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# Treatment of China in Anti-dumping investigation after 11 December 2016 – The EU proposal

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On 11 December 2016, specific provisions of Section 15 of the Protocol of Accession of China to the WTO will expire. Under the specific provisions, WTO members are allowed to deviate from the general rules laid down in the WTO Anti-dumping Agreement when dealing with investigations against China. The specific provisions allow WTO members to disregard the domestic prices and costs of Chinese exporters for the determination of the normal value in anti-dumping investigations and resort to an alternative methodology not based on a strict comparison with domestic prices or costs in China. The consequences of the expiry of the specific provisions have been subject to intense debate in Europe. In January and July 2016, the European Commission held discussions to determine whether, and if so how, the EU should change the treatment of China in anti-dumping investigations. On 9 November 2016, the European Commission released a long-awaited proposal to reform the trade defence instruments (anti-dumping and anti-subsidy) by introducing targeted amendments to the existing Basic Regulations.[1] The main feature of the proposal is the introduction of a new methodology to determine the normal value in case of significant market distortions prevailing in the exporting country.

## *Normal value for non-market economy countries under the current EU legislation*

Under the current provisions, a specific methodology, known as the analogue country methodology, is applied to calculate the dumping margin of non-market economy countries such as China. To that effect, the normal value is constructed on the basis of prices prevailing in a market economy third country as set forth in Article 2(7) of the Basic Anti-Dumping Regulation.[2] Chinese exporters may reverse the presumption and prove that they operate under the so-called market economy conditions, however, this has been seldom granted by the European Commission. The analogue country methodology almost invariably leads to an increase of the dumping margin determined for Chinese exporters.

[1] European Commission, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union and Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union, available at: http://trade.ec.europa.eu/doclib/docs/2016/november/tradoc_155079.pdf.

[2] Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union, OJ L 76, p. 21.

## A new methodology based on cost adjustments

The European Commission proposes to abandon the specific methodology applicable to non-market economy countries and to replace it with a new methodology applicable to all countries (with the exception of specific non-WTO countries). According to the new Article 2(6)(a), the European Commission will be able to disregard the domestic prices and costs of production prevailing in the exporting country in the presence of so-called "significant distortions". In such circumstances, the European Commission will construct the normal value on the basis of "undistorted prices and benchmarks", including undistorted international prices or costs of production in an appropriate representative country with a similar level of economic development as compared to the exporting country.

The European Commission considers that significant distortions are deemed to exist when the prices or costs, including the costs of raw materials, are not the result of free market forces as they are affected by government intervention. A non-exhaustive list of situations amounting to government intervention is provided in the proposal and includes the following situations: (i) when the market is served to a significant extent by enterprises operating under the control of state authorities, (ii) the state presence in firms allowing the state to interfere with prices and costs, (iii) the existence of public policies or measures discriminating in favour of domestic suppliers and (iv) the access to finance granted by institutions implementing public policy objectives.

The new methodology shifts the burden of proving the existence of significant market distortions in the exporting country to the complainant. Aware of the difficulty to adduce evidence of market distortions, the proposal provides that the European Commission may prepare reports describing the market distortions prevailing in specific sectors or countries. Such reports may be relied upon by the EU industry to claim that prices and costs in the exporting country are unsuitable to determine the normal value.

## Specific methodology for certain non-WTO members

The European Commission also proposes to amend Article 2(7) in order to introduce a specific methodology to determine the normal value in investigations concerning non-WTO Members specifically listed (i.e Azerbaijan, Belarus, North Korea, Turkmenistan and Uzbekistan). For those countries, the normal value will be determined on the basis of the prices or constructed normal value in a market-economy third country, or the prices from such third country to other countries or on any other reasonable basis, including EU domestic prices for the like product.

## Transitional application of the new methodology

The proposal introduces specific disciplines ensuring that the entry into force of the new methodologies does not create legal

uncertainty for ongoing investigations and for existing anti-dumping measures. Accordingly, the new rules will only apply to investigations which have been initiated upon entry into force of the amended provisions.

As far as existing anti-dumping duties are concerned, the European Commission considers that the mere introduction of a new methodology to determine the normal value in the presence of market distortions does not constitute sufficient grounds to review the existing measures. Therefore, producers or exporters will not be able to request an interim review until the initiation of an expiry review. Furthermore, new shipper reviews will also be deferred to the first expiry review.

## *Conclusion*

The timing and the features contained in the proposal make it clear that the European Commission intends to mitigate the consequences of China's new status following the expiry of certain provisions of its WTO Accession Protocol on 11 December 2016. However, the new methodology is neutral and may also be applied in investigations against other countries having state intervention in specific sectors.

The new methodology for the normal value determination in the presence of market distortions clearly enhances the power of the European Commission to make cost adjustments. However, the new methodology might be found WTO-inconsistent in the light of the recent findings of the Appellate Body in EU – Biodisel.[3] In addition, the transitional rules and the denial of review might also expose the EU to a legal challenge before the WTO.

