission's proposal works its way through the legislative process, China will press on with the newly filed WTO dispute. WTO disputes can take several years to progress from the initial stages to panel review and through an appeal to the Appellate Body.

Depending upon the nature of the Appellate Body's findings, the compliance process can last for years after a decision has been rendered. The speed with which a dispute proceeds depends on various factors, including the aggressiveness of the parties in pushing the dispute forward and the workload of the WTO administrators assigned to the case. Although the WTO recently expressed its anticipation for a record high caseload in 2017, there is little doubt that China will approach this dispute as aggressively as possible.

The first stage of a WTO dispute is the consultation process, which can last for an indeterminate amount of time depending on the positions of the parties. China is likely to push through this phase as quickly as possible and will then file a request for a dispute panel to be convened. Once composed, the panel has discretion to set a schedule for the dispute.

Panel proceedings normally last from 12 to 18 months, meaning that a decision on China's claims is not likely to be issued until late 2018 or early 2019, at the earliest. Because of the interim political interest in and practical consequences of any Appellate Body decisions, it is likely that the Appellate Body will take its time in rendering a judgment.

By rule, the Appellate Body must strive to render a decision within 60 days of the filing of an appeal of a panel decision. As a result, appeals to the Appellate Body are typically completed within six months after a panel issues its public decision. Assuming this standard timeline, China is likely to have a decision from the Appellate Body by mid-2019, at the earliest.

Conclusion. The EU and the U.S. will surely be searching for common ground in the upcoming weeks and months as they begin to defend their positions and as the European Commission's proposal is debated and considered by Council and Parliament. A unified front among the two WTO members would lead to a stronger defense against China's claims for market economy treatment in unfair trade proceedings, but it is quite possible that either approach may satisfy the countries' WTO obligations.