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Comments on the Use of Trade Defence Instruments against the EU in the Current Economic Downturn

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In parallel with the economic downturn, the number of new trade defence actions (anti-dumping, countervailing and safeguard measures) initiated by non-EU countries against EU exports has more than doubled. This is a worrying trend given the increased risk of improper use of these instruments especially in time of global economic crisis, when Governments are under exceptional protectionist pressure. Despite diverging national practices, all countries have to apply these instruments in full compliance with their international obligations. Restraint should also be exercised to preserve the true objective of remedying distortions of competition and to avoid any abuse and undue restriction to trade.

1. Introduction

Trade Defence Instruments (TDI), which include anti-dumping (AD), countervailing (CVD) and safeguard (SFG) measures are tools that permit restrictions against imports in case of injurious unfair trade (AD and CVD) or injurious sharp increase in imports (SFG). TDI are available to all countries operating in international trade to the extent that the conditions foreseen by the relevant international agreements of the World Trade Organization (WTO) are complied with. TDI are powerful instruments that influence international trade flows and should consequently be applied with fairness and surgical precision. The aim of correcting distortions on the market should be preserved and any abuse and undue restriction avoided.[1]

Between September 2008 and April 2009 in parallel with the economic downturn, while no increase has been registered in the TDI activity[2] of the European Community (EC),[3] the number of new investigations initiated by non-EU countries ('third countries') concerning EU exports has more than doubled.[4] The European Commission ('Commission') is carefully monitoring this trend. On the one hand, governments are under increased pressure to shield the local industry from import competition while on the other hand, businesses have more incentives under the current circumstances to export their goods to foreign markets at unfair conditions and in sharply increased quantities. This situation can lead easily to a resurgence of protectionist tendencies and an abuse of TDI.

Referring back to the fairness and the surgical precision, it is sometimes to be feared that TDI are used in pursuit of illegitimate objectives such as outright protection. Actions not-legally warranted would, as a result, unduly amplify the impact of the economic

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1 However, this is not always the case and unsurprisingly TDI is a highly controversial topic. There are notably two professions which show a particular interest in TDI. Economists, on the one hand, developed a theoretical framework that is situated at the level of macro-thinking and is coming with recommendations to adjust the instruments and to shift to concepts that are borrowed from the competition policy domain. Lawyers, on the other hand, have come with a set of comments and pragmatic recommendations to improve the functioning of the instruments. There is less questioning of the existence itself of the instruments. Issues that are raised relate to transparency, due process and re-examination of technical variables which can determine the outcome of a case (definition of product, selection of an analogue country, etc.).

2 Official statistics are available on the Commission's website: <www.ec.europa.eu/trade/issues/respectrules/index_en.htm>.

3 The EC has legal personality according to Art. 281 of the Treaty establishing the EC (consolidated text, *OJ* C 321E of 29 Dec. 2006, 1). The European Union ('EU') shall succeed and replace the EC only once the Treaty of Lisbon will enter into force (Art. 1, *OJ* C 306 of 17 Dec. 2007, 1).

4 Cf. European Commission's Annual Report, *Overview of third country trade defence actions against the Community*, 2009, available, like also preceding versions on the Commission's website, *supra*. In May 2009 The WTO Secretariat reported that during the period 1 Jul. 2008 to 31 Dec. 2008, the number of initiations of new AD investigations showed a 17% increase compared with the corresponding period of 2007. On a yearly basis, there were 208 initiations of new AD investigations in 2008, as compared to 163 in 2007 and 202 in 2006. Cf. WTO Press/556, 7 May 2009, AD – WTO Secretariat reports increase in new AD investigations, <www.wto.org>.

crisis on exporters. By contrast, it would be wise if the authorities of all countries adopted an attitude consisting of: applying TDI only where all legal conditions are clearly met and in moderation without denying the domestic industry its basic legal rights; making sure that the technical analysis is done very carefully and is of the highest quality standard; ensuring international cooperation between investigating authorities to raise the quality of their technical analysis and the administrative standards in order to better ensure that decisions being taken on the merits of the case.

