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CHINA'S FUTURE MARKET ECONOMY STATUS: RECENT DEVELOPMENTS

On 7 November 2013, Commissioner De Gucht announced in a speech before the European Parliament that China will receive Market Economy Status in 2016. This statement came in the aftermath of a judgment issued by the EU's General Court in *Rusal Armenal ZAO v Council of the European* on 5 November 2013, concerning the EU's practice of treating some WTO members as non-market economies. Both developments are important since some commentators have in recent years cast doubts about China's future Market Economy Status.

Background

Pursuant to China's WTO Protocol of Accession, Chinese exporters subject to anti-dumping proceedings can be treated as not operating under market economy conditions until 11 December 2016. This has the practical effect that, under EU law, a special methodology (the NME methodology) derogating from the WTO Anti-Dumping Agreement (ADA) can be used to determine the normal value for Chinese exporters in an EU anti-dumping proceeding. This means that, unless Chinese exporters can show that they operate under market economy conditions (and thereby obtain so-called Market Economy Treatment (MET)), the normal value for such producers will not be based on their own sales and cost data, but by reference to data from third countries. Typically, this results in higher dumping margins (and hence higher anti-dumping duties) than under the methodology applied to market economy countries, especially since it has become increasingly difficult for Chinese exporters to qualify for MET.

In addition, and possibly a more solid ground for predictions about China's future Market Economy Status under EU law is a recent judgment of the General Court in the *Rusal Armenal* case, especially if confirmed on appeal.

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While prior to 11 December 2016, the EU may rely on China's WTO Protocol of Accession to justify the application of NME, the post-December 2016 situation has been the subject of controversy. Some commentators have in recent years been arguing that the EU will not necessarily be obliged to abandon its NME methodology for China after 11 December 2016. Yet, in view of recent developments, the likelihood of such a scenario has reduced further. In a 7th November 2013 speech before a European Parliament conference concerning the modification of the EU's trade defence instruments, the Commissioner mentioned that China will receive Market Economy Status in 2016. In addition, and possibly a more solid ground for predictions about China's future Market Economy Status under EU law is a recent judgment of the General Court in the *Rusal Armenal* case, especially if confirmed on appeal.

Therefore, this briefing will focus primarily on the implications of the *Rusal Armenal* judgment for China's Market Economy Status.

The Judgment in *Rusal Armenal*

Being located in Armenia, a so-called "non-market economy" under EU law, Rusal Armenal ZAO was required to complete a MET form when the EU started an anti-dumping investigation against aluminium foil from Armenia in 2008. Rusal Armenal requested MET but was found not to meet the criteria. Therefore, the normal value used to determine the dumping margin was based on data from Turkey, which resulted in a dumping margin of 33.4%.

Since the initial stages of the investigation, Rusal Armenal had argued that since (1) Armenia had been a WTO member since 5 February 2003 and (2) Armenia's Protocol of Accession (unlike that of China) did not contain any provisions that allowed WTO members to deviate from the rules set out in the ADA, with respect to the normal value determination and could, therefore, not apply the NME methodology.

During the anti-dumping investigation, the EC rejected those arguments and consequently Rusal Armenal challenged the application of the NME methodology before the EU's General Court in 2009. In its judgment of 5 November 2013, the General Court agreed with Rusal Armenal that the NME methodology could not apply to Armenia. Basically, the Court held that the only two exceptions provided for under WTO law that allow derogation from the normal rules (as set out in the ADA) to calculate the normal value do not apply.

More specifically, the General Court first concluded that Articles 2.1 and 2.2 ADA constituted the appropriate legal authority in determining the normal value of a product originated from a WTO member and, therefore, whether the NME methodology for the normal value determination could be used in the case at hand. The General Court subsequently found that, pursuant to WTO law, the regular (i.e., MET) normal value determination can only be deviated from under two exceptional scenarios.

First, derogations from the regular normal value determination are only allowed when the WTO accession documents (as is the case for China) explicitly allow this. Since Armenia's WTO accession documents do not provide for such a derogation, the NME methodology cannot be applied to Armenia.

Second, the rules set out in Articles 2.1 and 2.2 ADA can be ignored only when exceptions to this rule are laid down in the ADA or other WTO instruments. The relevant rule in this respect is the second supplementary provision to paragraph 1 of Article VI GATT 1947. This provision aimed to deal with state trading countries back in the 1940s. Therefore, EU institutions can only apply the NME methodology if these institutions have

first determined that a WTO member meets the conditions set out in the second supplementary provision to paragraph 1 of Article VI GATT 1947. In Armenia's case, no such determination had been made.

As a result, the General Court concluded that, in the absence of (1) evidence that Armenia satisfied the conditions of the second supplementary provision to paragraph 1 of Article VI GATT 1947 and (2) any provisions in its WTO accession documents allowing a derogation from Article 2 ADA, the EU institutions cannot apply the NME methodology simply because Armenia is listed under EU law as a NME.

Consequences of Judgment

First, the NME methodology can no longer be applied to WTO members such as Albania, Armenia, Georgia, Moldova, Mongolia and Tajikistan, even though EU law lists them as NMEs, unless it is first determined that these countries meet the conditions set out in the second supplementary provision to paragraph 1 of Article VI GATT 1947. Given the relative unimportance of these six countries' trade with the EU as far as anti-dumping is concerned, the practical impact will be rather limited.

The judgment in *Rusal Armenal*, once confirmed on appeal, therefore substantially improves the legal position of Chinese exporters subject to EU anti-dumping investigations after 11 December 2016.

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A second, and more important, implication of this judgment relates to the future legal situation of Chinese companies subject to EU anti-dumping investigations. The possibility to rely on China's WTO accession documents to justify the EU's NME methodology will cease to exist on 11 December 2016.

Therefore, after 11 December 2016, the NME methodology can only legally be applied against Chinese exports if the EU institutions first determine that China meets the conditions set out in the second supplementary provision to paragraph 1 of Article VI GATT 1947. Given the strict nature of these conditions (i.e. *"a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State"*) and the economic transformation China has undergone, it appears rather unlikely that it can be reasonably determined that China meets these conditions.

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