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Article

EU trade defence instruments at a deadlock?

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The recent developments in the global steel crisis and the distinct features of the European Union (hereinafter the 'EU') have underlined the challenges currently faced by the EU trade policy. The EU is an economic and political union of 28 Member States with a specific institutional and decision-making framework. The entire trade policy has been delegated by the Member States to the European Commission and Member States can no longer impose trade defence on their own. However, any modification of the trade defence instruments necessarily involves the three institutions responsible for the decision-making. The European Commission which represents the general interest has the power to make legislative proposals. The European Council, which represents the interest of the Member States, and the European Parliament, which represents the interest of the European people, both act as co-legislators and can amend the Commission's proposal.

The recent market disturbances caused by the overcapacity, low prices and the surge in imports of steel products originating in China has resulted in escalating tensions between trading partners. EU steel producers and Member States' governments have requested the European Commission to protect the EU industry. However, the imposition of trade remedies has brought up two challenges facing the EU trade defence instruments: the market-economy status for China and the modernization of the trade defence instruments.

To grant or not to grant market economy status to China

China joined the World Trade Organization in 2001. However, the full benefit of the WTO membership has been differed to the end of 2016 for anti-dumping investigations. As a general rule, the dumping margin is computed by comparing the export price of a product with the domestic price or costs of the product in the exporting country. However, the specific market conditions prevailing in non-market economy, characterized by massive state intervention, usually lead to artificially low prices. These prices do not reflect the normal market conditions and hence cannot be taken into account for determining the dumping margin. WTO rules allow investigating authorities to resort to data from another market (the so-called analogue country) or the data of the domestic industry dully adjusted to determine the normal value.

China's Protocol of Accession to the WTO (hereinafter the 'Protocol') contains a specific provision on the market economy treatment. According to Article 15(a)(ii) of the Protocol, WTO members may use a methodology that is not based in a strict comparison between the

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export price and the domestic price. However, this provision is set to expire on 11 December 2016.[1]

It is broadly accepted by scholars and practitioners that Article 15 of China's Protocol of Accession to the WTO was poorly drafted. As a result, the outcome of the expiry of Article 15(a)(ii) is not clear and contradicting views exist. The effects of Article 15 of the Protocol will not be analyzed here. Rather, the options available to the EU to treat China as a market economy will be explored.

Unlike the Indian legislation, the EU anti-dumping Basic Regulation specifically mentions China as being a non-market economy.[2] Therefore, any decision to grant market economy status to China will require an amendment of the Basic Regulation to withdraw China from the list of non-market economies. Due to the distinct process of the EU decision-making, treating China as a market economy in anti-dumping investigations appears very difficult for the following reasons. First, the European Commission is still considering whether to grant market-economy status to China. Second, the European Parliament, one of the co-legislators, voted a non-binding resolution on 12 May 2016 urging the European Commission to deny market economy status to Beijing.[3] This resolution was voted by an overwhelming majority and clearly indicates the European Parliament's position against any favorable treatment for China. Last, but not least, Member States are divided on how to treat China. This question is currently very high on the EU agenda and lobbying efforts from various industries are expected to increase.

However, one should not exclude a compromise in the form of a 'yes, but' option. The European Parliament and the Member States could agree on the market-economy status for Beijing in exchange of the introduction of new rules for determining the dumping margin in order to address the specific market conditions (without specifically targeting China). Back in 2003, and before Russia joined the WTO, the EU modified the Basic Regulation by adding a new paragraph to Article 2(5) of the Basic Regulation to allow the European Commission to disregard the costs associated with the production and sale of the product under investigation if they are not reasonably reflected in the records.[4] The objective was to offer the European Commission with the possibility to reject the low prices of raw materials (e.g. natural gas and electricity) paid by Russian companies due to the market distortions and government

1 Article 15(d) of China's Accession Protocol to the WTO.

2 See Article 7(b) of 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 L 343.

3 See http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P8-TA-2016-0223

4 See Council Regulation (EC) No 1972/2002 of 5 November 2002 amending Regulation (EC) No 384/96 on the protection against dumped imports from countries not members of the European Community, OJ 2002 L 305.