Finally, it is important to bear in mind that the proposal still needs to be approved by the European Parliament and the European Council (both co-legislators in the EU). Certain Member States strongly oppose the recognition of China as a market economy. In addition, the European Parliament voted a non-binding resolution on 12 May 2016 urging the European Commission not to grant unilaterally market economy status to China in trade defence investigations after 11 December 2016, The proposal therefore seems to be stuck between a likely legal challenge before the WTO or a political dismissal.

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[3] Report of the Appellate Body, *European Union – Anti-Dumping Measures on Biodiesel from Argentina*, DS473.

# Trade Remedy News

## *Trade remedy measures by India*

| Product | Country | Notification No. | Date of Notification | Remarks |
|---|---|---|---|---|
| 4, 4 Diamino Stilbene 2, 2 Disulphonic Acid (DASDA) | China | 52/2016-Cus. (ADD) | 9-11-2016 | ADD modified subsequent to Mid-term Review |
| Axle for Trailers | China | 54/2016-Cus. (ADD) | 29-11-2016 | Definitive Anti-dumping duty imposed |
| Hot Rolled flat sheets and plates (not in coil) | All countries except developing countries other than China, Ukraine and Indonesia | 3/2016-Cus. (SG) | 23-11-2016 | Safeguard Duty imposed |
| Low Ash Metallurgical Coke | Australia, China | 53/2016-Cus. (ADD) | 25-11-2016 | Definitive Anti-dumping duty imposed |

## *Trade remedy measures against India*

| Product | Country | Notification No. | Date of Notification | Remarks |
|---|---|---|---|---|
| Fatty alcohols and their blends | EU | EU 2016/C 418/03 | 12-11-2016 | Anti-dumping measures expired |
| Finished Carbon Steel Flanges | USA | [C-533-872] 81 FR 85928 | 29-11-2016 | Preliminary Affirmative Countervailing Duty Determination |
| Resealable Can End Closures | Australia | Anti-dumping Notice No. 2016/124 | 21-11-2016 | Extension of time granted to issue Final Report |
| Welded Stainless Pressure Pipe | USA | [A-533-867, C-533-868] 81 FR 81062 | 17-11-2016 | ADD and CVD Orders issued |

# WTO News

## US tax breaks for civil aircraft production found to violate WTO provisions

The DSB panel of the WTO has issued its panel report in the case brought by the European Union - "*United States – Conditional Tax Incentives for Large Civil Aircraft*" (DS487). The European Union had challenged the United States with respect to conditional tax incentives established by the State of Washington in relation to the development, manufacture, and

sale of large civil aircraft. EU challenged the same as specific and prohibited subsidies. The Panel Report, circulated on 28-11-2016, also found the US incentives to be inconsistent, *de facto*, with the provisions of the Agreement on Subsidies and Countervailing Measures. The Panel however also observed that European Union could not demonstrate that aerospace tax measures are *de jure* contingent upon the use of domestic over imported goods. It may be noted that dispute between EU and USA on subsidies given by each to their aircrafts, is one of the oldest issues in WTO, with both alleging each other of illegal subsidies.

## Chinese export restrictions on raw materials - Second panel established

On 23 November, 2016, the Dispute Settlement Body (DSB) of the WTO has established a panel to examine China's duties and other alleged restrictions on the export of various raw materials, pursuant to the second request of the European Union (DS509). EU's complaint closely follows USA's complaint in a similar issue, wherein the Panel was established on 8 November, 2016. EU here challenges certain Chinese measures taken to promote the management of exhaustible natural resources and protection of the environment with the purpose of achieving sustainable development, thereby restricting export of various forms of antimony, chromium, cobalt, copper, graphite, indium, lead, magnesia, talc, tantalum and tin. According to EU, the measures violate Paragraphs 2(A)(2), 5.1, 5.2 and 11.3 of Part I of China's Accession Protocol, as well as paragraph 1.2 of the Accession Protocol and Articles X:3(a) and XI:1 of the GATT 1994. India will also participate in this dispute as third party.

## Panel ruling in US anti-dumping methodologies, appealed against

China has filed a notice of appeal in the case brought by China in *"United States — Certain Methodologies and their Application to Anti-Dumping Proceedings Involving China"* (DS471). The primary issues in the matter pertain to the US practices of usage of the exceptional weighted average-to-transaction (WA-T) methodology, including its use of zeroing under this methodology; the USDOC's treatment of multiple exporters from non-market economies (NMEs) as a NME-wide entity (single rate presumption); and its use of facts available in determining anti-dumping duty rates for such entities, as well as the level of such duty rates.

The Panel had determined the matter predominantly in favour of China. However, China's submissions pertaining to the US practice of determining suitability of cases for applying a 'targeted dumping' methodology and China's as such claims against the Adverse Facts Available Norm under Article 6.8 and paragraph 7 of Annex II to the Anti-Dumping Agreement, were not determined appropriately. China appeals the Panel's rejection of China's arguments regarding two of the four quantitative flaws identified by China in the so-called "Nails Test", which was applied in three specified determinations

(Coated Paper, OCTG and Steel Cylinders).

