

Position Paper



FTA
Foreign Trade Association

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The EU Commission's reform of TDI Two years on: a re-assessment

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THE EU COMMISSION’S REFORM OF TDI TWO YEARS ON: A RE-ASSESSMENT

Introduction

In December 2006, the Trade Commissioner, Peter Mandelson launched an ambitious – some would say quixotic – Green Paper to reform the EU’s Trade Defence Instruments. We filed a substantial response that answered the 31 specific questions therein with examples of case history and ECJ and CFI decisions to support our arguments, shortly before the deadline at the end of March 2007.

Our experience in European affairs – anti-dumping notwithstanding – told us that any proposals to improve the system that would require legislative change were highly unlikely to go through, not least because of the political pressure that would come from the more protectionist corners of the EU. However, we also knew that the existing legislation carried with it a certain degree of discretion in the manner of its application. Of course, this discretion is usually used by the Commission to its advantage, and that of the parties requesting action, but we reasoned that it should be possible to use this discretion to the advantage of our members – EU commerce; the importers and retailers who are adversely affected by anti-dumping measures. With that in mind, our proposals focussed on areas in which the system could be improved without the need for legislative change (although getting those changes enshrined in the legislation would be preferable and inevitably a few would unavoidably require some amendment).

After a lengthy examination process, draft proposals from the Commission saw the light of day in November 2007 and these contained many of the suggestions for improvement that we had proposed in our submission. Unfortunately at the beginning of 2008, owing to the political pressure referred to above, the process was abruptly pulled and put on the shelf (or, depending on to whom one spoke in the Commission, put in the deep freeze).

We of course did not let the matter lie there and have subsequently made sure that the reform process is not allowed to die. At subsequent meetings with the cabinet of the Trade Commissioner and with the services dealing with anti-dumping, we have continued to raise the issue of reform and the possibility of some improvements.

We also continued the discussions we held during the reform process with several of the more progressive Member States and in the run up to their presidency, discussed the possibility of *some* reform with the Czech Republic. This seems to have borne fruit since they opened their tenure at the head of Europe with a discussion process aimed at improving the level of transparency of the anti-dumping system – renowned for its opacity – and certain areas of predictability. In response, the Commission has announced an initiative of improving at least the level of transparency within the system it operates.

Those initiatives are welcomed but we believe we should not be complacent. The anti-dumping system is weighted heavily against EU importers and exporters and much more could be done to address this imbalance and improve the system.

With calls for protectionism growing and the likelihood that requests for anti-dumping investigations will also increase, now is an appropriate time to look at some of our main proposals of two years ago and see what still needs to be, and mindful of how very slim the chances of legislative amendment are, what can be done.

1. The Concept

Anti-dumping measures are imposed on imports from third countries when it is established that those imports are being sold at prices below the domestic price, are causing injury to the Community and when it is in the interests of the Community to impose such measures.

As one might expect from the above, the EU Anti-Dumping Regulation¹, which is based closely upon the WTO Agreement², is arguably a protectionist tool used to limit the effect that imports can have on EU industry. We do not deny that, when used in an appropriate manner and under appropriate circumstances, its use is valid. However, we also feel that all too often these caveats are not met.

Globalisation is no longer a “buzz-word”; it is a fact of life. Many EU companies – much as they would like to do so – are unable to source products from within the EU as the costs of manufacturing, supply and distribution are simply too high. Instead, those companies source from outside Europe.

Many of them, particularly those from northern Europe, have been doing so for some time. Some producers have even shifted their manufacturing facilities overseas to take advantage of the lower production costs in addition to being part of the local marketplace, whilst still keeping their main interests in the Community. Unfortunately, other companies have not been so diligent. This situation is particularly true of companies producing textiles and footwear, despite having been protected over many years by quotas on products from China and other countries³.

Resorting to trade defence measures, such as the imposition of anti-dumping duties, in order to *protect* European manufacturers that have been slow to adapt to the global marketplace and thus are not competitive is not legitimate. Imposing damaging duties on EU importers and retailers and ultimately the consumer in order to compensate those manufacturers is not the answer. Unfortunately, in recent years, this is exactly what appears to have happened as can be seen by the increase in anti-dumping cases against products whose import levels have increased - often as a result of the expiration of quotas which were imposed in order to protect European manufacturers and allow them time to adapt to increasing competitiveness from overseas.

As we say above, the use of TDIs can be a legitimate instrument to fight unfair trade practice and protect the interests of competitive EU producers. However, when doing so the interests of European importers, retailers and consumers must be properly considered alongside those of European industry. Our concern remains the same now as it did two years ago and many years before that; the apparent ease at which AD measures are applied and the increasing number of measures taken against consumer products.

2. Alternatives to anti-dumping?

Two years ago, the question of whether the Commission should make greater use of the Anti-Subsidy Regulation⁴ was raised. In a number of anti-dumping investigations (e.g. *Leather Uppers*⁵), the Commission has stated that the principle reason for imposing measures was one of subsidies. That being so, we suggested that conducting more anti-subsidy investigations in place of anti-dumping investigations was appropriate.