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intervention in Russia.[5] This provision has been applied in numerous investigations against Russia, Argentina and Indonesia. However, in *EU – Anti-dumping measures on biodiesel from Argentina,* a WTO panel recently ruled that the European Commission acted inconsistently with Article 2.2.1.1 of the WTO Anti-Dumping Agreement by failing to calculate the cost of production of biodiesel on the basis of the records kept by the producers.[6] This ruling gave a serious blow to the use of Article 2(5), second paragraph, of the Basic Regulation and could lead the EU to refrain from introducing any new provision. Another possibility would be to negotiate with China the grant of full market economy treatment for certain Chinese sectors in exchange for limited protection for specific EU industry. However, the option seems unrealistic given the tough stand of China vis-à-vis the automatic grant of market economy status.

The long and difficult overhaul of EU trade defence

In addition to the uncertainty regarding the treatment of China, the EU also appears to be mired in the modernization of its trade defence instruments. In April 2013, the European Commission published a proposal to reform the trade defence instruments. The objective was to adapt the instruments to economic environment changes and to improve the transparency, effectiveness and enforcement. The European Commission made groundbreaking proposals. For instance, it proposed to provide interested parties with a pre-disclosure, limited in scope, two weeks before the imposition of provisional measures. The underlying idea was to avoid factual errors or calculation mistakes and to provide information to interested parties as to whether their business will be affected by provisional measures. Besides, the European Commission suggested not to levy duty on the subject goods shipped within the two-week period. The main proposal concerned the so-called lesser duty rule according to which investigating authorities may impose duties below the dumping margin if such lesser duty is sufficient to remove the injury caused to the domestic industry. The lesser duty is a 'WTO-plus' requirement that goes beyond the WTO rules and is currently used by several WTO members including the EU and India. The European Commission's proposal was to refuse the application of the lesser duty rule in anti-subsidy investigations and where structural raw material distortions is found to exist in anti-dumping investigations.

The proposal was extensively modified by the European Parliament and new restrictions to the lesser duty rule were added. The European Parliament proposed not to apply

[5] E. Borovikov and B. Evtimov, 'EC's Treatment of Non-Market Economies in Anti-Dumping Law: Its History: An Evolving Disregard ofInternational Trade Rules; Its State of Play: Inconsistent with the GATT/WTO?', Revue des Affaires Européennes, 2002, pp. 875-896.

[6] WTO Panel Report, *EU – Anti-dumping measures on biodiesel from Argentina,* DS473.

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the lesser duty rule in three additional instances: when the exporting country has an insufficient level of social and environmental standards (no ratification of core International Labor Organization conventions or/and Multilateral Environmental Agreements to which the EU is party), when the complainants are largely SMEs and when subsidies are found to exist in anti-dumping cases. Despite several round of discussions, the Member States have not been able to reach an agreement at the European Council. Again, the fate of the trade defence modernization is affected by the competing interests of the EU institutions and the Members States.

Conclusion

The question of granting market economy status to China and the ongoing modernization of the trade defence instruments have both been affected by the steel crisis that has divided the Member States into two camps. A group of Member States headed by the Scandinavian countries and the UK is opposed to any restriction to the lesser duty rule and supports free trade with China. Another group under the leadership of France, Italy and Spain claims that granting China full membership in the WTO could have disastrous consequences for the EU's economy. The EU appears to be mired in a long-running standoff that reflects its north-south split on trade. However, the deadline for deciding on China's market economy status is looming and this could force the EU to take a position that is, anyway, likely to be challenged before the WTO by China.

