

## GLOBAL EUROPE

### Europe's Trade Defence Instruments in a changing global economy

#### A Green Paper for public consultation

##### Questionnaire

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Organisation/individual belonging to the following category	public administration Community producers Users Consumers <b>Importers and Retailers</b> Law firm University Other (please specify)
If organisation, please provide some economic key figures, e.g. turnover and employment and any other figure that you consider relevant.	

Replies to the questionnaire should reach the Commission by **31 March 2007** at: [Trade-tdi-green-paper@ec.europa.eu](mailto:Trade-tdi-green-paper@ec.europa.eu). Comments received will be made available on-line unless a specific request for confidentiality is made, in which case only an indication of the contributor will be given.

**Question 1:** *What is the role of trade defence instruments in the modern global economy? Do trade defence instruments remain essential in order to ensure respect for international trade rules and to protect European interests? Should the EU consider how they might be improved?*

**Answer 1:** The FTA believes that world-wide trade is an achievable goal, despite the problems in the current WTO negotiations. However, it is a simple fact that not all countries are equal with methods and costs in manufacturing, supply and distribution being different from one country to the next. It is also true that within the EU these costs are higher than many countries outside the EU. As a result, many EU importers and retailers source products from outside the EU.

This discrepancy means that in order to become more competitive, European industry needs to adapt its methods. In recent years, many companies – particularly those from northern Europe - have done this by shifting production outside the EU to take advantage of the lower production costs in addition to being part of the local marketplace. However, it is regrettable that other companies have not been so diligent. This situation is particularly true of companies producing textiles and footwear, despite a decade of quotas on products from China and other countries<sup>1</sup>.

Recourse 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.

In addition, one also has to wonder whether Commission policy on TDIs is not at odds with other Commission policies. For example: (i) imposing measures against countries to which the EU has provided aid programmes when these have been used in the development of manufacturing industries and (ii) imposing measures against imports of energy saving lamps<sup>2</sup> whilst also encouraging European consumers to increase the use of energy saving lamps<sup>3</sup>.

The above notwithstanding, the FTA accepts that in the absence of international competition rules TDIs are a legitimate instrument to fight dumping as an unfair trade practice and protect the interests of competitive EU producers. However, this will only be valid if, when considering “European interests”, the interests of European importers, retailers and consumers are properly considered alongside those of European industry. However, we are concerned about the apparent ease at which AD measures are applied and the increasing number of measures taken against consumer products. Therefore, the FTA feels it is entirely appropriate that the EU should consider how TDIs may be improved.

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<sup>1</sup> 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

<sup>2</sup> Council Regulation 1470/2001 – OJ [2001] L195/8 and Council Regulation 866/2005 – OJ [2005] L145/1

<sup>3</sup> Joint Research Council, Ref: MEMO/06/386, 19/10/2006

**Question 2:** *Should the EU make greater use of Anti-Subsidy and Safeguard instruments alongside its Anti-Dumping actions? Should the Commission, in particular circumstances, be ready to initiate more trade defence investigations on its own initiative provided it is in possession of the required evidence?*

**Answer 2:** The Commission has, on a number of occasions, stated that the principle reason behind the recent imposition of anti-dumping duties on leather upper shoes from China and Vietnam<sup>4</sup> was one of subsidies<sup>5</sup>. This being the case, although provided for within the Anti-Dumping Regulation<sup>6</sup>, one has to question whether an Anti-Subsidy investigation would not have been more appropriate. Indeed, on several occasions Anti-Subsidy and Anti-Dumping investigations have been conducted simultaneously<sup>7</sup> and it appears that “subsidies” are often quoted as a contributing reason for the imposition of anti-dumping measures.

That being the case, the FTA would have no objections to greater use of the Anti-Subsidy Regulation<sup>8</sup> *in place of anti-dumping investigations* provided that certain concerns are met. For example, Article 8(5), which deals with the impact of the subsidized imports on the Community industry, allows for; “[t]he fact that an industry is still in the process of recovering from the effects of past subsidization or dumping”. This appears to contradict Article 15.1 and 15.5 of the WTO Agreement on Subsidies and Countervailing Measures as it allows for factors other than the subsidized imports (i.e. dumping) to be considered when calculating the injury. In addition, Article 3(1) states that; “[S]ubsidies shall be subject to countervailing measures only if they are specific...” (as defined in the rest of the article). However, it is evident that the Commission takes a very liberal interpretation of this specificity by, for example, determining that a particular scheme is “specific” even though the same scheme is available throughout the industry<sup>9</sup>. Finally, special attention must be paid to the “Community Interest” provisions contained within Article 31 insofar that the interests of Community importers, retailers and consumers are properly considered alongside those of Community industry.

Greater use of safeguard measures is, however, not encouraged. The basis for imposing such measures<sup>10</sup> is essentially an increase in imports. However, this principle is open to abuse when, for example, imports substantially increase (not surprisingly) following expiry of previous quotas.

Under Article 5(6) of the Anti-Dumping Regulation the Commission is permitted to initiate an investigation of its own volition although this has occurred relatively few times<sup>11</sup>. However, this is only permissible if the same criteria for initiating an investigation requested by a third party (under Article 5(2)) are followed. Provided that this provision is adhered to strictly, the FTA has no objection in principle to the Commission exercising this right but considers that an *increased* use would be at odds with free-trade principles.

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<sup>4</sup> Council Regulation (EC) 1472/2006 – OJ [2006] L275/1

<sup>5</sup> (e.g.) Commission Press Release: 30/08/2006 and Peter Klein: Trade Defence Seminar, London – 05/02/07

<sup>6</sup> 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 and 462/2004 – OJ [1996] L56/1

<sup>7</sup> (e.g.) *Polyester Textured Filament Yarn originating in India and Korea* – OJ [1998] C264/2 and *Synthetic Polyester Fibres originating in Australia, Indonesia, Korea, Taiwan and Thailand* – OJ [1999] C111/3

<sup>8</sup> 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

<sup>9</sup> (e.g.) *Polyester Staple Fibres originating in Australia, Indonesia and Taiwan* – OJ [2000] L113/1

<sup>10</sup> 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

<sup>11</sup> (e.g) *Certain parts of television camera systems originating in Japan* – OJ [1999] C38/2 and *Synthetic fibre ropes originating in India* – OJ [1997] C201/8

**Question 3:** *Are there alternatives to the use of trade defence instruments in the absence of internationally agreed competition rules?*

**Answer 3:** The existing TDI legislation already covers a considerably wide range of defensive trade measures and the FTA believes that, internationally agreed competition rules notwithstanding, true alternatives are neither necessary nor achievable. However, there is considerable scope for the structure and certainly the use of existing TDIs to be improved, not least when considering whether these instruments are used for protectionist means.

These improvements will be discussed in more detail within the body of this response to the Green Paper.

Foreign Trade Association

**Question 4:** *Should the EU review the current balance of interests between various economic operators in the Community interest test in trade defence investigations? Alongside the interests of producers and their employees in Europe, how should we take into account the interests of companies which have retained significant operations and employment in Europe, even though they have moved some part of their production out of the EU? How should we take into account the interests of importers or producers who process affected imports?*

**Answer 4:** It can be argued that TDIs exist to protect the interests of the Community producing industry and by doing so favour that section. This was certainly the case in the initial EU Anti-Dumping Regulation<sup>12</sup> before it was subsequently amended<sup>13</sup> (following the *Ball Bearings* case<sup>14</sup>) to be more transparent and provide importers and exporters access to essential facts and considerations pertaining to the imposition of duties.

It has also been argued 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*. This theory seems to hold water if one considers the fervent opposition it received by the more protectionist Member States (e.g. France, Greece, Italy, Portugal and Spain) when it was first proposed. Unfortunately, whilst amendments introduced by the current Anti-Dumping Regulation (Article 21) more clearly define the Community Interest test it is still rather subjective and open to interpretation. In addition, when determining whether intervention is required, “[t]he interests of **the domestic industry** and users and consumers” (emphasis added) are considered. This imbalance should be addressed; importers and retailers are responsible for millions of jobs which can be at risk following the imposition of anti-dumping duties.

Of course, the situation within the EU industry is not simply an issue of “producers v. importers”; as already discussed under Answer 1 many EU companies although based in the EU have outsourced some or all of their production facilities to third countries. The FTA sees no reason why these companies should not be classified as “Community Industry”.

Article 4(1)(a) provides that Community producers that partially outsource their production can be excluded from the “Community Industry”. However, as confirmed by the European Court of Justice<sup>15</sup>, the Commission has a certain level of discretion when determining whether to exclude these producers and each decision should be taken on a case-by-case basis. There are a number of tests the Commission applies to assist in this determination. The most frequently applied seems to be a consideration of the amount of imports as percentage of the company’s overall production where the upper limit appears to be established as 25%<sup>16</sup>. However, this is not always the case. In *Plastic Sacks and Bags*<sup>17</sup>, BPI was excluded from “Community Industry” on the grounds that it imported – despite the level of import being less than 10%. As a major Community producer, this resulted in the figure for total Community production being reduced. As a result, it was much easier for the Complainants to reach the 25% “standing requirement” (c.f. Answer 13).

[cont...]

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<sup>12</sup> 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

<sup>13</sup> Council Regulation (EEC) No 1681/79 – OJ [1979] L196/2

<sup>14</sup> Case 113/77, *NTN Toyo Bearing Co v. EC Council*, 1979 ECR 1185

<sup>15</sup> Case C-156/87, *Gestetner Holding plc v Council*, 1990 ECR I-781

<sup>16</sup> (e.g.) *Certain footwear with textile uppers originating in China and Indonesia* – OJ [1997] L29/3

<sup>17</sup> Council Regulation (EC) 1425/2006 – OJ [2006] L270/4

**[Answer 4 cont.]** Another test considers circumstances where a company has imported products in reaction to unfair competition; here it seems that providing the final “mark-up” is not too great, the company will not be excluded from the Community Industry<sup>18</sup>. Finally, the Commission also considers whether companies have imported products to compliment their product range although the levels of these imports are also relevant in this test<sup>19</sup>.