However, when one reads Article 3(1); “*Subsidies shall be subject to countervailing measures only if they are specific...*” (as defined in the rest of the article) it is troubling to note that the Commission takes a very

¹ Council Regulation (EC) 384/96 on protection against dumped imports from countries not members of the European Community, as amended by Council Regulations Nos.: 2331/96, 905/98, 2238/2000, 1972/2002, 462/2004 and 2117/2005 – OJ [1996] L56/1

² Agreement on Implementation of Article VI of the GATT 1994 (Anti-Dumping Agreement) – OJ [1994] L336/103

³ Council Regulation (EEC) No 3030/93 on common rules for imports of certain textile products from third countries – OJ [1993] L275/1 and Council Regulation (EC) No 519/94 on common rules for imports from certain third countries (as amended) – OJ [1994] L67/89

⁴ Council Regulation (EC) No 2026/97 of 6 October 1997 on protection against subsidized imports from countries not members of the European Community, as amended by Council Regulation Nos. 1973/2002 and 461/2004 – OJ [1997] L288/1

⁵ Council Regulation (EC) 1472/2006 – OJ [2006] L275/1

liberal interpretation of this specificity by, for example, determining that a particular scheme is “specific” even though the same scheme is available throughout the industry⁶. In addition, the same “Community Interest” concerns that raise their head in anti-dumping investigations (i.e. that the interests of Community importers, retailers and consumers are properly considered alongside those of Community industry) are equally valid here.

The Commission has explored this matter further; notably via discussions with representatives from EU industry and not with EU retailers and importers. However, we have not seen any increase in its use. This is likely to be due to the fact that the burden of prove required to impose countervailing duties is higher than that for anti-dumping measures.

Greater use of safeguard measures was also proposed but not encouraged. Since the basis for imposing such measures⁷ is essentially an increase in imports we feel that the principle is open to abuse when, for example, imports substantially increase (not surprisingly) following the expiry of previous quotas.

3. Improvements

As mentioned above, there are a number of improvements to the existing anti-dumping system that should, and *could*, be implemented without resorting to the controversial, and unlikely, recourse of legislative amendment. However, this does not mean that these improvements would not prove controversial in themselves; far too many parties have protectionist agendas to allow that. Some of these were explored under the Green Paper exercise and were met with hostile reactions from the aforementioned parties. However, they are still worthy of discussion and as such are re-examined below.

3.1 Transparency

In the EU at least – the same cannot be said of countries such as the USA – the words “transparency” and “anti-dumping” do not sit comfortably side by side. Instead, the EU’s anti-dumping system is likely to be the best example of obfuscation as you are likely to find.

That is not to say that suggestions for remedying this situation have been lacking. For many years, we have continuously suggested ways in which improvements could be made and we have not been alone in this; there have even been calls from the EU industry corner. With that in mind, one would be forgiven for thinking that progress in this area would be swift. After all, how difficult can it be to make the system more transparent by releasing more details of an anti-dumping investigation? Unfortunately, until recent vague suggestions of improvements that may arrive in the near future, progress has been sadly lacking.

Complaints

Article 5(11) of the Anti-Dumping Regulation states the Commission (whilst giving due regard to the protection of confidential material) “shall make [the full text of the written complaint] available upon request to other interested parties involved”. Unfortunately, though perhaps understandably, the Regulation also permits the Complainant to submit a version that has confidential material removed and it is this version of the complaint that is made available to interested parties.

When one considers that the WTO has determined that; “...the purpose of the non-confidential summaries... is to inform the interested parties so as to enable them to defend their interests”⁸ it would be reasonable to assume that this issue would not be a matter for debate regarding (lack of) transparency. This would be so if the Commission did not take such a wide view of what is considered to be “confidential”; often the wishes of the Complainant in this respect are simply granted. The result is that frequently the information contained

⁶ [e.g.] *Polyester Staple Fibres originating in Australia, Indonesia and Taiwan* – OJ [2000] L113/1

⁷ Title V of Council Regulation [EC] 3285/94 on the common rules for imports, as amended by Council Regulations Nos.: 139/96, 2315/96 and 2474/2000 – OJ [1994] L349/53 and Title V of Council Regulation [EC] 519/94 on common rules for imports from certain third countries [as amended] – OJ [1994] L67/89

⁸ WTO document WT/DS189/R, 28/09/01: Panel Report on *Argentina – Ceramic Tiles*

in these complaints is completely inadequate for the purpose of defending a case. In *Ironing Boards*⁹, critical information pertaining to the substance of the case, such as; export price, EU production, Complainant production and product range was omitted and 19 of the 25 annexes containing information relating to the case were essentially blank. The utilisation of the “confidentiality clause” can even extend to the withholding of the name of the companies supporting the complaint¹⁰. The Anti-Dumping Regulation does not specifically permit this practice and it is worth noting that the most recent version of the WTO text currently being negotiated¹¹ specifically states that such information *should* be included.

Access to information

In the original Green Paper exercise, the Commission put forward the possibility of allowing access to non-confidential files via the internet. With the resources it has at its disposal, it is difficult to understand why this has not already occurred.