## Brazil files complaint against USA over CVD on steel products

Brazil has on 11-11-2016 notified the WTO Secretariat of its request for consultations with the United States regarding countervailing duties imposed by the United States on imports of Brazilian cold and hot-rolled steel flat products. According to Brazil, USA initiated countervailing duty investigations in the absence of sufficient evidence and based on clearly inaccurate data with respect to the regimes at issue, and did not perform an adequate review to establish the "accuracy and adequacy" of the evidence annexed to the initial applications. Further, violation of Article 15 and 16 of the SCM Agreement, and Article VI of the GATT has been alleged by Brazil while it observes that, with regard to the determination of injury, it is not clear from the documentation in the procedures that the decision was based on positive evidence or involved an objective examination of the facts.

## India's E-waste Regulations discussed at WTO

Korea, Japan and the United States have raised concerns about new Indian requirements for the management of e-waste which apply to manufacturers, producers, dealers, refurbishers, bulk consumers, dismantlers and recyclers. Questioning the feasibility of achieving the 30% e-waste recycling target set out in the new rules, it has been alleged that India neither notified the measure to the WTO, nor provided a transition period for industry to adapt to the rule prior to enforcement. The measures were discussed at meeting of Committee on Technical Barriers to Trade on 10th and 11th of November, 2016.

## Information Technology Agreement – India clarifies its stand

India has clarified its stand on Information Technology Agreement (popularly known as ITA-I). According to G/MA/W/128, dated 17-11-2016, stating India's reply to the questions put up by EU, USA and Japan, India considers that tariff preference commitments under ITA-I apply only to the original commitment and not to the new technologies evolved over the years. India hence is of the view that for the new technologies and the products which were not in existence prior to signing ITA-I, India, like any other WTO member, is entitled to impose duty on those specific new products. The questions were raised in respect of products covered under Heading 8517 which covered 'carrier-current line systems & digital line systems'. According to India, since ITA-I obligations are limited to those items that confirm to the 1996 definition of products for "carrier current line systems & digital line systems", new products that have lately been classified under this category cannot be considered as part of ITA-1 agreement. It may be noted that India is not a signatory to ITA-II.

## WTO members discuss three regional trade agreements, including India-ASEAN agreement

On 7 November, 2016, the WTO members discussed three regional trade agreements

(RTAs) in a committee meeting as part of efforts to increase understanding of how these RTAs relate to WTO rules and impact members and the multilateral trade agenda. Members discussed the Australia-China and Iceland-China free trade agreements as well as the India-ASEAN agreement on trade in services. As a rule, a meeting is devoted to the consideration of each notified RTA under the provisional Transparency Mechanism for RTAs.

While discussions on Australia-China and Iceland-China Free Trade Agreements remained vastly positive, the discussions pertaining to the Trade in Services Agreement between India and the Association of Southeast Asian Nations, which came into force from 1st of July, 2015, drew some criticism. Several members, commenting on the agreement, asked for further clarification as they were of the view that it featured lower ambitions and "GATS minus" outcomes. Thailand, however was of the view that its commitments in the Agreement were lower compared to those of the GATS only in terms of the coverage of sectors or subsectors.

### TRIPS amendment to ease poor countries' access to affordable medicines, accepted by more countries

On 28 November, 2016, Dominica accepted the protocol amending the TRIPS Agreement, which was agreed in 2005, and which intended to formalize a decision to ease poorer WTO members' access to affordable medicines. This follows close to the acceptance of the same by Benin on 23 November, 2016. With acceptance by Dominica and Benin, close to 65 per cent of WTO members have submitted their instruments of acceptance for the TRIPS protocol. The protocol will enter into force once two-thirds of the WTO membership has formally accepted it.

The protocol allows exporting countries to grant compulsory licences to their generic suppliers to manufacture and export medicines to countries that cannot manufacture the needed medicines themselves. These licences were originally limited to predominantly supplying the domestic market.

## Ratio Decidendi

### ADD investigation – Primary surrogate country selection in case of imports from NME country

US Court of International Trade has upheld the Department of Commerce's selection of surrogate country for computation of normal value in case of imports from China. DoC had selected Philippines over India observing that the Philippines was on the list of economically comparable surrogate countries at the same level of economic development as the PRC (the "OP List") while India was not. The contention that data to value two important inputs for manufacture of concerned goods was available in case of India, was rejected by the department stating that the use of those

inputs accounted only for two of the over 40 factors necessary for the production of the concerned goods, depending on the producers level of integration. Further, the court agreed with the department's selection of Philippines as surrogate country observing that the allegation that there was no adequate data for four other chemical inputs, was insufficient, inasmuch as the four factors were responsible for less than eight percent of the direct materials used in production. Challenges to the Philippines' quality of data, economic comparability, and the significant producer requirement, were also found to be insufficient to impact the said selection. Finally, argument that the department should have used Indian data because the size of India's chemical industry is more comparable to that of PRC, was also rejected, stating that economic comparability is not an industry-focused analysis as it is focused on the "overall economic environment," not the status of a particular industry within the economy. [*Clearon Corp.* v. *United States* - Slip Op. 16 -110, dated 23-11-2016, US CIT]

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