

CHINA'S MARKET-ECONOMY STATUS IN USA

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CHINA TREATED AS NON-MARKET ECONOMY

19 U.S.C. § 1677(18)(A)

(A) In general. The term "nonmarket economy country" means any foreign country that the administering authority determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise.

CHINA TREATED AS NON-MARKET ECONOMY

19 U.S.C. § 1677(18)(B)

(B) Factors to be considered. In making determinations under subparagraph (A) the administering authority shall take into account-

- (i) the extent to which the **currency** of the foreign country is **convertible** into the currency of other countries;[,]
- (ii) the extent to which **wage rates** in the foreign country are determined by **free bargaining** between labor and management,
- (iii) the extent to which **joint ventures** or other investments by firms of other foreign countries are **permitted** in the foreign country,
- (iv) the extent of **government ownership or control** of the means of production,
- (v) the extent of **government control over the allocation of resources** and over the price and output decisions of enterprises, and
- (vi) such **other factors** as the administering authority considers appropriate.

CHINA TREATED AS NON-MARKET ECONOMY

19 U.S.C. § 1677(18)(C)

(C) Determination in effect.

(i) Any determination that a foreign country is a nonmarket economy country shall **remain in effect until revoked** by the administering authority.

(ii) The administering authority may make a determination under subparagraph (A) with respect to any foreign country at any time.

NON-MARKET ECONOMY PROVISIONS IN U.S. LAW

For Market-Economy countries
NV-EP = Dumping

For Non-Market-Economy Countries,

$$NV = \sum(FOP_n * SV_n)$$

FOP = Factors of Production

SV = Surrogate Value

- SV are taken from country at “comparable economic level” that is a “significant producer of comparable merchandise”
- Countries with broadly available export subsidies not included

NON-MARKET ECONOMY PROVISIONS IN U.S. LAW

19 U.S.C. § 1677b – Normal Value

c) **Nonmarket economy countries.**

(1) **In general.** If--

(A) the subject merchandise is exported from a nonmarket economy country, and

(B) the administering authority finds that available information does not permit the normal value of the subject merchandise to be determined under subsection (a),

the administering authority shall determine the normal value of the subject merchandise **on the basis of the value of the factors of production** utilized in producing the merchandise and to which shall be added an amount for **general expenses** and **profit** plus the **cost of containers, coverings, and other expenses**. Except as provided in paragraph (2), the valuation of the factors of production shall be based on the **best available information** regarding the values of such factors **in a market economy country or countries considered to be appropriate by the administering authority.**

NON-MARKET ECONOMY PROVISIONS IN U.S. LAW

19 U.S.C. § 1677b – Normal Value

c) Nonmarket economy countries.

(3) **Factors of production**. For purposes of paragraph (1), the factors of production utilized in producing merchandise include, but are not limited to--

- (A) **hours of labor** required,
- (B) **quantities of raw materials** employed,
- (C) amounts of **energy and other utilities** consumed, and
- (D) representative **capital cost**, including depreciation.

NON-MARKET ECONOMY PROVISIONS IN U.S. LAW

19 U.S.C. § 1677b – Normal Value

c) Nonmarket economy countries.

(4) Valuation of factors of production. The administering authority, in valuing factors of production under paragraph (1), shall utilize, to the extent possible, the prices or costs of factors of production in one or more market economy **countries** that are--

(A) at a **level of economic development comparable** to that of the nonmarket economy country, and

(B) **significant producers of comparable merchandise.**

NON-MARKET ECONOMY PROVISIONS IN U.S. LAW

19 U.S.C. § 1677b – Normal Value

c) Nonmarket economy countries.

(5) Discretion to disregard certain price or cost values. In valuing the factors of production under paragraph (1) for the subject merchandise, the administering authority may **disregard price** or cost values without further investigation if the administering authority has determined that **broadly available export subsidies existed** or particular instances of subsidization occurred with respect to those price or cost values or if those price or cost values were subject to an antidumping order.