In addition, there is the question of access to the agendas of Anti-Dumping Committees, the decisions taken at those meetings and the names of the Member State representatives that attend such. This information is easily obtained – but not from the Commission. Such a restrictive practice is not credible and should be rectified. Failure by the Commission to do so makes it very difficult for importers and retailers to exercise their right to lobby Member States. The Anti-Dumping Regulation contains no specific restriction on the publication of such information and the FTA can see no reason why the information should be withheld.

Finally, in the US, the APO system (Administrative Protective Order) allows full access to files, including confidential material, by the legal representatives of interested parties. Were such a system to be introduced in the EU, it would greatly improve the certainty of the investigation and increase importers’ confidence in the legitimacy of an investigation’s conclusions – although, admittedly, legal costs would increase.

3.2 Predictability

Predictability is as equally a strange bed-fellow to anti-dumping as transparency. Indeed some would argue that the very strength of anti-dumping (for its users) lies in its unpredictability. However, similar to the lack of transparency, there are significant improvements that could be made.

Investigations

Article 5(5) of the Anti-Dumping Regulation states; “*The authorities shall avoid, unless a decision has been made to initiate an investigation, any publicising of the complaint seeking the initiation of an investigation.*” (this follows the text seen in Article 5.5 the WTO Agreement). The practical result of this is that notification that a complaint has been filed is only published the day the investigation is initiated. The time limits to respond to such are very restrictive (usually 40 days). Considering that the complainants have likely spent months gathering evidence to file their complaint, we feel that this is unduly restrictive. When one considers that most complaints have already passed through a pre-check stage, earlier disclosure should be possible (although in its current format, the Anti-Dumping Regulation would need to be amended).

The third country involved in an anti-dumping investigation is also hit by this unpredictability to some extent. However, Article 5(5), following the language within the WTO Anti-Dumping Agreement, does say; “*...after receipt of a properly documented application and before proceeding to initiate an investigation, the authorities shall notify the government of the exporting Member concerned.*” Unfortunately, this does not seem to permit the consultation with the government concerned. However, the revised version of the WTO text does include two important amendments; that the authorities should provide the government of the exporting country with the full text of the written application (with due regard to confidentiality) and do so no later than 15 days before initiating an investigation. Hopefully this text will end up in the final version and thereafter the EU Regulation.

⁹ Commission Regulation (EC) 1620/2006 – OJ [2006] L300/13

¹⁰ c.f. *Leather Uppers* (Council Regulation 1472/2006 – OJ [2006] L275/1) and the subsequent expiry review - OJ [2008] C251/21

¹¹ WTO document TN/RL/W/236 of 19 December 2008

Once the initiation of an investigation has been published interested parties have only 10 days in which to request a questionnaire (and also comment on the appropriateness of the chosen “analogue country”). Responses to these questionnaire or applications to be heard must be received within 40 days from publication. Considering the complexity of the questionnaires, these deadlines are extremely tight, especially so for SMEs who often lack the legal expertise, time and resources available to larger companies. The Commission is very strict with these deadlines and will normally reject any submissions received after the deadline¹² (although Article 6(2) of the Anti-Dumping Regulation does permit an extension under strict circumstances). We would like to reiterate our request from two years ago that the Commission relax its policy in this area, particularly in respect to SMEs, and simplify the questionnaires.

No warning is given when provisional duties are imposed; the Regulation simply appears in the Official Journal one day before its implementation. However, the preliminary investigation is normally completed within eight months at which point Member States are consulted at the Anti-Dumping Committee. However, since the Commission is not bound by any decision taken and will normally go ahead with measures, we believe that notification could be published one month in advance of their implementation. There is nothing in the Anti-Dumping Regulation that would appear to prevent this. Furthermore, whilst Article 7(1) of the EU Anti-Dumping Regulation says that provisional duties; “...shall be imposed...not later than nine months from the initiation of the proceedings.”, the WTO Agreement does not contain any deadline for provisional measures, rather it provides a deadline for the entire investigation. Therefore, there is scope to make the deadline longer. The situation is equally unpredictable when provisional measures are not imposed since no announcement to this effect is made. Again, nothing in the Regulation prevents such disclosure which is perhaps more important when one considers that non-imposition of provisional measures does not mean that definitive measures will not be imposed.

Whilst it could be argued that the 15 month deadline for the implementation of definitive measures does give an indication when these will arrive (particularly when one considers the inevitability of that occasion) again, no warning is given; the duties apply the day following publication of the Regulation in the Official Journal. However, here there is more scope for advance warning. Article 6(9) of the EU Anti-Dumping Regulation provides that; “...investigations shall in all cases be concluded within 15 months of initiation...”. Since Article 5.10 of the WTO Agreement states; “Investigations shall...be concluded within one year, and in no case more than **18 months**, after their implementation” (emphasis added), the EU Regulation could be amended to reflect this and if the investigations themselves were concluded within the existing 15 month period this would provide ample opportunity for the Commission to provide advance notification.