However, discretion notwithstanding, it still remains that the Regulation does not specify clear criteria for determining whether such companies are classified as Community Industry. It should certainly not be the case that such decisions are affected by whether or not the company supports the investigation. With that in mind the FTA considers that the level of imports as a percentage of turnover within the Community - at which point the company in question is excluded from Community Industry - should be set at 50%, and that this criteria should be reflected in the Regulation.

The situation concerning those companies who outsource their entire production is different to that above. Here, there should be a consideration as to what percentage of the company’s activities as a whole (within the Community) is covered by the importation. The FTA believes that if imports account for less than 50% of a company’s activities then it should be classed as Community Industry. However, in addition, careful attention must be paid to “origin” of the products under question since many producers still hold their principle concern in the Community and *finish* their products within the Community. Whilst the degree of value added to the final product in these circumstances is something that needs to be established, in principle, the FTA believes these companies should not be excluded from the Community Industry.

Regarding the balance of interests between the various economic operators in the Community Interest test, the FTA believes that the interests of the importing and distribution sectors should be given more weight.

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<sup>18</sup> (e.g.) *Bicycles originating in Taiwan* – OJ [1998] L238/10

<sup>19</sup> (e.g.) *Colour television receivers originating in Malaysia, China, Korea, Singapore and Thailand* – OJ [1995] L73/3 and *Integrated electronic compact fluorescent lamps (CFL-i) originating in China* – OJ [2001] L38/8

**Question 5:** Do we need to review the way that consumer interests are taken into account in trade defence investigations? Should the Commission be more proactive in soliciting input from consumer associations? How could such input be weighted? How could the impact of trade defence measures on consumers be assessed and monitored?

**Answer 5:** Although the FTA does not represent European consumers, it does represent European importers and retailers affected by TDI measures which subsequently may affect European consumers. With that in mind, we believe we are qualified to respond.

There is a common perception that the Community producer is considered far more favourably than the Community importer, retailer and ultimately the European consumer. Whether or not this is a true perception is beside the point; it is a perception that the Commission could and should change. This is particularly evident when the Commission does not receive any response by consumers, or their associations, to an investigation; the conclusion that is predominantly reached is that the possible introduction of TDI measures is of no concern<sup>20</sup> (although recently there has been a rare exception to this<sup>21</sup>). However, this is often far from being the case; rather, that the work involved in responding to questionnaires, and the time limits imposed on such an exercise, are too demanding for the sector in question.

Inadequate legislation aside, greater liaison with consumer organisations would be one step towards alleviating this problem and there should be no impediment to the Commission taking a more proactive approach in this regard. It goes without saying that any input received should be given the same weight as that received from Complainants.

The above notwithstanding, it is not true to suggest that the Commission *never* considers consumers when assessing the impact of TDI measures. In *Handbags*<sup>22</sup>, the Commission concluded that should anti-dumping measures imposed, consumers would be affected by a supply shortage. In *Photo Albums*<sup>23</sup>, the Commission decided that “[t]he consumer interest takes precedent over the interest of the Community industry” on the basis that the supply of the product concerned by the Community producers was insufficient and that the imposition of measures would lead to a shortage in supply. More recently in *Recordable DVDs and Recordable CDs*<sup>24</sup>, the Commission concluded that in those Member States where special levies already in place on recordable material were low, the impact of anti-dumping duties would likely be passed on to the consumer and so those investigations were terminated. Instances such as these are encouraging and the FTA would like to see them become more frequent.

Unfortunately, the impact of TDI measures on consumers is not always apparent. Many importers/retailers faced with duties will not pass on this cost to the consumer – since the retail industry is intensely competitive – rather, they will “swallow” the extra expense by reducing working hours, closing retail outlets or cutting jobs. Therefore, a rise in consumer prices for products that are subjected to TDI duties is not always evident. Liaison with importer/retailer organisations such as the FTA could help to assess the impact.

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<sup>20</sup> (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

<sup>21</sup> *Ironing boards originating in China and Ukraine* – OJ [2006] L300/13

<sup>22</sup> Council Regulation (EC) 1567/97 – OJ [1997] L208/31

<sup>23</sup> Commission Decision 90/241/EEC – OJ [1990] L138/48

<sup>24</sup> Commission Decision 2006/713/EC – OJ [2006] 293/7 and Commission Decision 2006/753/EC – OJ [2006] L305/15

**Question 6:** *Should the EU include wider considerations in the Community interest assessments in trade defence investigations, such as coherence with other EU policies? With regard to development policy, should the EU make a formal distinction between least developed countries and developing countries in the application of trade defence measures?*

**Answer 6:** There is certain amount of hypocrisy involved when the EU, having provided third countries with aid programmes (some of which assist in the development of manufacturing industries) later punishes those countries by imposing TDI measures when their industries use their competitive advantage over EU companies by exporting low cost products to the EU. The manufacturing industry in these developing countries can be hit particularly hard by the introduction of TDI measures as demand may be reduced owing to the increase in price.

Article 15 of the WTO Agreement<sup>25</sup> states: “[I]t is recognized that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under this Agreement. Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members.”

The meaning of this Article was discussed in some depth at the WTO during 2002<sup>26</sup> when developing Member States put forward a number of suggestions. Recommendations that were adopted by the Committee on Anti-Dumping Practice<sup>27</sup> were price undertakings and lesser duty rules and developed country Members are now obliged to indicate how these remedies have been fulfilled on semi-annual reports.

However, the FTA believes that some of the other suggestions by developing Member States that were not adopted warrant further consideration. These included:

- raising the *de minimis* margin from 2% to 5%
- raising the negligible import volume (for individual countries) from 3% to 7% (the EU Regulation is already lacking in this respect having a level of just 1% - a matter that will be discussed later – c.f. Question 14).

Indonesia suggested that no measures should be imposed when imports from developing countries had declined during the 12 months following the investigation period (arguing that the initiation itself will have affected the developing country in question). Although some Member States (the EU included) cited many practical difficulties in implementing this, Indonesia claimed that the time between the investigation period and the date of implementation was sufficient to obtain the necessary data.

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<sup>25</sup> Agreement on Implementation of Article VI of the GATT 1994 (Anti-Dumping Agreement) – OJ [1994] L336/103

<sup>26</sup> WTO document G/ADP/11 – 18/12/02

<sup>27</sup> WTO document G/ADP/9 – 29/11/02

**Question 7:** *What kinds of economic analysis might help in making these assessments?*

**Answer 7:** In order to apply the first two suggestions listed under Answer 6 (an increased *de minimis* margin and an increased negligible volume), no additional analysis would be required. The information necessary will have already been collected in order to assess the dumping margin and import margin in order to relate it to the existing thresholds.

The third suggestion listed under Answer 6 (decline in imports following the investigation period) would require an additional step to that already taken - that is, in addition to calculating the level of imports during the investigation period as is current practise, a calculation of imports subsequent to this period would be required. However, the FTA believes that this should not be an insurmountable task.

Foreign Trade Association

**Question 8:** *Should it be explicitly foreseen that the level of proposed measures might be adjusted downwards following the results of the Community interest test in trade defence investigations? Should the EU explicitly allow for exclusion of certain product types under Community interest considerations? If so, what criteria should be applied?*

**Answer 8:** Article 9(4) of the Anti-Dumping Regulation does not appear to provide any scope for reducing the level of measures if they are to remove the “material injury” to the Community industry; “[T]he amount of the anti-dumping duty shall not exceed the margin of dumping established but it should be less than the margin **if such lesser duty would be adequate to remove the injury** to the Community industry” (emphasis added). Article 3 defines “injury” to mean “material injury” or the “threat of material injury” or “material retardation” of the Community industry. However, there is no clear explanation for what is meant by “material” - although Article 3(2) does provide for certain tests for its determination (volume, effect on prices, consequent impact).

Whilst it is clear from the above 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 in applying the principle that; “[M]easures, 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.” (emphasis added). That is to say that the measures need not be rejected outright but could be adjusted downward if justified by the Community interest test.

The FTA would argue that the same level of discretion equally applies to the possibility of product exclusion.

At the provisional anti-dumping duty stage of the recent *Leather Shoes*<sup>28</sup> case, the Commission concluded that; “[G]iven 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.”

This conclusion followed an announcement by the EU Trade Commissioner, Peter Mandelson when he proposed “[t]o exclude children’s shoes, so as to be sure that even small price increases are not passed on to poorer families”<sup>29</sup>

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 stage<sup>30</sup> (stating such reasons as; inability to separate such shoes from the product scope, reduced impact owing to the definitive duties being lower than provisional duties and lack of response from consumer organisations – effectively ignoring its earlier (correct) conclusion as to the impact on the consumer).

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<sup>28</sup> Commission Regulation (EC) 553/2006 – OJ [2006] L98/3

<sup>29</sup> Strasbourg, 14.03.2006

<sup>30</sup> Commission Regulation (EC) 1472/2006 – OJ [2006] L275/1

**Question 9:** *Should the EU seek to have WTO rules changed to allow Community interest tests to be used at the complaints stage in Anti-Dumping and Anti-Subsidy investigations? Are there other situations where the community interest test would be appropriate – for example before the initiation of expiry reviews?*

**Answer 9:** There is nothing within the WTO Agreement *per se* that would preclude the use of the Community interest test at the complaint stage. However, it is true that Article 5.5 of the WTO Anti-Dumping Agreement does state that a Member; “[s]hall avoid, **unless a decision has been made to initiate an investigation**, any publicizing of the application for the initiation of an investigation.” (emphasis added). The same text, essentially, appears under Article 5(5) of the EU Anti-Dumping Regulation.