This article is intended to provide the reader with a more comprehensive vision of trade defence actions against the EU, since due to the current economic downturn it is more difficult than ever for the EU industry to maintain its access to third-country markets. The second chapter will describe the international legal framework of TDI, by providing general definitions and by illustrating the discretion left to the investigating authorities which in turn results in important differences in the law and practice of the countries using TDI. The third chapter will illustrate the main concerns about not-legally warranted trade defence actions affecting EU exports especially in view of the economic crisis. The forth chapter will describe the role of the Commission in this field in its various dimensions (monitoring of actions, support and advice to the Member States and industry and increase of discipline through direct intervention) and the importance of coordination with stakeholders at EU level. Finally, a few examples will be provided to illustrate third-country actions against EU exports which were not fully in compliance with WTO rules and consequently required the intervention of the Commission.

2. The International Legal Framework of TDI and the EC Practice

Although TDI are regulated at international and multilateral level by the WTO Agreements,[5] differences persist in TDI rules and practices from one country to another. This arises essentially because of two reasons. Firstly, when WTO members transpose WTO rules into national rules in order to comply with their international obligations, they often define certain concepts which are not exhaustively spelt-out at multilateral level. Secondly, further and perhaps more significant differences result from the introduction of provisions that go beyond WTO rules (WTO-pluses), that restrict further the application of TDI measures as compared to the WTO minimum standards. The EC, for example, has introduced special rules to translate into its practice a conservative approach to TDI.

2.1. Common WTO Rules Regulating TDI

The WTO is more than a 'free trade' institution as the WTO agreements are conceived as a system of rules dedicated to open, fair, undistorted competition. Indeed, the rules on most-favoured nation (MFN)[6] and national treatment[7] are designed to secure non-discrimination. Equally, in the case of practices distorting the conditions of competition on the market and the normal course of trade, free trade can be regulated by AD, CVD and SFG measures. On the one hand, dumping and subsidization are considered unfair practices and additional tariff duties remain in place as long as the distortion continues.[8] In a nutshell, dumping is selling at an unfairly low price in a foreign market (i.e., below the 'normal value' of the same product on the home market)[9] while CVD duties are used to offset the subsidies granted by the country of origin to the exported product.[10] On the other hand, SFG measures are emergency safety valves to limit an unexpected and important surge in imports which causes serious injury.[11] Therefore, quotas or tariff rate quotas are limited in time.[12] SFGs target any import irrespective of its origin (*erga omnes*) and irrespective of whether or not it is traded fairly.

In any event, the imposition of any of the above mentioned measures is justified only if they comply with the strict rules fixed at WTO level and, in particular, if there is evidence that the local industry is suffering from injury (that shall be material in the case of AD and CVD, and serious in the case of SFG) clearly caused by dumped, subsided or increased imports. All conditions for the application of these measures

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5 The basic concepts and the procedures for TDI are described in detail in three separate WTO agreements: the Anti-dumping Agreement (ADA), the Agreement on Subsidies and Countervailing measures (ASCM) and the Agreement on Safeguard (SG).

6 MFN means that every time that a country opens its market to a trading partner it has in principle to do the same for all trading partners. Cf. Art. 1 of General Agreement on Tariffs and Trade 1947 (GATT 1947).

7 Article 3 of GATT 1947 requires that imports be treated no less favourably than the same or similar domestically produced goods once they have passed customs.

8 Cf. Art. 11.1 ADA; Art. 21.1 SCM.

9 This is typically domestic sales price or cost of production plus a reasonable profit. The exporter will normally charge export prices below the level of normal value in order to gain market share, although it is not necessary to demonstrate such intent. Cf. Art. 2.1 ADA.

10 Cf. Art. 1 SCM.

11 Cf. Art. XIX GATT 1947.

12 Cf. Art. 7.2 SG.

apply cumulatively and any other factor that could breach the causal link between imports and injury should be identified and analysed separately.[13] These rules are binding for WTO members and are a benchmark for non-WTO members that have applied or will apply for membership (e.g., Russia).

2.2. Different National Rules Regulating TDI

Each WTO member, upon its accession, shall take any necessary step to ensure the conformity of its laws, regulations, and administrative procedures with the provisions of the WTO Agreements.[14] The national legislator normally transposes WTO TDI rules into national law in order to express them in its own language as well as to elaborate detailed guidance, absent in WTO rules.[15] However, even minor differences in translation, interpretation, implementation and any addition or change of these rules can have an impact on the use of the instruments and on the parties concerned. Moreover, in addition to laws and regulations investigating authorities may publish manuals guiding the national practitioners that can add further divergences.

