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Chinese claim to Market Economy Status under WTO

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1 Introduction

Market economy is the economic system wherein the economic decisions are largely independent of influence from state or the government. The decisions regarding investment, production and distribution are not taken by the state but are rather regulated due to the forces of supply and demand. This is a general understanding of what market economy constitutes; however, there are states that perceive the concept of a market economy differently than the majority. The World Trade Organisation (WTO) is the apex body for regulation of international trade and sets the standards. In times when the body is being questioned and undermined, it still continues to hold importance in terms of settlement of disputes regarding international trade practices between two or more states.

China approached the World Trade Organisation (WTO) with respect to a dispute with European Union and United States of America. The case with European Union was able to proceed further to advanced discussion while the one with United States is still in the pipeline. The dispute was primarily regarding the treatment of China as a Non-Market Economy by the European Union in anti-dumping on Chinese goods. The Chinese have contended that the agreement signed at the time of its admission to the organisation reflects that China was bound to be recognised as Market Economy on 15 Years from the date of signing. The Protocol of Accession signed in 2001, clarifies the revocation of the treatment as Non Market economy after 15 years in Clause 15(d) (Accession Protocol, 2001). On the other hand, European Union have claimed that China should not be recognised as a Market economy owing to their failure to fulfil the Market economy criteria as in use by the European Union. Both the EU and United States have argued against the substantial state control in Chinese economy as one of the core reasons to oppose their Market economy status within the global trading system.

2 Evaluating the Chinese economy for state control

The Chinese have kept it no secret that their faith is in the ‘social market economic’ system. It is understood as an economic system which operates somewhere between the free market system and an entirely state controlled economy. The economy in China is currently identified to be in a transition to an innovation-driven market from the investment-driven export economy by many experts. In such a scenario, it is clear that the state-owned enterprises (SOEs) would not be able to survive the competition without the perks laid down in the system for them by the Chinese government. In order to substantiate the point made above, it is important to understand that the regulations for the banking system in China are laid down as such that they are able to afford the state-owned enterprises (SOEs) in China with loans at a priority (Guluzade, 2019). This system of preferential loans to the state-owned enterprises (SOEs) gives these SOEs an undue advantage in terms of economic competition, considering the preferential loans would also impact the capacity of banks to lend to the private enterprises. The banks do not have a pool of unlimited resources to distribute and thus the government is effectively ruling out competition for the state-owned enterprises (SOEs). In addition to this, the state-owned enterprises also often end up lobbying with other SOEs for formulation of regulations which further drives out private companies from the competition (Guluzade, 2019). This ‘privileged loan’ system gives gravitas to the claims made by the West in respect of the Chinese economy to a substantial degree.

The Chinese economy is also expected to be taken aback due to the Anti-corruption campaign launched by President Xi Jinping. As a direct result of the campaign, many high ranking officials of the state-owned enterprises (SOEs) have been relieved from their duties. For example, Cai Xiyou who served as the President of Sinochem group and Chang Xiaobing who served as the Chairman of China Unicom/Telecom were both placed under investigation and subsequently removed from their positions. It definitely is a positive to be free of corrupt officials, however, there also emerges a lack of coherent strategy for the state-owned enterprise (SOE) which loses its leader and the overall impact of this is evident on the performance of the enterprise. The corruption in China has been attributed to this system of state control due to the discretionary power that it brings along.

The Chinese government has even eroded the private corporations and have attempted to place the public servants and the members of the communist party of China in private corporations at influential positions. The central organisation department of the communist party had reported that 68% of private companies in China had party members placed in them by 2016. The level of control exerted by the Chinese government can be clearly exemplified from the case of Jack Ma. He is the founder of Alibaba Group and it is said that he was forced or compelled indirectly to step down from his day to day role of the group considering his firm belief in open market economy which is not same as his party’s ideology (McGregor, 2019). This intolerance of the ideology within the Chinese setup seems to award the weight to the arguments raised by the Western faction about the Chinese economic structure.

3 Steps taken by China to make progress

The West has clarified that unless reforms are introduced in the Chinese system, the treatment of their goods shall be on similar parameters as was decided back in 2001. European Union and United States both have expressly stated that China hasn't made effort to bring about a change in the situation of their economic system and its structure. However, this claim does not represent the entire scenario. The Chinese government had established the State-Owned Asset Supervision Administration commission (SASAC) in 2003, which is two years after the Protocol of Accession, was signed. The commission had been tasked supervise the structure of the state-owned enterprises (SOEs) and bring changes to the same. The commission implemented the 'Zhuada fang-xiao' approach with the respect to the state-owned enterprises. The approach was about introducing changes to the stringent state control system through privatisation, mergers and acquisitions (Guluzade, 2019). The effort by the commission was targeted to bring a gradual change in the economic structure in China. The SASAC is currently working on transforming the organisational setup of state-owned enterprises (SOEs) of China. The reorganisation of the state-owned enterprises (SOEs) is being carried out with the objective of improving the internal governance standards in the aftermath of the anti-corruption campaign and to bring about more independence from the state control of Chinese government. All the entities overseen by the SASAC or under their supervision have been structured as corporations with Board of Directors who possess more independence from state control (Guluzade, 2019).

The questions raised by the European Union and United States to the legal framework of China allowing for such state control seems to be valid. However, it seems to be blown out of the water when one notices the changes initiated by the government in Beijing. The entire process has been gradual and has slowed down in the past few years owing to the Chinese conservatism. It seems China was willing to take the steps to transform from state control to more open markets, but the trade war against the Chinese has not helped the cause. China chose to stick with security over efficiency as a response to threats and one cannot entirely blame them for sticking to an ideology that has got them the results in terms of progress, when attacked or threatened. The arrival of Donald Trump at the international stage has further deteriorated the situation in terms of their transition to a more open market. The trade war declared by Trump has only added fuel to fire and not paved way for progress.