This is relevant when one considers that for a truly comprehensive determination of Community interest, third parties such as retail and consumer organisations should be consulted. Naturally, such action would require legislative amendment. Whilst this would undoubtedly be difficult, the FTA encourages the Commission to pursue this initiative.

However, the above notwithstanding, there should be nothing to prevent the Commission doing its own, preliminary Community interest investigation during the 45 day period following the application of a complaint and the decision to initiate an investigation.

As for the application of the Community interest test before the initiation of an expiry review, it is already Commission practise to apply this test *during* the review although instances of termination on these grounds are rare<sup>31</sup>. As to whether this proviso may be applied *before* the initiation of an expiry review, the FTA feels that it could be a useful way to prevent the effective extension of measures that ensues owing to the measures remaining in force during the 15 month period that the review invariably takes. However, such practise is not expressly stated within the EU Regulation and the FTA should like to see this rectified.

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<sup>31</sup> (e.g.) Commission Decision (2001/230/EC) – OJ [2001] L84/36

**Question 10:** *Are viability assessments relevant in reaching decisions on using trade defence instruments? If so, what criteria should be used in assessing the viability of EU industries in trade defence investigations, e.g. level of production, employment, market share?*

**Answer 10:** In essence, many of these criteria are already assessed during an anti-dumping investigation to establish the impact on the Community industry of imposing (or not imposing) duties. Therefore one could argue that it would be small step to assessing the viability of EU industry.

However, the FTA believes that this type of assessment would be a step too far; trading conditions within today's global marketplace can fluctuate widely and the viability of an industry today may change tomorrow. Furthermore, it is questionable that the Commission, whilst being competent to assess certain aspects of the Community, is not the correct authority to assess its viability.

Foreign Trade Association

**Question 11:** *Should the EU consider consultations with exporting third countries after receiving complaints and prior to launching Anti-Dumping investigations?*

**Answer 11:** Article 5(5) of the EU Anti-Dumping Regulation, following the language within the WTO Anti-Dumping Agreement, says; “[a]fter receipt of a properly documented application and before proceeding to initiate an investigation, the authorities shall notify the government of the exporting Member concerned.” However, this does not seem to permit the consultation with the government concerned. Similarly, some third country agreements<sup>32</sup> contain provisions to enable discussions to take place in order to reach a mutually agreeable solution in anti-dumping investigations before definitive measure are imposed.

Such consultations would be welcomed by the authorities in those countries accused of dumping and it is quite possible that the need to undertake a long and often complex anti-dumping investigation could be avoided as a result of the consultations. At the very least, it would allow the authorities in the third country more time to adequately prepare for such an investigation.

However, as already discussed under Answer 9, the first part of Article 5.5 of the WTO Anti-Dumping Agreement (followed by the EU Regulation), prevents the publication of the filing of a complaint unless a decision has already been taken to initiate an investigation. Reading the two parts together, it would seem that full and proper consultations are not possible without legislative amendment.

In addition, Article 5(9) of the EU Regulation sets a 45 day deadline between the filing of a complaint and the announcement by the Commission that an investigation will be initiated. Arguably this is insufficient time to allow for proper discussion although, the above notwithstanding, it could at least permit preliminary discussions.

That said, and despite the inevitable difficulties that would be involved in changing the legislation to allow such consultations, the FTA encourages the Commission to pursue this initiative.

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<sup>32</sup> (e.g.) EU/Turkey Customs Union – OJ [1996] L35/1

**Question 12:** *Should the EU more specifically foresee the use of the Anti-Subsidy instrument in cases involving companies in transition economies that receive market economy treatment?*

**Answer 12:** Whilst the question relates specifically to Anti-Subsidy measures in relation to companies receiving MET, in Non-Market Economies (NMEs), much of the answer to the first part of Question 2 in this Green Paper is valid.

The Commission has, on a number of occasions, stated that the principle reason behind the recent imposition of anti-dumping duties on leather upper shoes from China and Vietnam<sup>33</sup> (both being NMEs) was one of subsidies<sup>34</sup>. It also seems that this occasion was not an isolated case, with “subsidies” quoted as a contributing reason for the imposition measures in several cases. That being so, although the EU Anti-Dumping Regulation permits as much, one has to question whether an Anti-Subsidy investigation would not be more appropriate.

That being the case, the FTA would have no objections to greater use of the Anti-Subsidy Regulation *in place of anti-dumping investigations* provided that certain concerns are met. For example, Article 8(5), which deals with the impact of the subsidized imports on the Community industry, allows for; “[t]he fact that an industry is still in the process of recovering from the effects of past subsidization or dumping”. This appears to contradict Article 15.1 and 15.5 of the WTO Agreement on Subsidies and Countervailing Measures as it allows for factors other than the subsidized imports (i.e. dumping) to be considered when calculating the injury. In addition, Article 3(1) states that; “[S]ubsidies shall be subject to countervailing measures only if they are specific...” (as defined in the rest of the article). However, it is evident that the Commission takes a very liberal interpretation of this specificity by, for example, determining that a particular scheme is “specific” even though the same scheme is available throughout the industry<sup>35</sup>. Finally, special attention must be paid to the Community Interest provisions contained within Article 31 insofar that the interests of Community importers, retailers and consumers are properly considered alongside those of Community Industry.

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<sup>33</sup> Council Regulation (EC) 1472/2006 – OJ [2006] L275/1

<sup>34</sup> (e.g.) Commission Press Release: 30/08/2006 and Peter Klein: Trade Defence Seminar, London – 05/02/07

<sup>35</sup> (e.g.) *Polyester Staple Fibres originating in Australia, Indonesia and Taiwan* – OJ [2000] L113/1

**Question 13:** *Should the EU review the ‘standing requirements’ for the definition of Community industry in Anti-Dumping and Anti-Subsidy cases? Is the level of support needed to endorse a complaint and thus launch an investigation appropriate? Should we review the possibility of excluding companies which themselves import or are related to exporters from standing assessments?*

**Answer 13:** Article 5(4) of the EU Anti-Dumping Regulation and Article 10(8) of the EU Anti-Subsidy Regulation state that an investigation shall not be initiated unless; “[t]he complaint has been made by or on behalf of the Community industry.” The article goes on to define what is meant by that; “[i]f 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; “[n]o 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.

Article 4(1) of the Anti-Dumping Regulation and Article 10(8) of the Anti-Subsidy Regulation define the “Community Industry” as being “[t]he 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).

One can argue that 25% is hardly a “major proportion”, however, unfortunately it is too often taken as a basis to initiate an investigation – such as in *Plastic sacks and bags*<sup>36</sup> where Commission figures (which are contested) state the Complainants represent 26.7% of Community production.

Whilst the text quoted above directly follows that within the corresponding WTO Agreements<sup>37</sup>, 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.

To that effect the FTA feels that the Commission should consider raising the minimum standing requirement to one that more accurately reflects a “major proportion” of the Community Industry and that the figure in question should be 40%. As described above, there is no need for legislative amendment and the change could be made *in practice*. However, if possible, legislative change would introduce more certainty.

When dealing with the question as to whether certain companies should be excluded from the standing requirements, one must consider that before any standing requirement can be established, “Community Industry” must first be established. This is important because exclusion can have a direct effect on the standing requirements; (e.g.) if companies who are not part of the Complaint are excluded from “Community Industry”, the total Community production figures are reduced, making it easier for the Complainants to reach the required 25% level. As referred to in Answer 4, this occurred in *Plastic Sacks and Bags*<sup>38</sup>, where BPI, a major Community producer was excluded from “Community Industry” on the grounds that it imported – despite the import level being less than 10%. [cont...]

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<sup>36</sup> Council Regulation (EC) 1425/2006 – OJ [2006] L270/4

<sup>37</sup> Agreement on Implementation of Article VI of the GATT 1994 (Anti-Dumping Agreement) – OJ [1994] L336/103 and Agreement on Subsidies and Countervailing Measures – OJ [1994] L336/156

<sup>38</sup> Council Regulation (EC) 1425/2006 – OJ [2006] L270/4

**[Answer 13 cont...]** With that in mind and with reference to “companies which themselves import”, the arguments within paragraphs 4-7 in Answer 4 are relevant here. As discussed, since the Commission has a level of discretion when deciding whether to exclude such companies, the FTA considers that if the level of imports is greater than 50% (as a percentage of turnover within the Community) then the company in question should be excluded from Community Industry. Naturally, in this instance, the company should also be excluded from the standing assessments. However, if the import level is below 50%, then it should be included in the standing assessments.

As to whether companies which “are related to exporters” should be excluded, one has to look at Article 4(2) of the Anti-Dumping Regulation and Article 9(2) of the Anti-Subsidy Regulation which define such companies as: “[o]nly if (a) one of them directly or indirectly controls the other; or (b) both of them are directly or indirectly controlled by a third person; or (c) together they directly or indirectly control a third person provided that there are grounds for believing or suspecting that the effect of the relationship is such as to cause the producer concerned to behave differently from non-related producers.”

It would seem therefore, that such producers cannot be included in Community Industry nor, subsequently the standing assessment. However, the Commission has a certain amount of discretion when considering these requirements and has stated that the mere fact a company is related to an exporter does not automatically exclude it<sup>39</sup>.

