Report from Europe

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MODERNISATION OF THE EUROPEAN UNION TRADE DEFENCE SYSTEM – REFORM DE JURE AND DE FACTO

There have been several high profile European Union (EU) trade defence investigations and court decisions in recent years, including those concerning footwear, stainless steel fasteners, wireless modems and solar panels from China. These cases received high political attention and have led to increasing questions about the effectiveness, transparency and fairness of the EU trade defence instruments. In April 2013, the EU Commission proposed a modernisation of the current system, which may or may not be effective in addressing the issues raised.

The EU trade defence system is based on Arts VI and XVI of the World Trade Organization (WTO) *General Agreement on Tariffs and Trade* (GATT) and the respective implementing agreements, that is, the Anti-Dumping Agreement (ADA) and the Agreement on Subsidies and Countervailing Measures (ASCM). Trade defence instruments fall under Art 207 of the *Treaty on the Functioning of the European Union* (TFEU), which gives the Union sole competence in questions of common commercial policy. Regulation 1225/2009,[1] the Basic Anti-Dumping Regulation, and Regulation 597/2009,[2] the Basic Anti-Subsidy Regulation (jointly, the Basic EU Regulations), which are directly applicable in all EU Member States, implement the ADA and the ASCM into EU law.

The EU Commission is the investigating authority in anti-dumping and anti-subsidy investigations, which are subject to statutory time limits of 15 and 13 months, respectively. The Commission can impose provisional measures after a maximum of nine months from the initiation of the proceedings; currently, the EU Council decides whether or not to impose definitive measures upon a proposal by the Commission.[3] Like the WTO rules, the Basic EU Regulations make the imposition of anti-dumping or countervailing measures conditional upon the investigation establishing that non-EU producers have caused injury to the EU industry through dumped or subsidised imports of the product under investigation. In addition, EU law has two further requirements: first, the imposition of measures must be in the overall EU interest. The Commission and Council weigh the interest of the EU industry to have relief from the injury suffered, against that of EU users, importers or other parties.[4] Secondly, under the EU "lesser duty" rule, dumping/countervailing duties will only be imposed to the extent of the lesser of the dumping/subsidy margin and the injury margin. The rationale behind the lesser duty rule is that if the injury suffered by the EU industry is lower than the dumping/subsidisation, it is sufficient to remedy the former.[5]

[1] Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community, OJ 2009 L343/51.

[2] Council Regulation (EC) No 597/2009 of 11 June 2009 on protection against subsidised imports from countries not members of the European Community, OJ 2009 L188/93.

[3] A Commission proposal to impose anti-dumping/anti-subsidy measures is currently adopted by the Council through absolute majority. Each Member State has one vote and a measure is adopted unless 15 (or more) of the 28 Member States vote explicitly against it. Following the adoption of the Lisbon treaty, the EU is in the process of amending the voting system. In the future, the Council will only be able to reject a Commission proposal with a qualified majority. Importantly, Member States will no longer have the same vote. Instead, votes will be weighted.

[4] For instance, the EU Institutions would consider in the assessment whether there is sufficient supply of the product under investigation from producers in the EU or in third countries not subject to the anti-dumping/anti-subsidy investigation, and whether the product represents a major cost factor for downstream users.

[5] The injury margin is calculated by comparing the EU prices of imports of the product under investigation with the price the EU industry would achieve absent injurious dumping/subsidisation. This so-called target price is based on the EU industry's cost of production plus a reasonable profit margin.

The application of trade defence instruments, in particular anti-dumping, has been frequently requested by a wide range of EU producing industries, predominantly against imports from China.[6] In 2010, with the investigations of *Coated Fine Paper* and *Wireless Modems*, the Commission for the first time also initiated anti-subsidy investigations against China, which the EU treats still as a non-market economy. Since then, imports from China have frequently been the subject of EU subsidy cases, brought in combination with anti-dumping proceedings (either complaints or anti-review requests), such as in *Organic Coated Steel*, *Bicycles and Parts*, *Photovoltaic Modules and Parts*, and *Solar Glass*.[7]

Stakeholders have, however, increasingly challenged the practices of the Commission and Council in trade defence cases in recent years, and brought several proceedings before the EU courts and the WTO Dispute Settlement Body (DSB). The EU courts have overruled the Commission's and Council's findings in several instances, and forced fundamental changes in the Commission's practice in certain areas. In *Brosmann*,[8] the court ruled that the Commission cannot apply sampling to the determination whether exporting producers in China operate under market economy conditions, but has to assess all applications for market economy status individually. In *Interpipe*,[9] the court overruled a longstanding Commission practice of making adjustments for related sales companies in establishing the export price of an exporting producer. Finally, in *Zhejiang Xinan*,[10] the court agreed with the company that the Commission cannot reject market economy treatment based solely on the fact that the Chinese state is a shareholder. In the EU antidumping duties on fasteners, the DSB declared the EU's "individual treatment test"[11] incompatible with WTO law.

