

Wiley Rein White Paper: The United States Can Continue to Treat China as a Non-Market Economy After 2016

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Wiley Rein LLP's prominent International Trade Practice has published a white paper exploring how members of the World Trade Organization (WTO) must treat imports from China in antidumping investigations. The report, titled "The Treatment of China as a Non-Market Economy Country After 2016" was authored by practice chair Alan H. Price, partner Timothy C. Brightbill, and consulting counsel D. Scott Nance. To read the full article, [click here](#).

When China joined the WTO in 2001, many WTO Members expressed strong concerns about how they could apply the trade remedy laws, especially antidumping laws, to Chinese products. Dumping occurs when a company either sells a product more cheaply in an export market than in its home market, or it sells the product abroad for less than its cost of production. The Chinese government's control over key prices and inputs, however, meant that prices or costs in China could not serve as a reliable basis for determining whether Chinese products had been dumped. In its Protocol of Accession to the WTO, China agreed to allow other WTO members to base antidumping comparisons on something other than Chinese prices or costs.

Section 15 of China's Protocol of Accession permits WTO members to apply "non-market economy treatment" to Chinese imports in antidumping cases under certain conditions. One provision under Section 15 allows WTO members to do so with respect to an entire Chinese industry if the industry cannot show that it operates under market economy conditions. This provision alone will expire on December 11, 2016; the rest of Section 15 will remain in full force. The implications of the expiration of this single provision are nonetheless

Related Professionals

Timothy C. Brightbill
Partner
202.719.3138
tbrightbill@wiley.law
Alan H. Price
Partner
202.719.3375
aprice@wiley.law

Practice Areas

International Trade

fueling a debate in the trade community. Some commentators claim that after the provision expires, the United States and other countries will be required to treat China as a market economy in antidumping investigations without any exceptions.

The Wiley Rein white paper systematically analyzes the language and structure of the relevant provisions of China's Protocol of Accession in light of the rules of treaty interpretation applied by the WTO. The paper discusses the underlying purpose of the provisions, and places them in the context of the rest of the Protocol of Accession and the WTO Antidumping Agreement. The paper concludes that, even after the expiration of the provision in question, WTO members are still allowed to base antidumping comparisons involving Chinese products on something other than Chinese prices or costs *unless* individual Chinese producers can show that they operate under market economy conditions. In addition, other provisions of the Protocol that do not expire will continue to permit Chinese industries or the Chinese government to make the same showing regarding individual industries, sectors of the Chinese economy, or the Chinese economy as a whole. WTO Members are required to give Chinese imports market economy treatment only if a Chinese party can make such a showing. Significantly, U.S. law already allows for both sets of possibilities, so there will be no need to change U.S. law after December 11, 2016.

The paper points out that the claim that China is automatically entitled to market economy treatment in 2016 ignores the plain language of the Protocol of Accession and disregards key rules of treaty interpretation. This claim also ignores the fact that, despite commitments to the contrary, the Chinese government continues to exert significant control over prices in China, and over the Chinese economy in general. Under these circumstances, forcing other WTO members to treat China as a market economy would conflict with the underlying purpose of China's Protocol of Accession, which was precisely written to allow WTO members to take the Chinese government's control over prices into account in antidumping investigations.

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