There have been several cases where such companies have been excluded from Community Industry: in *Colour Picture Tubes*<sup>40</sup>, two Community producers who were related to the exporters were excluded on the grounds that it could not be proven that their situation was not affected by that relationship; in *Atlantic Salmon*<sup>41</sup>, all Community producers who were related to exporters in Norway, the Faeroe Isles and Chile were excluded.

There have also been a number of occasions when such companies have not been excluded from Community Industry: in *Polyester Staple Fibres*<sup>42</sup> two companies that were related to exporters were not excluded owing to there being no evidence to prove that the companies in question benefited from this relationship. In *PET*<sup>43</sup> although one company did receive imports, it was not excluded as its related company had exported only insignificant quantities of PET to it.

Arguably, the examples in each of the above two paragraphs are contradictory since the former required proof before exclusion was determined, whilst the latter did not. So it is clear that some standardised approach is required when determining whether or not to exclude companies in these circumstances.

One should pay particular attention to the concluding sentence of Article 4(2) of the Anti-Dumping Regulation and Article 9(2) of the Anti-Subsidy Regulation, being; “[o]ne shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter.” This implies “ownership” of the former over the latter – normally provided for by having at least a 50% holding. The FTA believes that this should be the criteria for determining whether there is sufficient relationship to exclude a company from Community Industry.

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<sup>39</sup> (e.g.) *Synthetic staple fibres of polyester originating in Australia, Indonesia and Thailand* – OJ [2000] L175/10

<sup>40</sup> Council Regulation (EC) 837/2000 – OJ [2000] L102/15

<sup>41</sup> Council Regulation (EC) 930/2003 – OJ [2003] L133/1

<sup>42</sup> Council Regulation (EC) 1472/2000 – OJ [2000] L166/1

<sup>43</sup> Council Regulation (EC) 1742/2000 – OJ [2000] L199/48

**Question 14:** *Should the EU change the de-minimis thresholds (in percentage and absolute terms) that currently apply to dumping and injury in trade defence investigations?*

**Answer 14:** The EU 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 met to prevent the termination of an investigation.

Volume of imports is defined under Article 5(7) of the EU Regulation; “[P]roceedings 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”) and it is these thresholds that the EU is bound to apply should the EU threshold be exceeded, but not the WTO threshold – in such circumstances terminating the investigation.

However, similar to the argument relating to the “standing requirement” (see Answer 13), 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.

With that in mind, it is worth considering that in EU Competition policy a case of dominant market share is generally not even considered at levels below 40%. Consequently, the figures expressed in the EU Anti-Dumping legislation seem excessively low. The FTA would like to see these thresholds raised, to at least 25%. As described above, there is no need for legislative amendment and the change could be made *in practice*. However, if possible, legislative change would introduce more certainty.

Dumping margin is defined under Article 9(3) of the EU Regulation; “[t]here 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 with Article 5.8 of the WTO Agreement).

This level could be raised by several points without having a detrimental effect on the domestic industry. In addition, Article 2(11) of the EU Regulation 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 distort the margin upwards.

When dealing with cooperating exporters in Non-Market Economy countries (“NMEs”), the Commission will generally not calculate an individual dumping margin, on the grounds that being state controlled, “domestic market price” and “cost of production” cannot be regarded seriously. Article 2(7) of the EU 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” and therefore qualify for an individual dumping margin<sup>44</sup>. For the rest<sup>45</sup>, the normal value is calculated by comparison to prices/costs in an “analogue” country.

However, the FTA has several concerns regarding the assessment of MET and analogue countries which, as discussed above, has a direct effect on the calculation dumping margin. These concerns will be discussed in detail under Answer 32.

<sup>44</sup> Albania, Armenia, China, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Mongolia, Ukraine and Vietnam

<sup>45</sup> Azerbaijan, Belarus, North Korea Tajikistan, Turkmenistan, Uzbekistan

**Question 15:** *Should the Commission refine the approach on "start-up costs" for dumping calculations in Anti-Dumping investigations in order to give a longer "grace period" to exporters in start-up situations?*

**Answer 15:** The issue of "start-up costs" is dealt with under Article 2(5) of the EU Anti-Dumping Regulation; "[t]he average costs for the start-up phase shall be those applicable...at the end of such a phase, and shall be included at that level, for the period concerned, in the weighted average costs...The length of a start-up phase shall be determined in relation to the circumstances of the producer or exporter concerned, but shall not exceed an appropriate initial portion of the period for cost recovery." It goes on to say that if the start-up phase goes beyond that period will be taken into account only when submitted within three months of the initiation of the investigation and be submitted to verification visits.

In *Polyester Staple Fibres*<sup>46</sup> the start-up phase went beyond the period of investigation but as the relevant information was submitted within the above parameters, it was accepted that the average costs that were applicable were those at the end of that phase. However, this deadline is rather restrictive and it seems that invariably the claims are rejected<sup>47</sup>.

The FTA should like this period lengthened to six months.

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<sup>46</sup> Commission Regulation (EC) 124/2000 – OJ [2000] L16/30

<sup>47</sup> (e.g.) *Sacks and bags made of polyethylene or polypropylene originating in India, Indonesia and Thailand* – OJ [1999] L11/1

**Question 16:** Are there other changes to the dumping margin calculation methodology in Anti-Dumping investigations – for example existing rules on the "ordinary course of trade test" – that need to be considered?

**Answer 16:** When one considers that the basic premise of dumping, as laid out under Article 1(2) of the EU Anti-Dumping Regulation, is; "[A] product is to be considered as being dumped if its export price to the Community is less than a comparable price for the like product, **in the ordinary course of trade**, as established for the exporting country.", (emphasis added) and that, when establishing "normal value" to determine dumping under Article 2(1); "[T]he normal value shall normally be based on the prices paid or payable, **in the ordinary course of trade**, by independent customers in the exporting country.", (emphasis added) then one can immediately see that any criteria applied in a test to establish the "ordinary course of trade" is critical.

Unfortunately, the test (which in fact establishes sales not having been made in the ordinary course of trade)<sup>48</sup> is flawed, enabling higher dumping margins to be calculated and subsequently, higher dumping duties. It usually considers three aspects:

#### **Prices between associated parties**

Article 2(1) of the EU Regulation says; *[P]rices between parties which appear to be associated [...] may not be used to establish normal value unless it is determined that they are unaffected by the relationship.*"

The EU Regulation considers parties to be associated by virtue of the definition of related persons under Article 143 of Commission Regulation (EEC) 2454/93 (that lays down provisions for implementing the Community Customs Code) namely; *"[p]ersons shall be deemed to be related only if: (a) they are officers or directors of one another's businesses; (b) they are legally recognized partners in business; (c) they are employer and employee; (d) any person directly or indirectly owns, controls or holds 5% or more of the outstanding voting stock or shares of both of them; (e) one of them directly or indirectly controls the other; (f) both of them are directly or indirectly controlled by a third person; (g) together they directly or indirectly control a third person; or (h) they are members of the same family [...]. For the purposes of this title, persons who are associated in business with one another in that one is the sole agent, sole distributor or sole concessionaire, however described, of the other shall be deemed to be related only if they fall within the criteria of paragraph 1."*

Although not covered by the EU Regulation itself, but included in questionnaires to producers and exporters, a purchaser is considered to be associated (or "related") if: *"[i]t holds directly or indirectly more than 1% of your capital or otherwise controls your company or if your company holds more than 5% of its share capital or you otherwise control it"*

In essence, this means that an association can be established by a share holding as little as more than 1% and that any sales between the two parties can be excluded from the calculation to determine normal value. The FTA believes that this figure is too low and allows for too great an opportunity for the exclusion of sales from the normal value determination.

In addition, we also consider the discretion allowed to reject sales between two parties that only appear to be associated is too great.

[cont...]

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<sup>48</sup> Neither the WTO Agreement or the EU Regulation actually define what is meant by "in the ordinary course of trade" although in *US - Hot-Rolled Steel* (WT/DS184/AB/R, 24 July 2001) the WTO Appellate Body confirmed that it was content with the US definition; "[g]enerally, sales are in the ordinary course of trade if made under conditions and practices that, for a reasonable period of time prior to the date of sale of the subject merchandise, have been normal for sales of the foreign like product."

## Answer 16 [cont...]

### Compensatory arrangements

Article 2(1) of the EU Regulation also allows the Commission to reject sales between parties that; “[a]ppear [...] to have a compensatory arrangement with each other...” However, the term is not defined within the Regulation, and the Commission has only used the argument on a few occasions. When doing so, the parties are treated the same as those who have an association.

Despite the infrequency of its use by the Commission, the FTA is unhappy with the discretion allowed by the vague term; “appear to have...” and should like this corrected.

### Below cost sales

Article 2(4) allows that; “[S]ales of the like product in the domestic market of the exporting country, or export sales to a third country, at prices below unit production costs (fixed and variable) [...] may be treated as not being in the ordinary course of trade by reason of price, and may be disregarded in determining normal value only if it is determined that such sales are made within an extended period in substantial quantities...” It goes on to define “substantial quantities” as being below cost sales of not less than 20% of the sales used to construct normal value or when the weighted average selling price is below the weighted average unit cost<sup>49</sup>. This follows the text seen in Article 2.2.1 of the WTO Anti-Dumping Agreement.

In essence, this means that sales of the product that are below cost can be rejected, resulting in an inappropriately higher normal value. When sales equal to or greater than the cost of production account for 80% or more of total domestic sales, the Commission will usually include the below cost sales within the calculations to assess normal value when applying the weighted average of all domestic sales<sup>50</sup>. Only those domestic sales that are profitable will be considered when the percentage of sales equal to or greater than the cost of production is less than 80% but greater than 10%<sup>51</sup>. Finally, the Commission will construct the normal volume if domestic sales that are equal to or greater than the cost of production represent less than 10% of all domestic sales (determining that there are no domestic sales in the ordinary course of trade).