An expiry review is another phenomenon that appears without warning. The Commission does publish in the Official Journal a notice of impending expiry roughly six months before expiry in order to give interested parties adequate warning to file an expiry review request by three months before expiry (as Article 11(2) of the Anti-Dumping Regulation insists). However, notification that an expiry review has been initiated only appears in the Official Journal on the day of initiation. Furthermore, whilst Article 11(2) also insists that a notice of actual expiry be published (should no, or an inadequate, review request be filed) the fact that no specific deadline is imposed means that this notice can appear any time from one month prior to expiry or on the day of expiry itself¹³.

¹² (e.g.) Ammonium nitrate originating in Russia – OJ [2002] L102/1

¹³ (e.g.) Cotton type bed linen originating in Pakistan – OJ [2009] C52/25

3.3 Procedural issues

There are many methods the Commission uses when conducting an anti-dumping investigation that could be improved upon. Of course, many of these are so non-transparent or carry such a wide degree of discretion (such as the way in which the Commission assesses whether, and how, measures should be imposed¹⁴) that it is difficult to examine in any great detail. However, those that can be explored below.

Standing

Article 5(4) of the Anti-Dumping Regulation states that an investigation shall not be initiated unless; “...the complaint has been made by or on behalf of the Community industry.” It goes on to define what is meant by that; “...if it is supported by those Community producers whose collective output constitutes more than 50% of the total production of the like product produced by that portion of the Community industry expressing either support for or opposition to the complaint.” It concludes with the caveat; “...no investigation shall be initiated when Community producers expressly supporting the complaint account for less than 25% of total production of the like product produced by the Community industry.” In essence, this defines the “standing requirement” for initiating an investigation.

That text directly follows the WTO Agreement and so there would seem to be little room for manoeuvre here. However, the FTA believes there is sufficient scope within the standing definition to increase the minimum level without requiring legislative amendment. There is no *obligation*, in either the EU or WTO legislation, to initiate an investigation if a complaint has a standing of 25%; the obligation rests on *not* initiating an investigation if the standing is below 25%. In other words, 25% is a *minimum threshold* – one at which investigations *may* be initiated, not *must* be initiated.

Unfortunately, the Commission sees this threshold as the point at which an investigation must be initiated - such as in *Plastic sacks and bags*¹⁵ where Commission figures state the Complainants represent 26.7% of Community production. Considering that Article 4(1) defines the “Community Industry” as being “...the Community producers as a whole of the like products or to those of them whose collective output of the products constitutes a **major proportion**...of the total Community production of those products” (emphasis added) we feel that the Commission should consider raising the minimum standing requirement, *in practice*, to one that more accurately reflects a “major proportion”; 40% being a reasonable figure.

A more controversial issue in the issue of standing is the question of whether European companies who are importing the product under investigation – often having outsourced its production whilst keeping a majority concern within the Community – should be excluded from the Community production. The reason for this should be clear when considering the important role “standing” plays in the proceedings; the lower the total Community production, the easier it will be for complainants to achieve the magic 25% standing. Of course, removing certain Community producers from this total is one method of arranging this.

Article 4(1)(a) of the Anti-Dumping Regulation states that Community producers that partially outsource their production can be excluded from the “Community Industry”. However, as confirmed by the European Court of Justice¹⁶, the Commission has a certain level of discretion when determining whether to exclude these producers. There are a number of tests the Commission applies in this regard but the most frequently applied seems to be a consideration of the amount of imports as percentage of the company’s overall production. In such cases the upper limit appears to be established as 25%¹⁷. However, this is not always the case; in *Plastic Sacks and Bags*, BPI was excluded despite the level of import being less than 10% - this seems to contradict an earlier decision in *PET*¹⁸. As a major Community producer, this resulted in the figure for total Community production being significantly reduced and therefore it was much easier for the complainants to reach the 25% standing. The FTA believes that a more appropriate figure would be 50%

¹⁴ An explanation of the Commission’s practice in this area can be seen in our Paper “EU Anti-Dumping Measures: How they are calculated and applied”

¹⁵ Council Regulation (EC) 1425/2006 – OJ [2006] L270/4

¹⁶ Case C-156/87, *Gestetner Holding plc v Council*, 1990 ECR I-781

¹⁷ [e.g.] *Certain footwear with textile uppers originating in China and Indonesia* – OJ [1997] L29/3

¹⁸ Council Regulation (EC) 1742/2000 – OJ [2000] L199/48

and since the Anti-Dumping Regulation does specify a level, there should be no need for a change in legislation, only a change in practice.

De minimis thresholds

The Anti-Dumping Regulation sets out two *de minimis* thresholds: one relating to the volume of imports, the other relating to the dumping margin, which must be exceeded if measures are to be imposed.

The former is defined under Article 5(7); “*Proceedings shall not be initiated against countries whose imports represent a market share of below 1%, unless such countries collectively account for 3% or more of Community consumption.*” Article 5.8 of the WTO Agreement sets higher thresholds of 3% and 7% respectively (referred to as the “negligible import volume”). If the EU threshold is exceeded, but not the WTO threshold, the investigation is terminated. However, we would argue that the obligation rests on *not* initiating an investigation if the volume of imports is below the threshold. In other words, the figures represent *minimum thresholds* – the point at which an investigation *may* be initiated, not *must* be initiated. Therefore, there is no barrier to increasing this level *in practice*. Since, under EU Competition policy, dominant market share is only considered at levels above 40%, the figures within the Anti-Dumping Regulation seem excessively low. The FTA would like to see these thresholds raised to at least 25%.