The following examples illustrate how some aspects of TDI investigations can be regulated differently by national law in the absence of detailed guidance at WTO level. Price undertakings, which are voluntary alternative measures to AD and CVD duties,[16] in the USA take the form of suspension agreements which cover all exporters in a given investigation[17] while in the EC there is no requirement that all exporters submit an undertaking in order for it to be accepted.[18] Access to the administrative file can range from the simple possibility of taking notes from the non-confidential version of the documents to full access to confidential information for lawyers, like in the USA and in Mexico. Disclosure of essential facts and considerations including the results of the verification visits can take place at different stages of an AD or CVD investigation (before or after imposition of preliminary duties).

If every country has the right to use TDI within the limits of the WTO Agreements, the governments should interpret, implement and complement those provisions with fairness and moderation. All investigating authorities should review any trade defence practice that could result in an incorrect implementation of WTO trade defence rules and thus amount to an abuse of TDI.[19] A general effort is necessary in this respect from both traditional and less experienced, but frequent, users of TDI.[20]

2.3. WTO-Pluses and the EC Practice as a Reference

WTO members can depart from and go beyond the common agreed rules by creating additional obligations. The EC has used 'WTO-pluses' to foster a conservative use of TDI, that is, to ensure a strict and fair use of these instruments.[21]

A brief non-exhaustive description of some WTO-pluses contained in EC TDI law follows.[22] The EC imposes[23] duties at a level lower than the margin of dumping or of subsidization but adequate to remove

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13 Cf. Art. 3.4 ADA; Art. 15.4 SCM; Art. 4(b) SG.

14 WTO members shall notify promptly to the WTO their laws, regulations and administrative procedures and any changes to it. Cf. Art. 18.4 and 5 ADA; Art. 32.5 and 6 SCM; Art. 12.6 SG.

15 The Authors are not convinced by the theory that the proliferation of AD laws can be explained simply with retaliation as explained by some doctrine. Cf. Vandenbussche/Zanardi, 'What explains the proliferation of anti-dumping laws?' in: *Economic Policy*, January 2008, 94–138.

16 AD and CVD proceedings may be suspended or terminated without the imposition of duties upon receipt of a satisfactory voluntary undertaking from any exporter to revise its prices so that the investigating authorities are satisfied that the injurious effect of the subsidy is eliminated, or from the government of the exporting WTO member that agrees to eliminate or limit the subsidy. However, in the WTO Agreements, there are no details on how an undertaking should work in practice. Cf. Art. 8 ADA and Art. 18 ASCM.

17 Cf. s. 734(b) of the Tariff Act of 1930, as amended (19 U.S.C. 1673c(b)), and 19 CFR 351.208.

18 Cf. Art. 8 EC anti-dumping Regulation No 384/96 *OJ* L 56, 6 Mar. 1996, 1 (EC Basic AD Regulation); Art. 13 of EC anti-subsidy Regulation No. 2026/97, *OJ* L 288, 21 Oct. 1997, 1 (EC Basic AS Regulation).

19 In this sense see also G. Depayre, 'Anti-dumping rules: for a predictable, transparent and coherent application', *Global Trade and Customs Journal* 3, no. 4, 123 ff.

20 During the second half of 2008 only 15 out of 208 new investigations were opened by developed Members and 36 out of 81 new final measures were applied by developed Members. Cf. WTO Press/556, 7 May 2009, *supra*.

21 Concerning the possibility of further improvement in the EC practice reference is made here to the constructive suggestions resulted from the reflection process launched by the Green Paper on TDI which are not discussed here (Cf. Communication from the Commission, *Europe's trade defence instruments in a changing global economy: A Green Paper for public consultation*, Brussels, 6 Dec. 2006 COM(2006) 763 final; replies and evaluation are available on the Commission's website, *supra*). For an example of discussion on this matter outside the Green Paper, E. Vermulst, 'The 10 major problems with the anti-dumping instrument in the European community', *Journal of World Trade* 39 (2005): n. 1, 105 ff; H. Wenig, 'The European Community's anti-dumping system : salient features', *Journal of World Trade*, 39(2005), n. 4, 787 ff.