However, the Commission applies these criteria rather strictly, neglecting to consider other aspects that may affect domestic prices that may not be related to dumping. In addition, arguably the 20% barrier, despite being endorsed by the WTO, is too low.

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<sup>49</sup> The Court of First Instance has determined that only one of these criteria need be met: Joined Cases T-33/98 and 34/98, *Petrobub SA and Republica SA v Council*, 1999 E.C.R. II-3837

<sup>50</sup> (e.g.) *Sulphanilic acid originating in India* – OJ [2002] L87/28

<sup>51</sup> (e.g.) *Urea and ammonium nitrate solutions originating in Poland* – OJ [2002] L279/3

**Question 17:** *Should the EU refine the provisions on the treatment of new exporters in Anti-Dumping and Anti-Subsidy investigations? Should the EU introduce the possibility of dealing with newcomers that start to operate during the investigation of the main case more expeditiously?*

**Answer 17:** Article 11(4) of the EU Anti-Dumping Regulation provides for the situation concerning “new exporters”. In order to obtain an individual dumping rate, a company must prove: that it did not export to the EU during the original investigation period; that it is not related to any exporters who are subject to the original measures; that it has actually exported to the EU following the original investigation (a single shipment may suffice)<sup>52</sup> or has entered into a contract to export<sup>53</sup>. Any measures that are in force will be repealed and exports will be registered so that should measures be imposed, they will apply retroactively from the date the review was initiated.

Article 20 of the EU Anti-Subsidy Regulation is less detailed in that it does not require that the exporter has not exported during the investigation period or that it is not related to any exporter subject to measures. However, it would seem that the same requirements that exist in the Anti-Dumping Regulation are applicable<sup>54</sup>. What it does not require is that measures are repealed or that exports are registered (in order to allow retroactivity as above).

Following the amendments implemented under Council Regulation 461/2005, as of 20 March 2006, Article 11(5) of the Anti-Dumping Regulation and Article 22(1) of the Anti-Subsidy Regulation state that any review must be completed within a deadline of nine months.

Whilst the FTA appreciates the definitive deadline of nine months is an improvement on the previous practice, considering the level of detail required to be provided by the exporter in question and the fact that the main investigation has already been completed, it is considered that a new exporter review could be completed within six months.

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<sup>52</sup> (e.g.) *Sacks and bags made of polyethylene or polypropylene originating in India* – OJ [2000] L316/67

<sup>53</sup> (e.g.) Commission Decision (2003/119/EC) re. *Farmed Atlantic salmon originating in Norway* – OJ [2003] L47/46

<sup>54</sup> (e.g.) *Stainless steel bars imported from India* – OJ [1999] L255/8

**Question 18:** *Is evidence of restructuring by an EU industry in any way relevant in Anti-Dumping and Anti-Subsidy investigations? If yes, in what way, and at what stage?*

**Answer 18:** In the current global marketplace, many EU companies (and others in third countries) have restructured in or order to be more competitive. This has even included moving production facilities outside the EU. Some have cited lower production costs in Eastern Europe as a reason for doing so.

However, this restructuring cannot be used as evidence that dumping/subsidization is occurring (i.e. that those companies are being forced to restructure) as the question suggests.

Should EU companies decide to restructure in reaction to what they believe is dumping or subsidization they should use the relevant legislation to seek redress. Upon doing so, the Anti-Dumping and Anti-Subsidy Regulations should not be amended to take account of such restructuring when determining if dumping or subsidization is occurring; this determination should be based upon facts and figures, not the reaction of EU industry.

Foreign Trade Association

**Question 19:** *What are the particular obstacles for SMEs to participate in trade defence investigations and how could they be addressed?*

**Answer 19:** SMEs essentially face the same obstacles in participating in TDI investigations as large companies except that, by virtue of them being smaller, they are less able to cope with those problems (they have fewer people, less access to the relevant information, less expertise and less money to pay for legal expertise). This is true for SMEs from the industry but also from the importing sector.

Being a member of a trade association such as the FTA is one way of alleviating these problems, but that is not always an option and it could be argued that the Commission could do more to help.

The problems facing SMEs are certainly recognised by the WTO; Article 6.13 of the WTO Anti-Dumping Agreement states; “[T]he 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.

One area that is particularly difficult for SMEs is the work required when responding to questionnaires and the time limits imposed on such an exercise; these could be simplified and the deadlines extended.

Other obstacles that apply to any participant in a TDI investigation – but in particular SMEs – have already been discussed in this Green Paper and others will be discussed in more detail under Question 32.

Foreign Trade Association

**Question 20:** *Bearing in mind that any shortening of deadlines could impose limitations on the conduct and transparency of investigations, should the EU consider shortening the deadlines in Anti-Dumping and Anti-Subsidy investigations within which it must decide whether or not to impose provisional measures? Should these deadlines be made more flexible?*

**Answer 20:** Far from a shortening of these deadlines the FTA considers that the current deadlines are too short and should be extended. This would allow importers of consumer products, particularly textiles and footwear where buying cycles are often lengthy, more time to react to the procedure.

Article 7(1) of the EU Anti-Dumping Regulation and Article 12(1) of the EU Anti-Subsidy Regulation both say that provisional duties; “[s]hall be imposed no earlier than 60 days from the initiation of the proceedings but not later than nine months from the initiation of the proceedings.” However, the WTO Agreements do not contain any deadline for provisional measures, rather they offer a deadline for the entire investigation; “[I]nvestigations shall, except in special circumstances, be concluded within one year, and in no case more than 18 months, after their initiation.”

Therefore, there is scope to make the deadline longer.

In addition to the specific issue of provisional duties implementation, there are other deadlines associated with Anti-Dumping and Anti-Subsidy investigations such as; the filing of information and reactions to decisions. These shall be dealt with under Answer 32.

Foreign Trade Association

**Question 21:** *Should the EU make greater use of more flexible measures in Anti-Dumping and Anti-Subsidy investigations?*

**Answer 21:** As has already been discussed, the Commission has a certain amount of discretion when it comes to applying the Anti-Dumping and Anti-Subsidy Regulations.

However, it is important to note that no amount of discretion or “flexibility” can take the place of legislation that is already sufficient to account for the suggestions detailed in the answers to the questions within this Green Paper.

Whilst the FTA would appreciate any use of the discretion afforded to the Commission when considering submissions and arguments from interested parties, in particular those from SMEs, we would much rather the current legislation and implementing regulations be amended appropriately.

Foreign Trade Association

**Question 22:** Do EU measures in Anti-Dumping and Anti-Subsidy investigations need to be adapted so as to take better account of products with a long order or shipment time? If yes, how?

**Answer 22:** As discussed under Question 32, EU Anti-Dumping and Anti-Subsidy measures apply the day following their announcement in the Official Journal, giving no warning to importers, regardless of the order or shipping time.

The problem is particularly acute for mail order importers where goods need to be ordered (and contracts signed) up to 12 months before importation<sup>55</sup>. In this respect, it is possible that an importer could place an order before the initiation of an investigation is published and yet be subject to anti-dumping or anti-subsidy duties when his goods are imported. Even allowing for a much shorter order cycle, it is quite likely that he will be subject to provisional measures.

A similar problem is faced by importers whose goods are *en route* to the EU when the measures are imposed. In such cases, the importer has already paid for the goods, and will have accounted for the expected, normal customs duty due when the goods arrive in the EU, within his costs. What he will not have accounted for of course is the additional anti-dumping duties. This can have a serious impact on that importer, particularly if he has a subsequent contract for an agreed price with his subsequent buyers.

With this in mind, the FTA believes that, with respect to those importers with long order or shipping times, the Commission should give special consideration to the following:

- Goods in transit should not be subject to TDI measures if said measures were imposed after the goods were placed in transit.
- Orders placed prior to the publication in the Official Journal of a TDI investigation should not be subject to any subsequent measures.

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<sup>55</sup> It is worthwhile at this point referring to the so-called “Bra Wars” of 2005 which, though not an anti-dumping issue, illustrates the conflict between the sudden implementation of punitive measures, and goods with long order cycles. EU importers who knew quotas on Chinese textiles would expire at the end of 2004 (and legitimately ordered “above quota” amounts with that expiry in mind) suddenly found themselves exposed to new quotas in June 2006. With no possibility of reacting to the new measures and with quota levels set too low, by September there were 83 million items blocked at EU ports (it was only after intense lobbying by the FTA and others that the goods were released).

**Question 23:** *Should it be made explicitly possible for the duration of definitive measures in Anti-Dumping and Anti-Subsidy investigations to be shorter than 5 years? If yes, in what type of situations would a shorter duration of measures be justified?*

**Answer 23:** Article 11(1) of the EU Anti-Dumping Regulation and Article 18(1) say that definitive measures; “[s]hall remain in force only as long as, and to the extent that, it is necessary to counteract the (dumping which is / countervailing subsidies which are) causing injury”.

That notwithstanding, Article 11(2) and Article 18(1) respectively, then set out what appears to be a minimum period of five years; “[a] definitive anti-dumping/countervailing measure shall expire five years from its imposition”.

However, Article 11.3 of the WTO Anti-Dumping Agreement and Article 21.3 of the WTO Anti-Subsidy Agreement do not specify an absolute minimum period saying “[a]ny definitive anti-dumping/countervailing duty shall be terminated on a date not later than five years from its imposition”.

The FTA believes that these deadlines are outdated, particularly when they concern consumer products. Innovation is changing technology at a pace much more rapidly than when the above provisions were originally set up in 1984 and the life-cycle of consumer products is getting shorter and shorter. In effect, goods accused of being dumped are, owing to the normal 15 month period of investigation before definitive duties are implemented, more than 6 years old by the time those duties expire and are often by that time outmoded.