These developments have accompanied an acknowledgment that the EU trade defence system, which has remained basically unchanged since the mid-1990s, when the ADA and the ASCM were implemented into EU law, would benefit from a modernisation.

Accordingly, in 2012, the Commission conducted public consultations among interested stakeholders concerning the effectiveness of the current trade defence system. Based on the feedback received, Commissioner Karel De Gucht presented a modernisation package in April 2013, consisting of a proposal of certain legislative and non-legislative changes, as well as the publication of practical guidelines. The focus of the modernisation package lies on six priority areas: transparency and predictability; fight against retaliation; effective enforcement; easier procedural co-operation; optimisation of the review process, and codification of certain practices in the legislation.

Specifically, the legislative proposal suggests amending the Basic EU Regulations to include: (1) a pre-warning system for importers prior to the imposition of provisional measures;[12] (2) the reimbursement of duties collected during an expiry review investigation if the measures are not extended; (3) the extension of the Commission's possibilities to initiate investigations ex officio where

[6] Some of the more recent cases include *Coated Fine Paper from China, Wireless Modems from China, Stainless steel wires from India, Biodiesel from Indonesia and Argentina, Aluminium Foil in small rolls from China, Ironing boards from China, Aluminium radiators from China, Stainless Steel Fittings from Taiwan and China, Tableware and kitchenware from China, Tube and pipe fittings of iron or steel from Russia and Turkey, Seamless pipes and tubes from China, Bioethanol from the US, Photovoltaic modules and parts from China and Solar Glass from China*. The cases involving *Photovoltaic modules* are the largest trade defence cases ever launched, involving Chinese imports worth over 20 billion, and have been highly political and heavily fought.

[7] The EU imposed anti-subsidy measures in *Coated Fine Paper* and *Organic Coated Steel*. The investigations in *Bicycles and parts and Wireless Modems* were terminated by the withdrawal of the complaints. *Photovoltaic Modules* and *Solar Glass* are still ongoing, with definitive measures due in December 2013 and May 2014, respectively.

[8] Case C-249/10 P, *Brosmann Footwear (HK) Ltd v Council* [2012] ECR, not yet published.

[9] Case C-191/09 P, *Council and Commission v Interpipe Niko Tube ZAT and Interpipe NTRP VAT* [2012] not yet published.

[10] Case C-337/09, *Council v Zhejiang Xinan Chemical Industrial Group Co Ltd* [2012] ECR, not yet published.

[11] Under the EU's Individual Treatment Test, the Commission and Council made the application of individual dumping margins to co-operating exporting producers in non-market economies conditional upon compliance with certain conditions, absent which the exporting producers would be subject to an average country-wide duty rate.

[12] Especially smaller market players claim that the "unannounced" "automatic" imposition of anti-dumping measures catches them by surprise and does not allow for effective planning.

the EU industry would be subject to retaliation by third country governments or producers; and (4) deviation from the lesser duty rule in certain cases, for example, where third countries create distortions to their raw material markets through subsidisation.

The non-legislative proposal suggests: (1) facilitating co-operation between companies and associations with the Commission and extending certain deadlines during the investigation; (2) improving the monitoring of trade flows; and (3) allowing ex-officio anti-circumvention reviews to ensure faster action.

Finally, the guidelines will give stakeholders a better understanding in four areas; (1) expiry review investigations; (2) the Commission's approach to assessing the Union interest; (3) the calculation of the injury margin; and (4) the choice of the analogue country in investigations involving non-market economies. A draft of the guidelines was published for comments by stakeholders between April and July 2013. The Commission is currently analysing the responses based on which it will further adapt and finalise the guidelines.

These proposals are in line with certain policy changes the EU Commission and Council have already adopted in recent years. For instance, the Commission has increased the level of scrutiny in expiry reviews, and is now more reluctant to maintain anti-dumping measures where they have already been in place for a long time. Also, the Council has several times imposed anti-dumping duties for less than the normal five years, such as a two-year period in politically sensitive cases.

A reform of the EU trade defence instruments could indeed bring improvements. Particularly, increased transparency and due process appear to be in the interest of all stakeholders. However, other proposals, such as the non-collection of provisional duties for a certain transition period, the refund of duties collected during expiry review proceedings, the possibility for ex officio initiation of anti-dumping and anti-subsidy investigations, and the deviation from the lesser duty rule in certain cases, are seen as being very controversial by different stakeholders. The right balance will therefore have to be struck for the proposed measures to indeed bring modernisation rather than destabilise what is already a difficult balance.

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