22 For detailed description Cf. W. Müller, N. Khan, T. Scharf, *EC and WTO Anti-dumping Law – A Handbook*, 2nd Edn (New York: Oxford University Press, 2009).

23 According to WTO provisions the lesser duty rule is only 'desirable' and there is no obligation for WTO members to apply it regularly. Cf. Art. 9.1 ADA; Art. 19.2 SCM.

injury (lesser-duty rule).[24] This ensures that imports are affected only to the extent necessary to allow the domestic industry recover from injury. A few other countries also apply this rule (e.g., India).[25] A Community interest test is performed by the Commission to balance the often conflicting interests of interested parties at EU level (i.e., community industry importers, users, consumers etc.).[26] This can lead to non-application of measures that are legally warranted, if such measures are not in the overall Community interest.[27] In other countries, where it exists,[28] the public interest test is often not a formal step in the procedure, but a decision left in the hands of an authority not involved in the investigation, usually a Minister (e.g., India)[29] or is not systematically applied (e.g., Canada).[30]

The EC applies a high standard at initiation stage[31] as demonstrated by the fact that the number of AD and CVD initiations opened by the EC every year is stable and it rarely initiates SFG investigations affecting also fair trade. Verification visits normally take place before provisional measures to avoid recourse to best facts available.[32] The EC decision making adds an additional layer of control due to the important role reserved for Member States at different stages of the investigation.[33] Since the WTO Agreements do not provide sufficiently detailed guidance in respect to the rights of parties to comment and transparency, the EC has developed its own system.[34] Aggregate data (when there are more than two complainants) or at least indexes are disclosed to provide meaningful summaries that allow a reasonable understanding of the information submitted in confidence. Moreover, while the WTO Agreements prescribe only disclosure of the essential facts under consideration which form the basis for the decision to apply definitive measures,[35] the EC discloses its findings both at provisional and definitive stage.[36] Furthermore, recourse is now provided to a Hearing Officer for parties that consider their right of defence hampered.[37] Moderation is shown at all levels and the EC practice is thus a reference, not only for the purposes of this article, but often also for third countries.

3. Main Concerns about Trade Defence Actions Affecting EU Exports

While the number of measures in force against the EU slightly decreased at the end of 2008 as compared to the previous year,[38] the number of new investigations initiated sharply increased from nineteen in 2007 to thirty-three in 2008, coinciding with the global economic crisis. In April 2009 there were forty-nine ongoing investigations world-wide potentially affecting EU exports, nineteen of which were SFGs.[39] This rise in the number of cases is a worrying trend in the current economic climate given the increased risk of improper use of TDI, in breach of WTO rules. This risk must be contained in order to avoid a race to protectionism and the creation of undue barriers to trade as a result.

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24 The lesser duty rule consists of calculating both a dumping margin and an injury margin. The injury margin is normally determined on the basis of the cost of production of the Community producers increased by a reasonable profit. Cf. Art. 7.2 of EC Basic AD Regulation; Art. 12.1 of EC Basic AS Regulation.

25 Cf. Guide for AD investigations available on the website of the Directorate General of Anti-Dumping & Allied Duties of the Indian Ministry of Commerce: <www.commerce.nic.in>.

26 One can read in the Community interest text a common sense analysis: even if there is dumping and there is injury, the EU will check whether overall the negative effects of the TDI cure do not outweigh the positive effects. Although at EC level it is recognized that the process of balancing of the different interests at stake is not a mathematical one, the process remains technical and transparent. Cf. Art. 21 of EC Basic AD Regulation.

27 According to Art. 9 ADA imposition of AD duties is optional even if all the requirements for imposition have been met.

28 Brazil, Mexico and USA have no provision for public interest; others like Australia are considering adopting the EC model.

29 In India the public interest test is not institutionalized but it is an implicit element of the consideration in the political decision of the Government.

30 Cf. Art. 45 of the Special Import Measures Act, available under <http://laws.justice.gc.ca>.

31 Cf. 'Guide on How to Draft an Anti-dumping Complaint', on the Commission's official website, *supra*.

32 When an investigating authority relies on best facts available, normally it means that it will base its findings on the information provided by the complaining local industry. Cf. Art. 6.8 ADA; Art. 12.7 ASCM

33 The Commission initiates TDI investigations, investigates and imposes provisional measures. EU Member States are consulted in the course of the investigation through an Advisory Committee and the Council decides on the basis of a Commission's proposal on the imposition of definitive measures.