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Trade Remedy News

Trade remedy measures by India

Product	Country	Notification No.	Date of Notification	Remarks
1,1,1,2-Tetrafluoroethane or R-134a	China	F. No. 5/23/2014-DGAD	30-5-2016	Anti-dumping duty recommended to be continued after sunset review
Cold rolled/ cold reduced flat steel products (specified)	China , Japan, Korea RP and Ukraine	F. No.14/9/2016-DGAD	31-5-2016	ADD – Time extended to submit responses
Coumarin	China	20/2016-Cus. (ADD)	27-5-2016	Definitive anti-dumping duty continued after sunset review
Digital Versatile Discs-Recordable (DVD-R)	Vietnam & Thailand	17/2016-Cus. (ADD)	13-5-2016	Definitive anti-dumping duty continued after sunset review

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Product	Country	Notification No.	Date of Notification	Remarks
Methyl Acetoacetate	USA, China	22/2016-Cus. (ADD)	31-5-2016	Definitive anti-dumping duty imposed
Hot-rolled flat products (specified)	China , Japan, Russia, Korea RP, Brazil and Indonesia	F. No.14/9/2016-DGAD	31-5-2016	ADD – Time extended to submit responses
Methylene Chloride / Dichloromethane	China , Russia	21/2016-Cus. (ADD)	31-5-2016	Definitive anti-dumping duty imposed
Seamless tubes, pipes and hollow profiles of Iron, alloy or non-alloy steel, whether hot finished or cold drawn or cold rolled of an external diameter not exceeding 355.6 mm or 14" OD	China	18/2016-Cus. (ADD)	17-5-2016	Provisional anti-dumping duty imposed
Sodium Chlorate	Canada, China and EU	F.No.14/13/2015-DGAD	12-5-2016	Anti-dumping investigation initiated
Plain Medium Density Fibre Board (MDF) having thickness of 6mm and above	Indonesia & Vietnam	F.No. 14/23/2014 -DGAD	5-5-2016	Anti-dumping duty recommended

Trade remedy measures against India

Product	Country	Notification No.	Date of Notification	Remarks
Polyethylene Terephthalate Resin	USA	[C-533-862] 81 FR 27977 & [A-523-810] 81 FR 27979	6-5-2016	Countervailing duty and Anti-dumping duty Orders issued
Re-sealable can end closures	Australia	2016/54	18-5-2016	Anti-dumping investigation initiated
Welded Stainless Pressure Pipe	USA	[A-533-867] 81 FR 28824	10-5-2016	Preliminary dumping margin determined at 18.90%

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WTO News

EU files appeal in biodiesel dispute with Argentina

European Union filed a notice of appeal in the dispute with Argentina over anti-dumping measures on biodiesel from the latter (DS473). In the dispute, Argentina challenged the EU practice of rejection or adjustment of certain cost data of the producers/exporters as included in their records when those costs reflect prices which are 'abnormally or artificially low' because they are affected by an alleged distortion. The Panel had upheld Argentina's claim on 29-3-2016. The notice of appeal dated 20-5-2016 specifies the challenges against the Panel finding of inconsistency regarding the aforementioned practice as well as the imposition of duties in excess of the margin of dumping.

Tuna dispute - Mexico requests consultations with US over second compliance panel

Mexico has, on 13-5-2016, notified its request regarding consultations with the United States over the latter's alleged non-compliance with the recommendations and rulings of the Dispute Settlement Body in the dispute over importation, marketing and sale of tuna and tuna products (DS381). This request concerns measures published by the United States in March 2016 regarding dolphin-safe labelling. It may be noted that as recently as on 9 May, 2016, a second 'compliance panel' under Article 21.5 was established, on the request of USA, to consider the measures taken by the US pursuant to recommendations in this dispute, after the Appellate Body in its earlier compliance report had held that the United States had not brought its dolphin-safe labelling regime for tuna products into conformity with the recommendations and rulings of the DSB. Mexico on its part had in March this year requested authorization from the DSB to suspend concessions and the matter was referred to arbitration on the dispute of level of suspension.

China to consult USA for compliance in countervailing duties dispute

China has on 13-5-2016 notified the WTO of its consultations with the USA over the latter's alleged non-compliance with the recommendations and rulings of the Dispute Settlement Body in the dispute relating to countervailing duties on certain products from China (DS437). In the original dispute, the Appellate Body in its report dated 18-12-2014 had found that USA had acted inconsistently in respect with several of its obligations in the Subsidies and Countervailing Measures (SCM) Agreement relating to countervailing duty determinations. US measures at issue included 17 countervailing duty investigations initiated by the US DOC between 2007 and 2012 and the 'rebuttable presumption' established by the US authorities that all Chinese state-owned enterprises are public bodies within the meaning of Article 1.1(a)(1) of the SCM Agreement.

