

**ECIPE Seminar**  
**Trade defense in the EU:**  
**The case of PV imports from China**

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# Essential elements (1)

- China is the leading producer and exporter of solar modules in the world.
- As China is considered a “non-market economy” [“NME”] by countries such as the US, the EU and India, it is an easy target of **AD** cases.
- The analogue or surrogate country concept that is used in case of NMEs makes a finding of high dumping margins almost a foregone conclusion.

## Essential elements (2)

- In **CVD** cases against China, the EU and US resort to the establishment of external (out of country) benchmarks for inputs, land-use rights, loans and credit lines, among others, on account of the alleged distortion of these cost items due to government intervention.
- Such findings are typically based on use of ‘facts available’ applied as a result of the alleged non-cooperation of the Chinese government [GOC].
- The non-cooperation results from massive information requests by the US and the EU authorities that the GOC cannot reasonably comply with  
→ self-fulfilling prophecy.

## Essential elements (3)

- Countries such as the US and the EU have started AS cases against China in recent years in anticipation of the fact that they will not be able to use the NME methodology for China in AD cases after 11 December 2016 pursuant to China's WTO Protocol of Accession.
- However, there is no provision precluding countries from utilizing external benchmarks in AS cases.
- Therefore, more CVD cases are being initiated against China and this trend can be expected to continue.

# The EU's solar dispute (1)

- AD and CVD complaints spearheaded by SolarWorld AG along with other EU producers under the banner of EU ProSun;
- Scope: initially solar panels, cells, and wafers, but wafers later excluded;
- Duration measures: two years;
- Coverage: solar panels and cells **originating in or consigned from China**. This implies that modules/panels assembled in China from non-Chinese cells are also covered by the measure even though they would normally have, for example, Taiwanese origin;
- Adoption product-specific origin rules for solar cells and panels.

# The EU's solar dispute (2)

- The AD and CVD definitive measures of the EU were published on 5 December 2013. All MET claims were rejected.

EU AD case		EU CVD case	
Exporter/Producer	Duty rate	Exporter/Producer	Duty rate
Wuxi Suntech companies*	41.4%	Wuxi Suntech companies*	4.9%**
Trina Solar companies*	44.7%	Trina Solar companies*	3.5%**
Jiangxi LDK Solar companies *	46.7%	Jiangxi LDK Solar companies*	11.5%**
Delsolar and related companies*	64.9%	Delsolar and related companies*	0%**
JingAo companies*	51.5%	JingAo companies*	5.0%**
Jinzhou Yangguang companies*	27.3%	Jinko Solar companies*	6.5%**
Yingli companies*	35.5%	Renesola companies*	4.6%**
Jinko Solar companies	41.2%	Yingli companies*	6.3%**
Renesola companies	43.1%	Non-sampled cooperating companies	6.4%
Non-sampled cooperating companies not subject to AS duty	41.3%	All others	11.5%
Non-sampled cooperating companies subject to AS duty	36.2%	* Sampled companies. ** The main subsidies found were loans, credit lines and land-use rights. Relevant public bodies or specificity findings were based on facts available.	
All others	53.4%		
* Sampled companies.			

# The EU's solar dispute (3)

- The relevant external benchmarks used in the EU CVD case

<b>Alleged subsidy scheme</b>	<b>Benchmark</b>
<b>Preferential loans in RMB</b>	<b>Interest rate of the PBOC based on duration + 3.5% mark-up to reflect 'normal' market risk.</b>
<b>Preferential loans in USD and EUR</b>	<b>~6% benchmark rate to reflect 'normal' commercial interest rates - based on the simple average of corporate bonds (sourced from Bloomberg Professional Services) issued in the IP with the rating bb+, bb- or bb.</b>
<b>Provision of credit lines free of charge or below market fees</b>	<b>Commitment and arrangement fee of around 1.79% charged to one sampled exporting producer by a bank whose headquarter is in a financial jurisdiction other than China.</b>
<b>Provision of land-use rights at less than adequate remuneration</b>	<b>Land prices in Taiwan.</b>

