

Malmström: No Automatic Market Economy Status for China in 2016

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By Matthew Dalton



The short tenure of Cecilia Malmström, the European Union's new trade chief, has been dominated by one issue: the U.S.-EU trade deal.

Yet there's another issue lurking on the horizon that will probably come to a head sooner than trade talks with the U.S. and fundamentally change the EU's trade relationship with its second-biggest trading partner, China. That would be whether to grant China "market-economy treatment" at the World Trade Organization.

When China joined the WTO in 2001, developed economies such as the U.S. and the EU refused to acknowledge that China was a market economy. They argued that China's domestic prices were set by government agencies and policies, not the forces of supply and demand.

The main impact of this finding, which was included in [China's WTO accession agreement](#), is that China's trading partners have an easier time imposing large duties on imports from China that are believed to be "dumped" at unfairly low prices. But the accession agreement calls for a key provision of this finding to expire 15 years after China joined the WTO; that's December 12, 2016.

As the momentous date approaches, trade lawyers and government officials around the world have been scrutinizing the language of China's accession agreement with rabbinical intensity to understand the potential impact. A key question is: once the date arrives, does WTO law automatically require its members to recognize China as a market economy and, more importantly, abandon methodologies that allow them to impose large anti-dumping duties on Chinese products?

That would be a huge change, depriving European sectors such as steel, textiles and solar-panel manufacturers of the main tool they've used to protect themselves against low-priced Chinese imports.

Ms. Malmström in a recent interview told The Wall Street Journal that she will begin discussing whether China should get market-economy status with other European commissioners early next year. "You cannot say today that they (China) fulfill all the criteria," she said.

"There's no automaticity in that," Ms. Malmström said about the decision to grant China market-economy treatment. "We need to make a formal decision and table a law."

That will probably cause some consternation in China, where officials are counting on their exporters being treated as producing in a "market-economy" come December 2016. If the EU and the U.S. haven't changed their national laws by that date, China is almost certain to bring a complaint the next day at the WTO, said Folkert Graafsma, an attorney at Holman Fenwick Willan in Brussels.

"China will win, because it is very clear," said Mr. Graafsma, who defends Chinese exporters in anti-dumping cases before the EU.

Daniel Rosario, Ms. Malmstrom's spokesman, elaborated on her view in an email:

China's Protocol of Accession to the WTO contains special rules regarding their treatment in trade defence investigations. The end of 2016 is foreseen as the date when some of these provisions expire.

At present we are looking at the legal implications of the protocol of accession. As this is a complex question that requires detailed reflection and this will be examined by the College next year.

A dumped product, under international law, is one that is sold in an overseas market at below the domestic cost of production, with some adjustments for transport costs and a few other items.

The problem with finding that China dumps on world markets, the argument goes, is that China's domestic costs are artificially lowered by a suite of Chinese government subsidies: tax credits, land grants, cheap credit, subsidized raw materials and other measures. While Chinese export prices might not be below, or far below, the cost of Chinese production, that's because Chinese costs are artificially low.

To get around this problem, the U.S., the EU and others compare Chinese export prices to the production costs in a different nation that is considered a market economy but is also comparable to China. Sometimes that's India, other times it's Brazil or Indonesia.

What appears to expire on Dec. 11, 2016, is the ability of countries to determine anti-dumping margins by comparing Chinese export prices to production costs in a third country such as Brazil. But some lawyers argue that the language isn't so clear, and that a proper reading of the text shows that nations will still retain the right to use these funky – er, alternative methodologies.

"From a technical legal perspective, the two essential points are that the WTO rules do not dictate that China gets Market Economy Status automatically in 2016," says Laurent Ruessmann, a lawyer at Field Fisher in Brussels, who represents companies bringing anti-dumping complaints against China, "and that the Chinese economy is still today directed and distorted such that it does not meet more than one of the EU's ... criteria for the grant of market economy status."

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