“PARTICULAR MARKET SITUATION” IN U.S. LAW

For market-economy countries, DOC may use any calculation methodology if a Particular Market Situation exists

Particular Market Situation:

- Goods sold outside the ordinary course of trade
- DOC “may use another calculation methodology . . . or any other calculation methodology” = **NME**

“PARTICULAR MARKET SITUATION” IN U.S. LAW

- 19 U.S.C. § 1677 - Definitions

(14) **Sold or, in the absence of sales, offered for sale.** The term "sold or, in the absence of sales, offered for sale" means sold or, in the absence of sales, offered--

(A) to all purchasers at wholesale, or

(B) ***in the ordinary course of trade*** to one or more selected purchasers in commercial quantities at a price which fairly reflects the market value of the merchandise,

without regard to restrictions as to the disposition or use of the merchandise by the purchaser except that, where such restrictions are found to affect the market value of the merchandise, adjustment shall be made therefor in calculating the price at which the merchandise is sold or offered for sale.

“PARTICULAR MARKET SITUATION” IN U.S. LAW

19 U.S.C. § 1677 - Definitions

(15) **Ordinary course of trade.** The term "ordinary course of trade" means the conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to merchandise of the same class or kind. The administering authority **shall** consider the following sales and transactions, among others, to be **outside the ordinary course of trade**:

(A) Sales disregarded under section 773(b)(1) [19 USCS § 1677b(b)(1)].

(B) Transactions disregarded under section 773(f)(2) [19 USCS § 1677b(f)(2)].

(C) *Situations in which the administering authority determines that the **particular market situation** prevents a proper comparison with the export price or constructed export price.*

“PARTICULAR MARKET SITUATION” IN U.S. LAW

19 U.S.C. § 1677b – Normal Value

(e) *Constructed value*. For purposes of this title, the constructed value of imported merchandise shall be an amount equal to the sum of--

(1) the cost of materials and fabrication or other processing of any kind employed in producing the merchandise, during a period which would ordinarily permit the production of the merchandise in the ordinary course of trade;

“PARTICULAR MARKET SITUATION” IN U.S. LAW

19 U.S.C. § 1677b – Normal Value

(e) *Constructed value*. For purposes of this title, the constructed value of imported merchandise shall be an amount equal to the sum of--

For purposes of paragraph (1), **if a particular market situation exists** such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade, the administering authority may use another calculation methodology under this subtitle [19 USCS §§ 1677-1677j] or **any other calculation methodology**. For purposes of paragraph (1), the cost of materials shall be determined without regard to any internal tax in the exporting country imposed on such materials or their disposition that is remitted or refunded upon exportation of the subject merchandise produced from such materials.

MARKET-ORIENTED INDUSTRY

MOI test

- (1) There is **virtually no government involvement** in production or prices for the industry;
- (2) The industry is marked by **private or collective ownership** that behaves in a manner consistent with market considerations; and
- (3) Producers pay **market-determined prices** for **all** major inputs and for **all but an insignificant proportion** of minor inputs.
- (4) Must cover all (or **virtually all**) of the **producers** in the industry in question

ACCESSION PROTOCOL

The Accession Protocol specifically allowed for non-market-economy treatment.

Some provisions related to market-economy treatment expired after 15 years (December 2016)

Text must be evaluated in context in light of object & purpose of the Agreement

ACCESSION PROTOCOL

The expired paragraph:

(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.

ACCESSION PROTOCOL

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:

ACCESSION PROTOCOL

(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:

ACCESSION PROTOCOL

(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.

ACCESSION PROTOCOL

- (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.

ACCESSION PROTOCOL

BEFORE:

(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.

ACCESSION PROTOCOL

AFTER:

(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;

ACCESSION PROTOCOL

(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.

- **Why “subparagraph (a)(ii)” and not “(a)(i)”?**
- **What is the antecedent to “In addition”?**

EVALUATION OF ART. 15

- **Did anything change?** (temporary to permanent MOI decision?)
- **Will the WTO find that something had to have changed?** (surplussage, every word/change has meaning)
- **Will the subtle / nominal changes be enough for the WTO Panel or AB?** (different outcomes at different levels?)
- **What is political feeling at WTO?** (institution vs. members)
- **If China ultimately wins at the WTO, what will that mean?** (time to win, fall-back legislation)

THE END.

谢谢

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