## The EU's solar dispute (4)

- The EU accepted an undertaking provided by various Chinese exporting producers, *i.e.* over 130 companies or groups of companies jointly with the China Chamber of Commerce for Import and Export of Machinery and Electronic Products [“CCCME”].
- Minimum import price plus quantity threshold, allocated among the various Chinese exporting producers by the CCCME. Additionally, strict sales, documentary and reporting requirements apply.
- All cooperating Chinese exporting producers that did not sign the undertaking are subject to a combined AD and CVD rate of 47.7% and exporting producers that did not cooperate in the investigations are subject to a combined duty rate of 64.9%.
- However, the solar dispute between the EU and China remains active, as witnessed by the various court cases, allegations of undertaking violations, false origin certificates, AC investigations, interim and expiry reviews, etc.



# Normal Value in AD proceedings against China Post-2016 (1)

➤ **Whether or not China qualifies for MES is irrelevant:**

- 1. Market economy [ME] and non-market economy [NME] concepts not defined in the GATT 1994 or ADA;**
- 2. Relevance of MES qualification based on the first sentence of Section 15(d) is limited to the extent the national law of a WTO Member had MES criteria -- as opposed to market economy treatment [MET] criteria which are applicable to individual producers -- at the time of China's accession to the WTO;**

**The EU did not and still does not have MES criteria in its law; only countries classified as NMEs are listed in the Basic AD Regulation**

- 3. Imposing an obligation to qualify for MES under the national laws of even those WTO Members which did not have MES criteria at the time of China's accession amounts to unilaterally expanding the scope of China's commitments;**
- 4. Second sentence of Section 15(d) starts with the words, "in any event" and seems to indicate that whether or not WTO Members had MES criteria in their laws at the time of China's accession and notwithstanding that China may not have qualified for MES under the laws of those or other WTO Members, the permission to use alternate methodologies does not exist after 11 December 2016.**

# Normal Value in AD proceedings against China Post-2016 (2)

## ➤ NME methodologies cannot be applied post-11 December 2016:

1. From a legal and practical perspective: incoherent to put in a 15-year deadline or to have included the second sentence of Section 15(d) in the Accession Protocol if the exception could nevertheless be applied subsequently;
2. Chapeau of Section 15(a) provides an outline for the rules and not a rule in itself; rules are provided in sub-paragraphs (i) and (ii) - (i) lays down the rule for the use of Chinese producers' prices or costs while (ii) outlines the situation when a special/analogue country methodology "may" be used;
3. Section 15(a)(i) cannot be interpreted to create an exception because it cannot be read *a contrario* since the latter interpretation is already provided in Section 15(a)(ii);
4. There is no mechanism in the ADA or the Protocol indicating that upon the expiry of Section 15(a)(ii), Section 15(a)(i) would provide the exception and could be the basis to derogate from the general normal value calculation rules;

# Normal Value in AD proceedings against China Post-2016 (3)

5. Textual and contextual differences between the three sentences of Section 15(d) reinforce this point;
6. WTO dispute *EC —Fasteners (China)*:
  - the EU itself argued that Section 15 of China's Accession Protocol entitles it to treat China as a NME until 2016;
  - Even if dicta, the AB did provide a proper legal interpretation and noted that in 2016 the special rules in Section 15(a)(ii) will expire;
7. EU court Case *Rusal Armenal V Council and Commission*:
  - Council argued that China and Vietnam had negotiated a deadline beyond which WTO Members are required to treat them as market economies;
  - General Court also interpreted Section 15(d) as containing a cut-off date after which the special methodologies for normal value calculation would be repealed.

# Conclusions

- NME dumping margin calculation methods make findings of dumping a foregone conclusion;
  - Post-11 December 2016, WTO Members cannot resort to the Accession Protocol to apply the analogue country methodology;
- Specificity findings and use of external benchmarks, based on 'facts available', in CVD cases make subsidy findings a foregone conclusion;
  - Unclear whether China would be dumping or subsidizing more than others in PV sector if regular calculation methods were to be applied;
- Snowball effect of trade remedy cases (US, EU, Canada, India, Australia);
- Tit for tat not limited to China (e.g. GOES, sodium metal).

# Relevant parts of Section 15 of China's Accession Protocol

*“Price Comparability in Determining Subsidies and Dumping*

*15 (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...***

...

*15 (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...***** 13