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US seeks consultation with China for compliance panel in chicken dispute

United States has on 10-5-2016 requested for consultations with China over latter's alleged non-compliance with the recommendations and rulings of the Dispute Settlement Body (DSB) in the dispute over anti-dumping and countervailing duties on broiler products from USA (DS427). The DSB had adopted on 25 September 2013 its panel report dated 2-8-2013 wherein it was found that the cost allocation methodology MOFCOM adopted was inconsistent with Article 2.2.1.1 of the Anti-dumping Agreement because Chinese authorities allocated processing costs to products that were not actually associated with their production and sale. China re-determined the duties in July 2014 which according to the US are still not consistent with the WTO Agreements.

Philippines to consult Thailand for compliance review in cigarettes dispute

In yet another compliance stage consultation which was initiated last month, Philippines has on 4-5-2016 requested consultations with Thailand under Article 21.5 of the Dispute Settlement Understanding on measures adopted by Thailand in compliance of Appellate Body report in '*Thailand – Customs and fiscal measures on cigarettes from the Philippines*' (DS371) which was circulated in June 2011. The panel and the Appellate body had earlier found that Thailand's measures were not consistent with various provisions of the GATT 1994 and the Customs Valuation Agreement.

Ratio Decidendi

Anti-dumping duty – Computation of normal value

The US Court of International Trade has upheld the Commerce department's determination of value relating to downgraded non-prime pipe (considered as by-product), at the net recovery cost. It was observed that in such determination the department had followed its practice with regard to downgraded product that is not suitable for the same applications as subject merchandise. The Court in this regard agreed with the Commerce department's finding that the exporter did not include in the cost the normal offset for non-prime pipe, and thus without adjusting for this offset, costs would be overstated. It was also noted that valuing the cost of non-prime pipe at the net recovery price of the product is consistent with Generally Accepted Accounting Principles (GAAP) because to avoid the overstatement of inventory accounts on a company's balance sheet, GAAP does not allow companies to value products held in inventory at an amount greater than their market price.

US CIT also allowed the VAT adjustment, noting that the department of commerce does not require that a respondent document that

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every VAT payment was refunded during the period of investigation or outside the period of investigation. It was observed that only requirement was to demonstrate entitlement to a VAT refund on exports. Issue relating to department's rejection of adjustment in respect of rebate was however remanded by the Court observing that Commerce's practice of rejecting rebate adjustments when it is not satisfied that customers were aware of the terms and conditions of the rebate at the time of the sale violates a recent decision of the court. [*Tension Steel Industries Co. Ltd.* v. *United States* - Slip Op. 16-51, dated 16-5-2016, US CIT]

Anti-dumping duty – Product under consideration

Observing that the German competition authority's investigation was still in progress when the contested EU regulation came into force, and that therefore the institutions were not entitled to consider it for the purpose of injury analysis, the Court of Justice of the European Union has rejected the contentions of the Chinese exporter that the General Court had erred by relieving the authorities of any obligation to analyse the impact of anti-competitive practices. The court in this regard also rejected the contention that it was necessary for the General Court to be aware of the identity of the EU producers forming part of the sample in the anti-dumping investigation in order to ascertain whether some of those producers were also being investigated by the German competition authority. It upheld the General Court's review carried out on the basis of microeconomic indicators, such as stocks, sale prices, profitability, capital flow, wages and the cost of production.

The dispute involved inclusion of plain polyester-coated ceramic mugs in the 'product under consideration' in the dumping investigation relating to ceramic tableware and kitchenware originating in the People's Republic of China. The court of justice was of the view that the General Court did not impose unreasonable burden of proof on the appellant inasmuch as it was specifically established that the mugs were in competition with other goods manufactured in the European Union. [*Photo USA Electronic Graphic Inc.* v. *Council of the European Union* – Judgment dated 2-6-2016 in Case C-31/15 P, CJEU]

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