In the overwhelming majority of cases, the full five year term is imposed, both when first imposing measures and following a positive conclusion to an expiry review. However, the Commission has imposed measures for shorter periods: in *Photocopiers*<sup>56</sup> a 2 year term was imposed; in *Electronic Weighing Scales* and *Magnetic Disks*<sup>57</sup> a four year term; and more recently in *Leather Shoes*<sup>58</sup> a two year term was imposed.

In addition, in 1998, the Court of First Instance 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 imposed<sup>59</sup>.

The FTA believes a more reasonable period for definitive duties would be 3 years. Whilst this is permitted in practice - by virtue of the above ruling and with reference to the appropriate WTO Agreements, thereby removing the absolute necessity for legislative amendment - it would introduce greater certainty if this 3 year term was introduced to the EU Regulations. Of course, this period should be a maximum period, and the discretion to reduce this term, should the circumstances be appropriate, should remain.

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<sup>56</sup> Council Regulation (EC) 2380/95 – OJ [1995] L244/1

<sup>57</sup> Council Regulation (EC) 461/2001 – OJ [2001] L468/24 and Council Regulation (EC) 312/2002– OJ [2002] L50/24

<sup>58</sup> Council Regulation (EC) 1472/2006 – OJ [2006] L275/1

<sup>59</sup> Case T-232/95, *Committee of European Copier Mfrs. (Cecom) v. Council*, 1998 E.C.R. II-2679

**Question 24:** *Should duties collected beyond the 5-year duration of the measures in Anti-Dumping and Anti-Subsidy investigations be reimbursed if the expiry review concludes that measures are not to be continued?*

**Answer 24:** Articles 11(2) and 18(1) respectively confirm that during an expiry review; “[t]he measure[s] shall remain in force pending the outcome of such review”. Article 11(5) of the EU Anti-Dumping Regulation and Article 22(1) of the EU Anti-Subsidy Regulation state that expiry reviews “[s]hall in all cases be concluded within 15 months of the date of initiation”. This differs from the WTO Agreement which, under Article 11.4 says; “[a]ny such review...shall normally be concluded **within 12 months** of the date of initiation of the review.” (emphasis added).

Evidence seems to show that in most cases the Commission requires the full 15 months to complete an expiry review. Since the measures remain in force during this period (and here it is interesting to note that the WTO Agreement (Article 11.3) says only; “[T]he duty **may** remain in force pending the outcome of such a review.” (emphasis added)) upon conclusion, those measures will have been in place for 6 years and 3 months.

It would seem logical that, should an expiry review determine that the measures should *not* go beyond the original five year term, reimbursement of any duties paid during the period of the expiry review (i.e. 15 months beyond the original five year term) should be possible.

However, under these circumstances the EU Anti-Dumping (and Anti-Subsidy) Regulation does not provide for reimbursement. This is odd when one considers that reimbursement is possible when definitive duties are set at a level that is lower than provisional duties as occurred in *Leather Shoes*<sup>60</sup> by the local customs authorities via the Community Customs Code<sup>61</sup> - although as *Bed Linen*<sup>62</sup> shows, it would appear that the same is not true when definitive duties are recalculated to a lower level.

This is clearly an example of a failing of the current Regulations that must be corrected.

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<sup>60</sup> Council Regulation (EC) 1472/2006 – OJ [2006] L275/1

<sup>61</sup> Council Regulation (EEC) 2913/93 (as amended) – OJ [1993] L302/1

<sup>62</sup> Council Regulation (EC) 397/2004 – OJ [2004] L66/1 and Council Regulation 695/2006 – OJ [2006] L121/14

**Question 25:** *Should expiry reviews in Anti-Dumping and Anti-Subsidy investigations be timed to end on the fifth anniversary of measures rather than to start on that date?*

**Answer 25:** As described above, the conduction of an expiry review invariably results in the original Complainant obtaining an extra 15 months of protection (in effect, it is as though the definitive measures were set for 6 years and 3 months, rather than 5 years). This leaves the privilege of being able to file an application for an expiry review open to abuse.

Should expiry reviews be timed to conclude with the expiry date of the definitive measures (that being not necessarily the *fifth* anniversary – see Answer 23) then the possibility of an unjust extension to the period of measures would be removed. This is a proposal that requires closer examination.

Article 11(2) of the EU Anti-Dumping Regulation and Article 18(4) of the EU Anti-Subsidy Regulation only restrict the application for an expiry review to; “[n]o later than three months before the end of the five year period”. This by itself does not prevent an application being filed or indeed, a review being *initiated* prior to this point (i.e. 15 months before the end of normal expiry) but it does allow for an application to be filed at a very late stage.

In addition, Article 11(3) of the WTO Anti-Dumping Agreement and Article 21(3) of the WTO Anti-Subsidy Agreement say a review may be initiated following a substantiated request; “[w]ithin a reasonable period of time prior to that date” [being the date of normal expiry]. One could argue that the “three months” period permitted under the EU Regulations is not a “reasonable period” but that notwithstanding, it does mean that should the Commission decide to amend the EU Regulations so that expiry reviews are concluded as described above, it would not contravene WTO rules.

Therefore, although technically, no legislative change is required, the FTA believes the EU Anti-Dumping (and Anti-Subsidy) Regulation should be expressly amended so that expiry reviews cannot be initiated at a date later than 15 months prior to normal expiry<sup>63</sup>.

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<sup>63</sup> This will require additional amendment of Article 11(2) of the Anti-Dumping Regulation and 18(4) of the Anti-Subsidy Regulation to the effect that notice of impending expiry shall be published in the Official Journal in the *penultimate* year of the period of application.

**Question 26:** Should the EU increase thresholds for expiry reviews in Anti-Dumping and Anti-Subsidy investigations? For example should the EU consider introducing the "threat of injury"-standard instead of the "likelihood of recurrence"?

**Answer 26:** Article 11(2) of the EU Anti-Dumping Regulation and 18(2) of the EU Anti-Subsidy Regulation say that an expiry review shall be initiated where there is sufficient evidence that; "[t]he expiry of the measures would be likely to result in a continuation or recurrence of dumping/subsidization and injury". However, Article 3(9) and Article 8(9) of the same Regulations say; "[A] determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping/subsidy would cause injury must be clearly foreseen and imminent."

Therefore, it can clearly be seen that the level of proof required when deciding whether measures should be continued is significantly lower than that when deciding whether measures should be adopted. This seems to have been recognised by the Court of First Instance which has said; "[I]t is also clear that the mere possibility that injury might continue or recur is insufficient to justify retaining a measure; that is dependent on the likelihood of continuation or recurrence of injury being established."<sup>64</sup>

The Commission considers a number of factors as indications that a recurrence or continuation is likely, such as: a decline in imports following the imposition of measures; the imposition of measures against imports of the same product from the same country by a third country<sup>65</sup>; the existence of unused capacity in the exporting country<sup>66</sup> and the possibility for the capacity to be increased in a short space of time<sup>67</sup>; a small domestic market<sup>68</sup>. Arguably, these are not suitable arguments for the continuation of measures since they only provide circumstantial evidence.

The FTA believes that assessing the likelihood of such a situation is far too subjective a test to determine whether anti-dumping/anti-subsidy measures should continue. It can also lead to unsubstantiated reviews being conducted that unjustly prolong the term of the original measures.

Instead, the same criteria that applied during the original investigation should be applied during an expiry review (i.e. coterminous with the requirements seen under Articles 3(9) and 8(9) of the EU Regulations).

At the very least imminent injury should be considered, together with an assessment as to how the original complainants - or the Community Industry they represent - have adapted during the term of the measures since, it could be argued, that the time should have been used to improve their competitiveness with respect to competing industries in third countries.

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<sup>64</sup> Case T-188/99, *Euroalliages v. Commission*, 2001 E.C.R. II-1757

<sup>65</sup> (e.g.) *Coumarin originating in China* – OJ [2002] L123/1

<sup>66</sup> (e.g.) *Gas-fuelled, non-refillable pocket flint lighters originating in China* – OJ [2001] L248/1

<sup>67</sup> (e.g.) *Television camera systems originating in Japan* – OJ [2000] L244/38

<sup>68</sup> (e.g.) *Colour television receivers originating in China, Korea, Malaysia and Thailand* – OJ [2002] L231/1

**Question 27:** *The Commission is going to create the position of a hearing officer for trade defence investigations - what precise functions should such a person carry out?*

**Answer 27:** Article 6(5) of the EU Anti-Dumping Regulation allows interested parties to be heard by the Commission with respect to whether they will be affected by the imposition of measures. In addition, Article 21(3) permits interested parties to be heard in order to assess whether the imposition of measures is in the Community Interest. Articles 11(1) and 31(3) of the EU Anti-Subsidy Regulation provide the same opportunity respectively.

However, neither of the Regulations set out a specific or formal procedure (which leads to a level of uncertainty) and such hearings are conducted opposite Commission officials intimately associated with the case in question (a factor which has led to accusations of bias). This lack of formality has been recognised by the European Court of Justice which said; “[W]ith regard to the right of a fair hearing, any action taken by the Community institutions must be all the more scrupulous in view of the fact that, as they stand at present, the rules at present do not provide all the procedural guarantees for the protection of the individual...”<sup>69</sup>

Therefore, the FTA welcomes this proposal as a positive step toward improved transparency within TDI investigations. Arguably, there is a need for an “importers only” Hearing Officer – as opposed to one who would serve both importers and parties supporting the complaint. However, in the spirit of equality, the FTA feels this would not be appropriate. In addition, in order to avoid any accusations of prejudice, and to ensure neutrality, the Hearing Officer should be independent from the ongoing investigation and the team conducting that investigation.