34 Cf. Art. 6.5 ADA; Art. 12.4 ASCM.

35 Cf. Art. 6.9 ADA; Art. 12.8 ASCM.

36 Access to public files is ensured to interested parties at the Commission's premises and an informatization process is currently ongoing. In addition, publication of all decisions in made in twenty-seven languages in the Official Journal.

37 Cf. Commission's website, *supra*.

38 A total of 133 measures in force against 147 in 2007. Major users of TDI against the EU are the USA, India, Brazil, Turkey, China, Ukraine and Mexico. Cf. Annual report 2009.

39 Those cases consist of twenty-nine AD investigations (of which nine expiry reviews), nineteen SFG investigations (of which eight concern EU exports) and one CVD (expiry review). It is noted that the new SFGs that do not concern EU exports directly can still highly affect the EC because of trade diversion. Cf. also Annual report 2009.

EC concerns with regard to trade defence actions targeting EU exports mainly relate to poor standards of initiation of investigations, poor injury and causality analysis, disregard for the rights of defence of interested parties, and the increasing use of SFG measures. These concerns reported for several years by the Commission in its official annual reports are exasperated by the above mentioned increase in TDI activity world-wide. The financial and economic crisis is hitting industries very hard all over the world and it is feared that those industries might try to obtain relief through an improper use of TDI.

3.1. Poor Standards of Initiation

The opening of an investigation can already create uncertainty on the market and affect normal trade flows regardless of whether it ends with the imposition of measures. At this stage the main concerns are whether investigations are opened on the basis of sufficient and duly substantiated prima facie evidence and whether interested parties are notified properly and granted the opportunity of cooperating in the investigation in accordance with the relevant WTO rules. The current economic crisis is likely to have a negative impact on standards of initiation. Indeed, the economic indicators for injury in many recent complaints only show a certain downward trend for the last one or two months of the period covered, which should not be considered sufficiently representative. Moreover, the current crisis is not, in itself, grounds for justifying the launch of an investigation and the subsequent imposition of measures.[40]

3.2. Poor Injury and Causality Analysis

In order to impose trade defence measures it must be proven that injury to the domestic industry is the result of injurious dumping or subsidization or, for SFG actions of a sudden, massive and unexpected increase in imports. In practice investigating authorities often fail to investigate properly the causal link and wrongly attribute injury caused by other factors, which have a bearing on the state of the industry concerned, to the imports. In fact the local industry can be suffering from its own inefficiencies, difficulties to adapt to a liberalized global economy, adverse climate conditions, etc. According to WTO rules, injury caused by other factors, including the global economic crisis, cannot be attributed to imports.[41]

3.3. Disregard for the Rights of Defence of Interested Parties and Burdensome Procedural Requirements

Non-confidential versions of the petition lodged by the local industry often are sketchy and do not contain indexes or percentages to show trends or data and sentences are simply blanked-out. This is not in line with WTO rules requiring that meaningful summaries should be provided that could allow a sufficient understanding of the situation.[42] Furthermore, parties have to be vigilant during the whole proceeding that investigating authorities make a proper disclosure of the essential facts that form the basis of the decision whether to apply definitive measures and that interested parties are allowed to comment before these measures are imposed. In addition, it has also to be examined carefully whether the amount of information requested by third-country authorities is really necessary for the purposes of the investigation. Finally, proper consideration must be given to information of a confidential nature.[43] In time of crisis, investigating authorities may be tempted to neglect their obligations regarding the above mentioned resource-intensive requirements.