4 Disregard of Rules and Misleading documentation

The main contention of the consultations requested by China was to raise concerns about the enforcement of the Protocol of Accession and the Clause 15 under the agreement. As per the claims by China, Clause 15(d) lays down that "In Any event, the provision laid down in subparagraph (a)(ii) shall expire 15 years after the date of Accession" (Protocol of Accession, 2001). The claim so made by China is valid as far as the text of the Protocol is concerned. However, the European Union is not entirely incorrect when they derive their power to use different methodology under the clause 15 still.

The clause 15(d) says that “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.” The subparagraph (a) states that “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.” The subparagraph (a) of clause 15 also lays down similar provision as to (a)(ii). The document becomes misleading the moment it allows for expiry of the provision in one clause while protects its existence in the other. Now both claims are accruing out of one single provision and both seem to have standing prima facie.

There could have been clarity over the interpretation of the Protocol, if the Dispute resolution process could have gone through and a report could have been obtained from the Panel established. However, China have been denied the opportunity to take the matter further owing to procedural clause which needs the resumption of panel proceedings within 12 months from its suspension as requested by one of the parties to the dispute. However, it is important to review the dispute resolution process as it unfolded considering there is something to take into consideration.

Article 12.8 of the Understanding of the rules and procedures governing the settlement of disputes has laid down that the time period from composition of the panel and agreement over terms of reference to the final report should not exceed six months. The Article 12.9 states that if the panel considers that it will not be able to submit the report within the stipulated time then by a written communication of reasons for the same, they can seek an extension and specify the estimated time period for the submission of the report. The Article 12.9 also states that “In no case should the period from the establishment of the panel to the circulation of the report to the Members exceed nine months” (Document of Rules of procedures governing dispute settlement, 1994). The Communication from Panel to DSB for extension dated 11th December 2017, submits that the report shall be submitted in Second half of 2018 (Communication from Panel, 2017). The panel was established on 3rd April 2017 as substantiated by the communication of the Panel itself. Clearly, the time period of Nine Months from 3rd April 2017 which is the date of establishment of panel was not given consideration and the report was delayed. The Panel further delayed the report to 2019 by a notification in 2018 (Communication of Panel, 2018). The rule laid down in Article 12.9 has been clearly disregarded in this case and the procedures as laid down haven't been followed by the World Trade Organisation. Owing to such disregard and the importance of interpreting the protocol, it is important that World Trade Organisation finds a way to reopen or reinstate the consultation with due consideration of established procedure.

5 European Union Free Trade Agreements and their significance in this case

The European Union has signed many Free trade agreements in order to boost their economic partnerships; however, they seem to have an indirect bearing over this whole case and the treatment of Chinese goods with hostility. At the beginning of the proceedings, Canada initiated a request to join the consultations so initiated by China against European Union and claimed to have an interest in the decision since their exports are in direct competition with Chinese exports in Europe as per their communication from the delegation of Canada (Communication by Canada, 2017). Canada also mentioned in the same communication that the exports from Canada to European Union are to increase further in the near future owing to the Canada-European Union Comprehensive Trade agreement (CETA). As per the agreement, there will be removal of trade barriers from both parties on the goods from the other and promotion of free trade will be the main objective. It is interesting to note that European Union is the second largest trading partner of Canada and has been trying to bolster the Trans-Atlantic trade. If Chinese goods are comparatively expensive in the European markets and they fail to compete with other goods, the direct advantage will be accrued by Canada. They had mentioned that their exports are in direct competition with Chinese in the European Market. Thus, It seems important for European Union to adopt the different methodology in order to also create this advantage for their strategic trade partner. An advantage to Canada will only return as an advantage to European Union since they will be afforded more relaxations on exports to Canada under their agreement.

It is further interesting to note that other parties who requested to join the consultations including Australia, Mexico, and Vietnam have vested interests in the situation of Chinese goods. All these countries are parties to current or potential free trade agreements with the European Union. In order to improve the performance of their exports to Europe, it is important for them to compete with Chinese exports and the current European Union Policies give them this opportunity on a plate. While questions about the intentions of China have been raised with respect to fulfilment of the principles of Marrakesh Agreement and its supplements, it seems more pressing to raise questions to the intentions of the West of fulfilling the provisions of the principles laid down in the World Trade Organisation agreements which call for fair trade practices and respect for the terms of accession.

6 Conclusions

The Panel established to deal with claim made by China has closed the case owing to failure of resumption within 12 months of suspension. However, the proceedings were not exactly conducted as per the procedure set by World Trade Organisation. It is important for the Dispute Settlement Board to reinstate the process considering the

Protocol of Accession is grossly misleading and accommodates claims from both parties. The decision to close work for now still seems to be politically relevant considering the European Union will continue their anti-dumping practices against China and not recognise China as Market Economy. It is important for China to try and bring about the changes more rapidly with respect to the liberation of markets. The trade war declared by United States does not seem to help in this case since it forces China to give preference to security over efficiency. In totality, the Chinese government for the time being will have to settle with their Non-Market Economy status and try to approach the World Trade Organisation again in their consultations with United States and stake their claim regarding the Protocol of Accession and domestic market reforms. Canada, Mexico will try to make the most of their agreements with European Union, while Australia and Vietnam will hope to complete negotiations and then exploit the current situation between Europe and China.

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