As to what precise functions the Hearing Officer should carry out, the Commission may like to consider the following, non-exhaustive, suggestions: meeting with individual importers and retailers to discuss the impact of measures on their business; providing greater access to files; hearing arguments regarding the granting of Market Economy Treatment to individual companies in NMEs; hearing arguments regarding the allocation of analogue countries; to act as an “information point” concerning the progress of an investigation.

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<sup>69</sup> Case C-49/88, *Al-Jubail Fertilizer Co. (Samad) and Saudi Arabian Fertilizer Co. (Safco) v. Council*, 1991 E.C.R. I-3187

**Question 28:** *Should the Commission conduct public hearings in Anti-Dumping investigations for decisions to award country-wide Market Economy Status to a country?*

**Answer 28:** The Market Economy Status of a country is determined by considerations much wider than those covered by a TDI investigation. Therefore, there seems to be no call for such a practice.

Foreign Trade Association

**Question 29:** *Should there be greater openness regarding the working of the Anti-Dumping Committee, e.g. publication of its agenda and/or the minutes of its meetings?*

**Answer 29:** The affairs of the Anti-Dumping Committee are shrouded in secrecy; dates and agendas of meetings, the voting results and minutes, the proposals discussed by the Committee...none of these are published.

This makes it very difficult for importers to exercise their right to lobby Member States. At the provisional stage, owing to the fact that proposals are released so close to the meeting, the Member States themselves have little time to make an assessment, let alone discuss it with their importers. Following the implementation of provisional duties, as the voting decisions of the individual Member States are not published, it is difficult to lobby appropriately. Of course both of these are also dependent on knowing who to lobby – another factor not made public.

The EU 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 – particularly when one considers that often the information is obtained through unofficial means, which can lead to inaccuracies.

Therefore, the FTA welcomes this proposal as a further step toward greater transparency in TDI proceedings.

Foreign Trade Association

**Question 30:** *Would it be desirable for the non-confidential files in trade defence investigations to be accessible via the internet? Would intermediary solutions be more appropriate – for example the publication of a file index?*

**Answer 30:** Whilst the FTA supports such a proposal as another example of increased transparency in TDI proceedings, it is one that carries little weight unless the requirements for what may be removed from such files on the grounds of confidentiality are strengthened. Currently, non-confidential versions of complaints can be stripped of all but the most minimal of detail.

This matter will be discussed in greater detail under Question 32.

Foreign Trade Association

**Question 31:** *Should current institutional arrangements for adopting Anti-Dumping, Anti-Subsidy and Safeguard measures be maintained? Are there ways to improve the way those decisions are taken?*

**Answer 31:** There are two main aspects associated with the way in which decisions are taken that require improvement.

Firstly, there is the matter of when Member States receive proposals.

Once the Commission has completed either its preliminary or definitive investigation and has decided whether or not to implement provisional or definitive duties, Member States are permitted only 10 days in which to see the proposal before being required to vote on it. This is insufficient time to examine what is often a highly complex and lengthy document.

The FTA should like to see the distribution of provisional and definitive proposals to Member States at an earlier stage in the proceedings.

Secondly, there is the question of the voting system by Member States at Council.

In March 1994, the existing Anti-Dumping dating from 1988 was amended with respect to the way in which decisions were taken at Council. Prior to this change, decisions were under the Qualified Majority Vote (QMV) system. The amendments introduced 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 from QMV to a simple majority vote system was, by itself, not so controversial; many other Council decisions are taken under the same system, as well as QMV. 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.

One only has to look at the Commission proposal to the Council at the time<sup>70</sup> to see that the sole purpose of this initiative was to ensure that fewer Commission proposals are rejected: “[T]he 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 “[U]nder 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...”

The FTA believes that this system is undemocratic and can result in absurd situations such as that seen at the provisional stage in *Leather Shoes*<sup>71</sup> where only 3 Member States voted in favour, 10 voted against and 12 abstained. The FTA has protested this rule change since it was first proposed and we take this opportunity to do so again.

In addition, there is the requirement placed on Member States who reject a Commission proposal to provide clear reasons for this objection<sup>72</sup>. The FTA feels this is unnecessarily bureaucratic and we would like to see it removed.

<sup>70</sup> Commission Proposal COM(2003) 380 final, 2003/0141 (ACC)

<sup>71</sup> Commission Regulation (EC) 553/2006 – OJ [2006] L98/3

<sup>72</sup> Case C-76/01 P, *Eurocoton and others v. Council*, 2003 E.C.R. II-3727

**Question 32:** *Is there any other aspect of the EU's trade defence instruments that you would like to see addressed?*

**Answer 32:** In July 2006, the FTA was invited by EU Trade Commissioner, Peter Mandelson, to an Experts Meeting to discuss a possible reform of the current EU TDI legislation. Unfortunately, this Green Paper fails to address several issues included in the Paper we presented at that meeting. Therefore, we welcome the opportunity to re-address those issues.

### **Time limits to reply to complaints**

Since, as discussed above, the filing of a complaint is not published until the announcement that an investigation has been initiated, importers have no warning of the possible imposition of measures that may adversely affect their business.

Following publication of the initiation of an investigation, interested parties have a mere 15 days in which to request a questionnaire. To make themselves known, to apply to be heard or to submit questionnaire replies, a request must be received within 40 days from publication. Finally, to comment on the appropriateness of the chosen "analogue country" in cases involving non-market economies, requests must be received within just 10 days.

These deadlines are extremely tight, especially regarding the submission of questionnaires as these are particularly complex; for SMEs, these often prove too burdensome to reply to within the required period considering they often lack the legal expertise, time and resources available to larger companies. The Commission is very strict with these deadlines and will reject any submissions received after the deadline.<sup>73</sup>

These deadlines are not specified in the Regulations rather, Article 5(10) of the Anti-Dumping Regulation and Article 10(14) of the Anti-Subsidy Regulation says; "[T]he notice of initiation of the proceedings shall [...] state the periods within which interested parties may make themselves known, present their views in writing and submit information if such views and information are to be taken into account during the investigation; it shall also state the period within which interested parties may apply to be heard by the Commission..."

However, Article 6.1 of the WTO Anti-Dumping Agreement and Article 12(1) of the WTO Anti-Subsidy Agreement state; "[A]ll interested parties in an anti-dumping/countervailing investigation shall be given notice of the information which the authorities require and **ample opportunity** to present in writing all evidence which they consider relevant in respect of the investigation [...]" (emphasis added).

Whilst the WTO, has decided Member States are not required to set time limits for the submission of information<sup>74</sup>, one can argue that the time limits the Commission sets in practice do not constitute "ample opportunity". The FTA should like the time limits set for interested parties to: make themselves known; request a questionnaire; apply to be heard and to comment on the analogue country, to be extended to 30 days.

The only specificity regarding time limits comes under Articles 6(2) and 11(2) respectively which state that "[P]arties receiving questionnaires [...] shall be given at least 30 days to reply." This text follows that seen in the relevant WTO Agreements. Although an extension to this 30 day period is provided for in the EU Regulations (as demanded by the WTO Agreements), it would seem that the requirements for obtaining such an extension are very strict and it is infrequently granted. The FTA would like to see the Commission relax its policy in this area, particularly in respect to SMEs, and in addition simplify the questionnaires. [cont...]

<sup>73</sup> (e.g.) *Ammonium nitrate originating in Russia* – OJ [2002] L102/1

<sup>74</sup> WTO document WT/DS60/R, 19/06/98: Panel Report on *Guatemala – Cement II*

## Answer 32 [cont...]

### Publication of complaints

Article 5(5) of the Anti-Dumping Regulation and Article 10(9) of the Anti-Subsidy Regulation state; “[a]uthorities 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 the WTO Agreements (Articles 5.5 and 11.5 respectively)). The practical result of this is that notification that a complaint has been filed – i.e. the initiation of an investigation – is only published the day before the investigation is initiated.

However, as detailed below, the time limits granted for replying to complaints are very restrictive. Earlier disclosure of a complaint would help to rectify this situation. Since, by the time Member States are provided with a copy of the complaint a decision has already been taken to initiate an investigation, the FTA feels it would appropriate to provide a copy of the complaint at this stage.

However, since Member States frequently complain that the time allowed by the Commission for them to consider a complaint (often as little as 5 days) is too short, the Commission should look to furnishing them, and thereby interested parties, with complaints at an earlier date. If one considers that most complaints have already passed through a pre-check stage (as criticized above) and assuming that this practice is continued, earlier disclosure should be possible.

### Non-confidential summaries of complaints

Article 5(11) of the Anti-Dumping Regulation and Article 10(15) of the Anti-Subsidy Regulation state the Commission (whilst giving due regard to the protection of confidential material) “[s]hall make [the full text of the written complaint] available upon request to other interested parties involved”

Article 19(2) of the Anti-Dumping Regulation and Article 29(2) of the Anti-Subsidy Regulation place an obligation on a Complainant that has filed a complaint containing information that is considered to be confidential to; “[f]urnish non-confidential summaries thereof.” Furthermore, the same articles also state; “[T]hose summaries shall be of **sufficient detail** to permit a reasonable understanding of the substance of the information submitted in confidence.” (emphasis added) – this text follows that seen in the WTO Anti-Dumping and Anti-Subsidy Agreements (Articles 6.5.1 and 12.4.1 respectively). Under such circumstances, it is this version of the complaint that is made available to interested parties.