3.4. Increasing Use of Safeguard Measures

The increasing use of SFG measures against the EU[44] is quite worrying because, as already mentioned, this instrument does not distinguish between fair and unfair trade and should therefore be used only exceptionally and temporarily. This trend may be linked to the fact that AD and CVD investigations require expertise and resources that are not readily available to all investigating authorities[45] and that SFGs seem easier to use as there is no need to prove that imports are unfairly traded. With particular reference to the actual economic downturn, it has been noted that some countries have clearly favoured this instrument since November 2008 to provide an immediate relief to the domestic industry.[46]

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40 Cf. Annual report 2009.
41 Cf. Art. 3.4 ADA; Art. 15.4 SCM; Art. 4 (b SG).
42 Cf. ADA Art. 5.2; 11.2 ASCM.
43 Cf. Annual report 2009.
44 Cf. Annual reports 2007–2009.
45 An investigating authority needs the proper resources in terms of manpower. However, it appears that some countries operate the instrument without allocating the necessary resources to these services.
46 For example in only six months – between November 2008 and June 2009 – India has initiated almost as many SFG investigation as in the past ten years (ten new cases). Provisional high measures (ca. 20%-25%) have been imposed in several cases or at least recommended (decision for many cases has been currently deferred) actually or potentially affecting EU interests. Cf. also Annual report 2009.

By contrast, WTO rules require a higher level of injury for SFGs as compared to other TDIs ('serious' instead of 'material' injury) which is more difficult to meet. To the extent that WTO criteria are not complied with, SFGs turn into a protectionist instrument. Moreover, even if WTO rules are met, since SFG measures target all imports irrespective of their origin (*erga omnes*), EU exports can be excluded from the market even if they do not compete with the local products (e.g., higher-priced) or because other exports are gaining market share from the local producers.

4. The Role of the Commission in Trade Defence Actions Affecting EU Exports

A specific service has been created in the Directorate General for Trade of the Commission ('DG Trade')[47] to assist Member States and EU exporters concerned by third-country actions with the aim of minimizing, as far as possible, the negative impact of actions and especially of those which are not-legally warranted. The Commission's general practice in this field consists of closely monitoring third-country trade defence investigations, providing assistance to, and coordinating with, the Member States and the EU industry concerned, and intervening where appropriate to ensure that third countries comply with their international obligations. The EC also offers technical advice to the partner countries by promoting discussion meetings (like seminars where several countries are allowed to exchange respective experiences). Ultimately, it can also resort to the WTO dispute settlement mechanism. Positive results were achieved so far but, as seen above, many problems still persist which often unduly restrict EU access to the export markets. In view of the current crisis the Commission, as well as the different stakeholders, is called to play a more active role.

4.1. Monitoring of Third-Country Commercial Defence Investigations

Monitoring is based on a comprehensive approach, that is, by relying not only on official information disclosed to the WTO[48] and by third-country investigating authorities,[49] but also on information from EC Delegations world-wide, from Member States' administrations and also European companies and industry associations. In this respect, it must be recalled that TDI investigations are national quasi-judicial proceedings and that the procedural language is that of the investigating authorities. Therefore, since information is not always easily accessible, it is crucial to establish a good information network. In order to be officially informed of the evolution of an investigation, the Commission also often registers as an interested party in TDI proceedings and circulates immediately any information concerning third-country trade defence action to all Member States. These are invited to inform their industries concerned[50] and to come back to the Commission for coordination. The Commission also publishes detailed statistics and an annual report on its internet site:[51]

4.2. Assistance and Coordination with the Member States and the EU Industry Concerned

The Commission supports Member States and EC exporters in all cases where important economic or systemic interests are at stake. The Commission intervenes ex officio in anti-subsidy cases which concern EU subsidies (being also the granting authority) and SFG cases affecting, by definition, all EU exports. In AD investigations it checks compliance with WTO rules and, unless systemic questions are involved, does not deal with company-specific issues. Indeed the Commission, due to its institutional role of public service remains *super partes*.

The Commission's intervention can take different forms but will always ensure consistency with its own practice to remain credible towards its counterparts. Firstly, it makes representations to the investigating authorities in the third country addressing technical weaknesses and inconsistencies of a case. Secondly, the Commission intervenes at political level in the third country carrying out the investigation by insisting that their international multilateral and bilateral

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47 Currently this is Unit H.5.

48 Any WTO member shall report to the competent Committee all preliminary or final AD and CVD actions and shall also submit a semi-annual report (Art. 16.4 ADA; Art. 25.11 ASCM). As far as SFGs are concerned all WTO members are under the obligation to notify the Committee on SFGs upon initiation, findings and any decision to apply or extend a measure (Art. 12 SG).