The latter is defined under Article 9(3) of the Anti-Dumping Regulation; “*...there shall be immediate termination [of an investigation] where it is determined that the margin of dumping is less than 2%, expressed as a percentage of the export price...*” (as seen under Article 5.8 of the WTO Agreement). Furthermore, Article 2(11) provides that the dumping margin may be calculated on the basis of “*...a comparison of a weighted average normal value with a weighted average of prices of all export transactions to the Community*”. However, when the export prices to the Community differ between purchasers, regions or time periods, the calculation can be based on a comparison of the weighted average normal value with all individual export transactions to the Community. This can increase the margin found and thereby increase the possibility to continue an investigation. We believe that the level could be raised by several points without having a detrimental effect on the domestic industry.

Market Economy Treatment

The Commission will generally not calculate an individual dumping margin when investigating cooperating exporters in Non-Market Economy countries (“NMEs”) arguing that as they are state controlled, “domestic market price” and “cost of production” cannot be regarded seriously. Article 2(7) of the Anti-Dumping Regulation lists and classifies which countries are considered NMEs and sets up certain conditions. In a number of these, owing to a reform of their country’s economy or membership of the WTO, individual companies may be able to claim “Market Economy Treatment” (by convincing the Commission that they operate under market economy conditions) and therefore qualify for an individual dumping margin (for the rest, the normal value is calculated by comparison to prices/costs in an “analogue” country). The Commission sets out five criteria that must be met: decisions taken on prices and costs (e.g. raw materials, labour, sales and investment) must be possible without significant state interference; accounting records must be in line with international standards; production costs and the financial situation must not be subject to significant distortions from the former non-market economy system; bankruptcy and property laws must be in place; all exchange rate conversions must be conducted at the market rate. These assessments can be critical for importers as invariably the duties applied to companies that obtain MET are lower than those that do not.

However, the FTA is concerned about what appears to be a lack of consistency in what the Commission determines to be “state interference”. In *Urea*¹⁹ the setting of a minimum export price was not considered a barrier to assigning MET. However, in *Bicycles*²⁰ the existence of export quotas and a minimum export price was classed as state interference and so MET was denied. We are also concerned about reports that MET applications are refused because of minor faults on submission forms – which the restrictive

¹⁹ Council Regulation (EC) 1497/2001 – OJ [2001] L197/4

²⁰ Council Regulation (EC) 1095/2005 – OJ [2005] L183/1

deadlines for completion make difficult to correct. The FTA feels that the system should be applied more consistently and should apply less restrictive criteria such as those used by the US.

Analogue country

As mentioned above, when NME countries are the subject of a complaint, an “analogue country” is used to assess the normal value – Article 2(7); “An **appropriate** market economy third market country should be selected in a not unreasonable manner” (emphasis added). The European Court of Justice has stated that; “...the analogue country should be a market-economy country in which prices are formed in circumstances which are **as similar as possible** to those in the country of export.”²¹ (emphasis added).

Understanding the reasoning behind the Commission’s choice of analogue country is often difficult. Common factors include: the product is of similar quality²²; strong domestic competition and high domestic sales²³; producers are efficient²⁴; conditions for access to raw materials is similar²⁵; production processes and scale of production is similar²⁶. This aside, the FTA questions whether proper attention is given to the choice of country; in *Leather Uppers* Brazil was chosen, whilst in *Chamois Leather*²⁷ the USA was chosen. It is also somewhat disingenuous that the Complainant may choose the analogue country, especially when it seems that the Commission will generally accept that choice.

Sampling

Article 17(1) of the Anti-Dumping Regulation says that, when the number of complainants, exporters or importers, types of product or transactions is large; “...the investigation may be limited to **a reasonable number** of parties, products or transactions by using samples which are **statistically valid**...” (emphasis added). Article 17(2) says that the selection of these; “...shall rest with the Commission...to enable a **representative sample** to be chosen” (emphasis added).

As sampled companies are assigned individual duties which are usually lower than those who are not sampled, it is crucial to importers that the sampling be conducted in a proper manner. Unfortunately, there is no specific definition of the terms emphasised above and there are serious concerns that the Commission’s interpretation often differs from what one may reasonably assume. In *Leather Uppers* only 12 of the 154 cooperating exporters were chosen for sampling. The provisional Regulation states that those companies represented 25% of the quantities exported during the investigation period. However, the General Disclosure Documents notes that exports from these companies totalled 6,546,728 pairs. When this figure is seen alongside the total export figure of 53,470,000 the true representation of the 12 companies sampled is only 12.2%. The Commission needs to ensure that a proper representative sampling method is applied.

Term of measures

Anti-dumping measures are invariably imposed for a period of five years – although there have been rare occasions when the period set was less; in *Photocopiers*²⁸ a two year term was imposed; in *Electronic Weighing Scales* and *Magnetic Disks*²⁹ a four year term; and in *Leather Uppers* a two year term.