The WTO has determined that; “[t]he purpose of the non-confidential summaries [...] is to inform the interested parties so as to enable them to defend their interests”.<sup>75</sup> However, the information contained in these complaints is often woefully inadequate for the purpose of defending a case. In *Ironing Boards*<sup>76</sup>, 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 Complainant from the eventual notice of initiation of investigation; Article 5(10) of the Anti-Dumping Regulation and 10(14) of the Anti-Subsidy Regulation, do not specifically state that this information need be included. Whilst this reflects the provisions within Article 12.1.1 of the WTO Anti-Dumping Agreement and Article 22.2 of the WTO Anti-Subsidy Agreement the FTA believes this is unduly restrictive. [cont...]

<sup>75</sup> WTO document WT/DS189/R, 28/09/01: Panel Report on *Argentina – Ceramic Tiles*

<sup>76</sup> Commission Regulation (EC) 1620/2006 – OJ [2006] L300/13

## Answer 32 [cont...]

### Access to confidential files

Full access to files, including confidential material, should be introduced. This is permitted in the United States where the APO system (Administrative Protective Order) provides interested parties, more specifically their legal representatives, with access to the files. 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.

### Market Economy Treatment

When dealing with cooperating exporters in Non-Market Economy countries ("NMEs"), the Commission will generally not calculate an individual dumping margin, on the grounds that being state controlled, "domestic market price" and "cost of production" cannot be regarded seriously. Article 2(7) of the EU 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" and therefore qualify for an individual dumping margin<sup>77</sup>. For the rest<sup>78</sup>, the normal value is calculated by comparison to prices/costs in an "analogue" country. 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 has several concerns regarding the assignment of MET – or more especially, the arguments given to refuse such. In *Leather Shoes*, all twelve of the Chinese companies chosen for sampling were refused MET at the provisional stage of the investigation (one company later received MET at the definitive stage)<sup>79</sup>. Several of those were refused MET on grounds of what the Commission cited as "significant State interference" based on corporate charters or business licenses that stated the company would only export, despite the fact that those companies were acting under WTO consistent Chinese law that enabled them to decide the level of export and import.

In addition, there appears to be a lack of consistency in what the Commission determines to be "state interference". In *Urea*<sup>80</sup> the setting of a minimum export price was not considered a barrier to assigning MET. However, in *Bicycles*<sup>81</sup> the existence of export quotas and a minimum export price was classed as state interference and so MET was denied.

There is also concern over allegations that applications for MET are rejected for minor faults on submission forms which the restrictive deadlines for completion make difficult to correct.

Finally, if one compares the EU system with that of the United States, some interesting differences are seen. For example, the US system does not require that companies be subject to bankruptcy and property laws (that grant legal certainty and stability for the company), nor does it require that distortions to production costs and the general financial situation are not carried over from the former NME system. Finally, the US system considers the extent to which companies permit free bargaining between the employer and the worker, unlike the EU.

The FTA feels that the EU system should be applied more consistently and could apply some aspects of the US system. [cont...]

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<sup>77</sup> Albania, Armenia, China, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Mongolia, Ukraine and Vietnam

<sup>78</sup> Azerbaijan, Belarus, North Korea Tajikistan, Turkmenistan, Uzbekistan

<sup>79</sup> Commission Regulation (EC) 553/2006 – OJ [2006] L98/3 and Council Regulation (EC) 1472/2006 – OJ [2006] L275/1

<sup>80</sup> Council Regulation (EC) 1497/2001 – OJ [2001] L197/4

<sup>81</sup> Council Regulation (EC) 1095/2005 – OJ [2005] L183/1

## Answer 32: [cont...]

### Analogue country

Article 2(7)(a) of the EU Anti-Dumping Regulation states that when NME countries are the subject of a complaint; “[A]n **appropriate** market economy third market country should be selected in a not unreasonable manner” (emphasis added). The European Court of Justice has stated that; “[t]he 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.”<sup>82</sup> (emphasis added).

The reasoning behind the choice of analogue country given by the Commission is often difficult to understand. Common factors include: the product is of similar quality<sup>83</sup>; strong domestic competition and high domestic sales<sup>84</sup>; producers are efficient<sup>85</sup>; conditions for access to raw materials is similar<sup>86</sup>; production processes and scale of production is similar<sup>87</sup>. This aside, the FTA questions whether proper attention is given to the choice of country; in *Leather Shoes*<sup>88</sup> Brazil was chosen, whilst in *Ironing Boards*<sup>89</sup> the USA was chosen – in fact, statistics for the last five years show that the USA was chosen as an analogue country in 40% of cases. It is also somewhat disingenuous that the Complainant may choose the analogue country.

### Sampling

Article 17(1) of the EU Anti-Dumping Regulation and Article 27(1) of the EU Anti-Subsidy Regulation say that, when the number of complainants, exporters or importers, types of product or transactions is large; “[t]he 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) and 27(2) respectively say that the selection of these; “[s]hall rest with the Commission [...] to enable a **representative sample** to be chosen” (emphasis added).

Individual duties will be assigned to those exporting companies who are part of the sample – and these levels are often lower than those who are not sampled (receiving a weighted average of those sampled). Exceptions to this rule are permitted, providing that the company in question has submitted the required information within the specified deadlines and the number of exporters does not turn out to be too large to conclude the investigation within the required time frame<sup>90</sup>. Therefore this sampling is an important issue for importers who may incur duties. [cont...]

Although no specific definition is given to determine what is meant by the above emboldened terms, in many cases there is some considerable doubt that the Commission’s interpretation is a valid one. In *Leather Shoes*<sup>91</sup> only 12 of the 154 cooperating exporters were chosen for sampling. The Regulation that set up provisional duties 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. [cont...]

<sup>82</sup> Case C-16/90 *Nölle v. Hauptsollamt Bremen – Freihofen*, 1991 E.C.R. I-5163

<sup>83</sup> (e.g.) *Integrated compact fluorescent lamps (CFL-i) originating in China* – OJ [2001] L38/8

<sup>84</sup> (e.g.) *Colour television receivers originating in China, Korea, Malaysia and Thailand* – OJ [2002] L231/1

<sup>85</sup> (e.g.) *Ferro molybdenum originating in China* – OJ [2002] L35/1

<sup>86</sup> (e.g.) *Potassium chloride originating Belarus, Russia and Ukraine* – OJ [2000] L112/4

<sup>87</sup> (e.g.) *Certain tube or pipe fittings originating in the Czech Republic, Korea, Malaysia, Russia, Slovenia* – OJ [2002] L56/4

<sup>88</sup> Notice of initiation (2005/C166/06) – OJ [2005] C166/14

<sup>89</sup> Notice of Initiation (2005/C29/02) – OJ [2006] C29/2

<sup>90</sup> (e.g.) *Cotton-type bed linen originating in Pakistan* – OJ [2004] L66/1

<sup>91</sup> Commission Regulation (EC) 553/2006 – OJ [2006] L98/3

## **Answer 32 [cont...]**

### **Non-imposition of provisional measures**

The decision not to impose provisional measures – normally resulting from the Commission being unable to reach a conclusive conclusion before the nine month deadline - is by no means an indication that definitive measures will not be imposed. When this occurs, no announcement is made. The FTA believes that this is yet another example of non-transparency and since neither the EU Regulations, or the WTO Agreements prevent disclosure in this way, one that could be rectified.

### **Lack of notice regarding the implementation of measures**

When provisional measures are imposed, the announcement in the Official Journal is published only the day before imposition. The same is true for definitive measures. This means that importers affected by the implementation of those measures are given no time in which to reorganise their sourcing methods in an effort to avoid the extra cost these measures cause.

The FTA should like these notices published sooner in order to accommodate those affected.

Article 7(1) of the Anti-Dumping Regulation and Article 12(1) of the Anti-Subsidy Regulation set a deadline for the imposition of provisional measures of 9 months following the initiation of an investigation. However, the preliminary investigation which results in a proposal for provisional measures is usually completed within 8 months. At this point the Member States (the Advisory Committee, the so-called “Anti-Dumping Committee”) receive the proposal and “vote” on whether to accept or reject. Since, at the provisional stage, there is no requirement for the Council to vote on the proposal, any measures that are to be imposed will usually be implemented within a matter of days. With this in mind, the FTA believes that notification of measures could be published one month in advance of their implementation.

When one looks at the implementation of definitive measures, advance notification of measures is not only more necessary – considering the longer term – but more possible. Article 6(9) of the EU Anti-Dumping Regulation provides that; “[i]nvestigations shall in all cases be concluded within 15 months of initiation...”. Since Article 5.10 of the WTO Agreement states; “[i]nvestigations 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.

Considering the impact definitive measures have, the FTA believes notification should, and could, be published three months ahead of the implementation of measures. A similar situation exists with Anti-Subsidy investigations save that the period set under Article 11(9) of the EU Regulation is limited to 13 months.

### **Interim and Expiry Reviews**

Whilst the FTA appreciates the certainty introduced under Council Regulation (EC) 461/2004 that introduced a 15 month deadline (as of 20 March 2006) for the conclusion of interim and expiry reviews, the FTA believes that such a deadline is too long. The fact that this is the period granted to conduct the full, original investigation, it is not unreasonable to assign a shorter period to these reviews. A nine month period is suggested.

[cont...]

## Answer 32 [cont...]

### Continual renewal of measures

When imports into the EU cause the EU industry harm, a finding of dumping or subsidization results in duties being imposed on those imports in order to reduce that harm. The FTA has argued that this harm could be reduced (or would not occur) if the EU industry in question was more competitive and more adaptive to today's global marketplace - at the very least, the period following the implementation of those duties should allow that industry to do just that.

Protecting that industry by continuously implementing TDI measures is not the answer. 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. Therefore the FTA suggests that in principle TDI measures should not run beyond three terms.

Foreign Trade Association