49 Investigating authorities shall notify the initiation of an AD or CVD investigation to the WTO members the products of which are subject to an investigation and other interested parties known to have an interest therein. Public notice shall also be given (Art. 12 ADA; Art. 22.1 ASCM). For AD investigations, a prior notification of the receipt of a properly documented application shall be notified before proceeding to initiate an investigation to the Government of the exporting member concerned (Art. 5.5 ADA). In case of CVD investigations pre-initiation consultations shall also be offered as soon as possible after an application is accepted (Art. 13.1 ASCM) and in case of SFGs the member proposing to apply or extending the SFG measure shall provide adequate opportunity for prior consultations (Art. 12 SG).

50 With the exception of prior notifications under Art. 5.5 ADA.

51 Cf. European Commission's website, *supra*.

obligations are properly respected. Thirdly, the Commission supports the industry with respect to procedural aspects of the investigation. It can, in certain cases of high economic interest, send experts on spot to assist the verification visits carried out by the third-country investigating authorities at the premises of EC exporters; it can provide its expertise to evaluate whether requests for certain information are excessive and unreasonable, and elaborate, together with the exporter and third-country officials, reasonable alternative solutions; it can also inform the industry of the steps of the proceeding and of the possibility and different manner of requesting undertakings.

Coordination with all European players affected by third-country actions, notably industry and Member States, is crucial for the EU. It ensures that the EU speaks with one voice in trade matters[52] and that its interventions are focused and effective. The role of industry is decisive in AD and SFG investigations given that product-specific information is often available only to it. Similarly, in anti-subsidy investigations the burden of proof that exporters do not benefit from the subsidy under investigation is with the industry concerned (e.g., pass-through in agricultural products). In addition, cooperation of exporters with the investigating authorities of third countries avoids the use of best facts available for the findings and reinforces the Commission's representations. However, it should be noted that the decision to cooperate is a matter for each EU exporter individually, taking into account economic interest, resources and opportunity.

EU Member States play an important role in ensuring coordination with the Commission and supporting the industry at national level. Moreover, Member States can provide national-specific information, establish direct contacts with exporters and provide valuable insights on the political and economic situation in the third countries carrying out the investigation thanks to their Embassies on spot.

4.3. To Increase Discipline and Ensure That Third Countries Comply with Their International Obligations

The Commission 'exports' its best practices in the area of TDI through intervention in individual cases, technical assistance and dialogue with EC trading partners at all levels. By expressing its views in individual cases the Commission not only supports EU exporters and Member States but also puts forward its own interpretation of TDI rules as an example of a conservative approach to these instruments. Thus it can happen that the Commission intervenes even in the absence of an actual and specific economic interest but in the context of a broader systemic interest to prevent future problems.

Moreover, the Commission organizes *fora* for exchanging views (like seminars) by inviting third countries' authorities to illustrate, both in theory and through practical exercises, their standards and use of TDI. At the occasion of bilateral trade subcommittees and meetings on trade-related issues it can also address concerns. In addition, the Commission can request formal consultations under the relevant WTO Agreements, and, as last resort, request a WTO panel. As a matter of fact, the experience shows that, in general, bilateral contacts and negotiated solutions are preferable to formal dispute settlement since in practice this is the best way to ensure immediate and effective relief to the EU exporters concerned and entails a win-win situation reducing the level of uncertainty for both exporters and importers.

5. Recent Examples of Third-Country Actions That Required the Commission's Intervention

Based on last years Commission's annual report on third-country trade defence actions against the Community, a limited number of examples are provided in this chapter to explain, in practical terms, the effects and limits of the Commission's intervention with regard to technical assistance in third-country AD, CVD and SFG investigations and WTO disputes. In this regard, it must be emphasized that third-country authorities remain the master of the proceeding and that a satisfactory result depends also largely on the level of the EC's industry cooperation.