Article 11(1) of the Anti-Dumping Regulation says that definitive measures; “...shall remain in force only as long as, and to the extent that, it is necessary to counteract the dumping which is causing injury”. However, Article 11(2) then sets out what appears to be a fixed period of five years; “...a definitive anti-dumping measure shall expire five years from its imposition”. Interestingly the WTO Anti-Dumping Agreement, under Article 11.3 does not specify an absolute fixed period saying “...any definitive anti-dumping/countervailing duty shall be terminated on a date not later than five years from its imposition”.

²¹ Case C-16/90 *Nölle v. Hauptzollamt Bremen – Freihafen*, 1991 E.C.R. I-5163

²² (e.g.) *Integrated compact fluorescent lamps (CFL-i) originating in China* – OJ [2001] L38/8

²³ (e.g.) *Colour television receivers originating in China, Korea, Malaysia and Thailand* – OJ [2002] L231/1

²⁴ (e.g.) *Ferro molybdenum originating in China* – OJ [2002] L35/1

²⁵ (e.g.) *Potassium chloride originating Belarus, Russia and Ukraine* – OJ [2000] L112/4

²⁶ (e.g.) *Certain tube or pipe fittings originating in the Czech Republic, Korea, Malaysia, Russia, Slovenia* – OJ [2002] L56/4

²⁷ Council Regulation (EC) 1338/2006 – OJ [2006] L251/1

²⁸ Council Regulation (EC) 2380/95 – OJ [1995] L244/1

²⁹ Council Regulation (EC) 461/2001 – OJ [2001] L468/24 and Council Regulation (EC) 312/2002 – OJ [2002] L50/24

The FTA believes that the term indicated within the Anti-Dumping Regulation should not be taken as a fixed term – a view backed up by a 1998 judgement by the Court of First Instance which found that Article 11(2) of the Regulation [at the time, Article 15(1)] could not be interpreted as setting a minimum mandatory period of five years and that the rules under the Regulation did not prevent a lesser term being imposed³⁰. In addition, we believe that with the rate at which technology is changing – particularly with regard to consumer products – the five year term is now outdated and a more appropriate term would be three years. As explained above, implementing such a change in practice would not require any legislative change and would not contravene WTO rules.

Voting system

Before definitive anti-dumping measures can be imposed, Member States at the Council must vote on the proposal put forward by the Commission. Unlike when provisional duties are proposed (where this exercise is only consultative) the Commission is bound by the vote reached.

Prior to March 1994 (under the Regulation of 1988) decisions were taken at Council under the Qualified Majority Vote (QMV) system. This was amended to introduce a simple majority vote system; in other words 8 votes in favour from a total of 15 Member States was required to pass a Commission proposal for definitive measures. This change was, by itself, not so controversial; many other Council decisions are taken under the same system. More insidious was the amendments under Council Regulation 461/2004 that applied as of 20 March 2004. This introduced the principle that an abstention counts as a vote in favour. This is unique to decision making concerning anti-dumping and anti-subsidy investigations.

One only has to look at the Commission proposal to the Council at the time³¹ to see that the sole purpose of this initiative was to ensure that fewer Commission proposals are rejected: *“The current situation allows rejecting the Commission proposal in the Council without clearly taking a position, i.e. not having to vote “no” if a Member State decides not to follow the Commission proposal.”* And also *“Under the current approach, a Commission proposal will only be adopted if a simple majority of Member States votes in favour of such a proposal. This has the effect that abstentions count effectively against the Commission proposal. This in turn can result in a situation where a Commission proposal will not be adopted by the Council...”*

We have opposed this rule change since its inception and believe it to be undemocratic allowing absurd situations such as that seen at the provisional stage in *Leather Uppers* where only 3 Member States voted in favour, 10 voted against and 12 abstained – and yet the Commission still imposed those measures and continued with the investigations.

Expiry reviews

Since the Commission invariably takes the full 15 month period permitted to conclude an expiry review and the measures remain in force throughout that review, this in effect grants the complainant a *de facto* 15 month extension. This could be avoided if expiry reviews were conducted during the term of the measures (rather than once the normal date of expiry is reached) and timed to conclude on the date of normal expiry. There does not appear to be any real barrier to this possibility within the Anti-Dumping Regulation; Article 11(2) only restricts the application for an expiry review to; *“...no later than three months before the end of the five year period”*. Arguably this does not prevent a review being *initiated* prior to this point. In addition, Article 11(3) of the WTO Anti-Dumping Agreement says a review may be initiated following a substantiated request; *“...within a reasonable period of time prior to that date...”* (being the date of normal expiry) which should permit the Commission to change its practice without contravening the WTO provisions. Unfortunately, in the current round of negotiations concerning the WTO Agreement, although such an idea was considered, opinions were too divided for any consensus to be reached.

This would eliminate another criticism against expiry reviews; the fact that it is not possible to obtain reimbursement of duties paid throughout the duration of an expiry review – when that review concludes that extension is not warranted. There should be no reason why this unfair practice should continue,

³⁰ Case T-232/95, *Committee of European Copier Mfrs. (Cecom) v. Council*, 1998 E.C.R. II-2679

³¹ Commission Proposal COM(2003) 380 final, 2003/0141 (ACC)

particularly when one considers that reimbursement is possible when definitive duties are set at a level that is lower than provisional duties by the local customs authorities via the Community Customs Code³².

The above two proposals notwithstanding we consider that the deadline set to conclude an expiry review is too long. Whilst Article 11(5) of the Anti-Dumping Regulation says that such reviews “...shall be carried out expeditiously and shall normally be concluded within 15 months of initiation.”, it is almost exclusively the 15 month period that is adhered to. A nine month period would be preferred.

Finally, we still object to the ability for anti-dumping measures to be continually extended. Protecting a non-competitive industry that has failed to adapt to the global marketplace by continuously imposing anti-dumping measures is not acceptable – in fact, one could argue that it *damages* the competitiveness of the industry. Quotas perform a similar protective function and they have a limited lifetime; so should TDI measures. This was proposed in an earlier version of the text being discussed in the negotiating rounds of the WTO³³. Unfortunately, views were too divergent for a consensus to be reached and the latest version does not include it. We would suggest that in principle TDI measures should not run beyond two terms.

3.4 Community Interest

This is probably one of the most controversial issues one can discuss in anti-dumping. Few would argue that anti-dumping legislation exists to protect the interests of the Community producing industry and by doing so favours that section. This was certainly the case in the initial Anti-Dumping Regulation³⁴ before it was subsequently amended³⁵ to be more transparent and provide importers and exporters better access to essential facts and considerations pertaining to the imposition of duties.

One can also argue that to counter this perceived bias, the Community Interest test was introduced – i.e. a test to consider the interests of Community importers/retailers and consumers *only*. If one considers the intense opposition put up by the more protectionist Member States (e.g. France, Greece, Italy, Portugal and Spain) when it was first proposed, this argument seems to hold true. Unfortunately, although Article 21 of the current Anti-Dumping Regulation introduces greater clarification to the test it is still subjective and open to interpretation. In addition, when determining whether intervention is required, “...the interests of **the domestic industry** and users and consumers” (emphasis added) are considered. This imbalance should be addressed to give greater consideration to importers, retailers and consumers.

As we say above, there is a perception that importers, retailers and consumers are considered less favourably than producers. That perception is only strengthened when one looks at the Commission’s response to not receiving any response by importers, retailers or consumers (or their associations) to an investigation; it predominantly concludes that the possible introduction of TDI measures is of no concern³⁶ (although recently there has been a rare exception to this³⁷). However, this is often far from being the case; the most likely reason is that the work involved in responding to questionnaires, and the time limits imposed on such an exercise, are too demanding – particularly so for SMEs³⁸.

The above notwithstanding, there have been occasions when the Commission has considered retailers (or consumers): in *Handbags*³⁹, it concluded that if measures were imposed, consumers would be affected by

³² Council Regulation (EEC) 2913/93 (as amended) – OJ [1993] L302/1

³³ c.f. WTO document TN/RL/W/232

³⁴ Council Regulation (EEC) 459/68 on protection against dumping or the granting of bounties or subsidies by countries which are not members of the European Economic Community – OJ [1968] L93/1

³⁵ Council Regulation (EEC) No 1681/79 – OJ [1979] L196/2

³⁶ [e.g.] *Bicycles originating in China* – OJ [2000] L175/39 and *Large rainbow trout originating in Norway and the Faeroe Islands* – OJ [2003] L232/29

³⁷ *Ironing boards originating in China and Ukraine* – OJ [2006] L300/13

³⁸ The problems facing SMEs are certainly recognised by the WTO; Article 6.13 of the WTO Anti-Dumping Agreement states; “The authorities shall take due account of any difficulties experienced by interested parties, **in particular small companies**, in supplying information requested, and shall provide any assistance practicable.” (emphasis added). The EU Regulation is sadly lacking in this respect.

³⁹ Council Regulation (EC) 1567/97 – OJ [1997] L208/31

a supply shortage; in *Photo Albums*⁴⁰ it decided that “...the consumer interest takes precedent over the interest of the Community industry” on the basis that the supply by the Community producers was insufficient and that the imposition of measures would lead to a shortage, and in *Recordable DVDs and Recordable CDs*⁴¹ it concluded that in those Member States where special levies already in place on recordable material were low, the impact of duties would likely be passed on to the consumer and so those investigations were terminated. However, these occasions are rare and the FTA should like to see them more often.

The subjectivity of Article 21 has been cited to suggest that initiatives such as excluding certain products from the proposed measures in order to benefit the interests of Community retailers, importers and consumers. At the provisional stage of *Leather Uppers* the Commission concluded that; “Given that... children’s shoes have to be replaced three to four times more often than other shoes, it is fair to consider that the absolute cost to consumers will also be substantially higher for these shoes as compared to the other shoes... Provisional measures could thus constitute a very significant burden for families with young children. Indeed, the risk would exist that the imposition of provisional measures on these shoes could cross the dividing line between the benefit of such measures and their possible cost... It is therefore provisionally concluded that imposing measures on children’s footwear would not be in the interest of the Community.” Unfortunately, whilst the initiative was warmly welcomed at that time by consumer and retailer organisations, following strong opposition from the complainants and protectionist Member States such as France, Italy, Portugal and Spain the Commission reintroduced children’s shoes at the definitive duty stage⁴².