5.1. Anti-Dumping and Countervailing Measures

In Mexico, in 2008 an AD investigation (welded pipes from Germany) was terminated without imposition of measures after lack of evidence of threat of material injury was highlighted.[53] US AD measures and/or CVD orders on stainless steel bar from France, Germany, the UK and Italy were revoked within the framework of expiry reviews. It was claimed that as a result of the revocations of AD orders by the US following the WTO ruling on zeroing (below), the market shares of the exporters remaining subject to the duties were much lower and no material injury was likely to occur.[54] The

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52 Cf. Art. 133 EC Treaty on EC competence in commercial matters.
53 Cf. Annual report 2008.
54 Cf. Annual report 2008.

argument that an important negative dumping margin proved that there was no likelihood of continuation or recurrence of dumping for the EU exporters led to the termination of AD measures against cold-rolled steel products in Thailand in 2008.[55] In 2006, following long negotiations, Argentina agreed to revoke three CVD measures (olive oil, wheat gluten and canned peaches), but in the case of canned peaches it increased, at the same time, the bound tariff rate.[56]

5.2. Safeguards

In 2008 a Ukrainian SFG investigation (Polyvinylchoride profiles) with a significant economic interest was terminated after the shortcomings of the supporting evidence were pointed-out. Also an investigation initiated by Australia concerning mainly imports of pig meat from Denmark was finally terminated as the investigating authorities recognized that the difficulties of the Australian pig meat producers were not due to imports but to high feed costs.[57] When termination is not possible, often consultations prior to the imposition of measures offer a possibility to seek a type of SFG that least disturbs trade flows.[58] While such an option is not always made available by the investigating authorities, it would constitute a viable alternative.

5.3. WTO Disputes

In April 2007, the US have implemented, although only partially, the rulings of the WTO panel requested by the EC concerning the zeroing methodology (a particular method of calculating AD duties).[59] Many European exporters have seen the contested AD duties either entirely revoked or substantially reduced and in May 2009 also the Appellate Body compliance report decided against the US. This success was confirmed in 2008 by another Panel decision concerning later cases.[60] Secondly, a Panel Report found in 2008 faults in the Mexican CVD investigation on imports of Olive oil from the EC. The breach of the rules was so serious that Mexico could comply with the Panel report only by repealing the CVD measures.

6. Conclusions

Although there is a common multilateral framework, important differences remain between the practices of TDI users since the provisions in international agreements and national laws can differ in many aspects. It is important in this context to watch over TDIs' true objective of remedying distortions of competition. This is especially true in this time of global economic crisis when Governments are under exceptional protectionist pressure.

EU experience has shown that Community exports have been suffering for years owing to poor TDI practices in third countries including weak procedural standards, and inadequate injury and causal link analyses. Exporters around the world also suffer from an increasing use of SFG measures targeting indiscriminately all sources even if they were traded at fair conditions with the real problem on the local market originating elsewhere. The authors fear that although the Commission's intervention to support the EC industry and Member States has given many good results in the past, the current economic downturn can have a negative impact on the quality of TDI practice of many users.

Good cooperation between TDI authorities may help to contain this danger. The stakeholders' role has also been described in this article with a particular focus on the need to coordinate in order to ensure the effectiveness of any intervention. The Commission, by offering its support and technical expertise to EC exporters and Member States, tries to monitor third-country TDI practice but it is crucial that all interested parties assume their proper role.

The EC is a conservative user of TDI and very rarely resorts to the use of SFGs. The use of WTO-pluses, like the lesser-duty rule, the public interest test, the several and comprehensive disclosures is meant to ensure that the EC only uses TDI when, and to the extent, necessary to remedy the real injury caused to the local industry by the imports subject to investigation. However, the EC market cannot become the dumping ground where companies sell their goods to generate cash for their liquidity squeezed businesses. It must thus be expected that the EC will continue to apply the rules and impose measures if warranted and will encourage its trading partners to use the same special care.

The Authors are of the opinion that all TDI users have, in the current international financial crisis, a particular responsibility to apply TDI with moderation aiming only at its true objective and in full compliance with international rules. The way forward is to work on quality, restraint and cooperation at technical level.

Notes

55 Cf. Annual report 2009.
56 Cf. Annual report 2007.
57 Cf. Annual report 2007.
58 Cf. Annual report 2009.
59 For more details Cf. Annual report 2007 and European Commission's General Overview of Active WTO Dispute Settlement Cases Involving the EC as complainant or defendant and of active cases under the Trade Barriers Regulation, 23 Jan. 2009, 15–16 and 20–21, available on the Commission's website, *supra* (EU & WTO section).
60 Annual Report 2008.