It has also been argued that the same subjectivity could be used to adjust the level of measures. However, if one considers that under Article 9(4) measures are set to remove the “injury” to the Community Industry (defined under Article 3(2) as “material injury”) there does not appear to be much scope within Anti-Dumping Regulation to permit this. That said, there is no clear explanation for what is meant by “material” - although the Regulation does provide for certain tests for its determination (volume, effect on prices, consequent impact). Therefore, whilst it is clear that duties must be fixed according to the impact the dumped products have on the Community *Industry*, one can reasonably argue that there is scope within Article 21 for some discretion under the principle that; “Measures, as determined on the basis of the dumping and injury found, may not be applied where the authorities...can clearly conclude that it is not in the Community interest to apply such measures” and that measures, though not rejected outright, could be lowered.

The FTA would also support the use of the Community Interest test upon receiving a complaint or before initiating an expiry review stages. Whilst Article 5(5) of the Anti-Dumping Regulation would appear to preclude its use when a complaint is filed; “The authorities shall avoid, **unless a decision has been made to initiate an investigation**, any publicising of the complaint seeking the initiation of an investigation.” (emphasis added), there should be nothing to prevent the Commission doing its own, preliminary Community interest investigation prior to any decision to initiate an investigation. As far as applying the test before conducting an expiry review, it is already Commission practise to apply this test *during* the review - although instances of termination on these grounds are rare⁴³. Doing so *prior* to this would be a useful way to prevent an unnecessary (*de facto*) extension of measures that occurs once a review is opened. There is nothing within the Anti-Dumping Regulation that would appear to preclude this.

Of course, there are guidelines detailing the basis of the Community interest test and how an assessment should be conducted, but these are internal Commission guidelines only. There should be no reason why these should not be made publically available. However, when one looks at those guidelines the reason for their restricted status perhaps becomes clear. They show a bias toward job losses in the Community industry – we would argue that anti-dumping duties, especially in highly competitive markets such as consumer products, can affect employment in retail; these jobs are just as important. They also confirm that a lack of response is considered to indicate that users would not be affected by the measures. In addition, there is an admission that anti-dumping duties can cause price increases to the consumer but claims that this is ultimately the purpose of anti-dumping measures. Finally, it accepts that choice could

⁴⁰ Commission Decision 90/241/EEC – OJ [1990] L138/48

⁴¹ Commission Decision 2006/713/EC – OJ [2006] 293/7 and Commission Decision 2006/753/EC – OJ [2006] L305/15

⁴² Commission Regulation (EC) 1472/2006 – OJ [2006] L275/1

⁴³ [e.g.] Commission Decision (2001/230/EC) – OJ [2001] L84/36

be affected but also assumes that other sources (such as Community industry) would prevent this ignoring the fact that for cost considerations this is not usually possible.

The guidelines make clear that the assessment conducted is only an economic one; policy considerations are not included. However, Article 21 does not restrict the analysis to any area, let alone an economic one, so there should be no reason why wider considerations, such as those detailed above, could not be considered.

Conclusion

The ideal conclusion to this paper would be one that listed all the above points, each with a check mark to indicate those that Commission had implemented since the submissions for its Green Paper on the reform of the Anti-Dumping Regulation were received two years ago. Unfortunately, were we to conclude with such a list, it would consist of only a single item; the Commission has created a Hearing Officer position (and the decision on that issue had already been taken before the Green Paper was issued).

As we say in our introduction, the Commission has recently announced that over the course of the remainder of this year and the next it will be increasing the transparency of the anti-dumping system. Details have recently emerged that the improvements will cover areas such as: the possibility of electronic access to non-confidential files, an improved website (comprising a better alert system, case timetables and a list of measures), an SME on-line help desk, simplifying the response mechanism to questionnaires (by allowing sampling of PCNs and partial responses), and lengthening the minimum 10 day period for responses to disclosure documents and improving the quality of such. The role of the Hearing Officer is also to be expanded.

This is of course to be applauded and shows that the Commission has at least listened to our requests and suggestions on transparency. However, far greater improvement is needed if importers and retailers are to have a fair and equal chance of defending their interests in anti-dumping investigations. This message is not new now, nor was it new when we submitted our response to the reform exercise, but it cannot be one that is allowed to quietly slip away and die.

Critics of any reform will say that legislation should not be changed and that the WTO is the only body with the authority to permit any changes. To the former, we would reply that, as we have explained in this paper, many improvements can be implemented without resorting to legislative amendment. To the latter, as it is the European system that we are criticising, and it is the utilisation of that system by the European Commission that we consider to be at fault, we would reply that it is perfectly acceptable for any reform to be carried out by that authority.

Finally, it must be made clear - should there be any doubt remaining – that the FTA is not asking for a full-scale overhaul of the Anti-Dumping Regulation, nor its total abolition; that would be unrealistic. What we are asking the Commission to do is change its practice in several areas to provide importers and retailers with a more level playing field. We believe this goal is possible and we will continue to fight to achieve it.

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