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POLICY DEPARTMENT

WORKSHOP

MODERNISATION OF THE EU´s TRADE DEFENCE INSTRUMENTS (TDI)

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DIRECTORATE-GENERAL FOR EXTERNAL POLICIES OF THE UNION

DIRECTORATE B

POLICY DEPARTMENT

WORKSHOP

MODERNISATION OF THE EU´s TRADE DEFENCE INSTRUMENTS (TDI)

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Olivier PROST

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DIRECTORATE GENERAL FOR EXTERNAL POLICIES

Policy Department and Committee on International Trade

MODERNISATION OF THE EU´S TRADE DEFENCE INSTRUMENTS (TDI)

JOINT WORKSHOP AND HEARING

Brussels,

Paul-Henri Spaak building, Room P3C050

Thursday, **7 November 2013**, **9:30 to 12:30**

PROGRAMME

9:30 Welcome and introduction to the conference by Vice-Chair of the Committee on International Trade **Mr Paweł Zalewski**

9:40 Keynote speech by **Mr Karel de Gucht**, Commissioner for Trade

Panel 1: Experts panel

10.00 **Dr Edwin Vermulst**, faculty member World Trade Institute Bern and IELPO Barcelona

10:15 **Mr Olivier Prost**, partner at Gide Loyrette Nouel, Member of the Paris and Brussels Bars

First round of questions and answers session (MEPs only)

Panel 2: Stakeholders panel

11.00 Discussants

Mr Stuart Newman, Legal Advisor, Foreign Trade Association (FTA)

Mr Gordon Moffat, Director General, European Steel Association (EUROFER)

11.20 Commenters

Mr René Van Sloten, Executive Director, European Chemical Industry Council (CEFIC)

Mr Ralph Kamphöner, Director for International Trade, EuroCommerce

Mr Milan Nitzschke, President, EU ProSun

Second round of questions and answers (open to stakeholders)

Comments and replies by the European Commission representatives

12.20 Closing remarks by Rapporteur **Mr Christofer Fjellner**

12.30 Closure of the workshop by Vice-Chair of the Committee on International Trade **Mr Paweł Zalewski**

SUMMARY OF THE WORKSHOP

The Chairperson Mr. Paweł Zalewski opened the workshop by pointing out that the European Parliament is now a full-fledged partner in the formation of the commercial policy. He also pointed out that MEP Fjellner is the Rapporteur of the workshop.

The Keynote speech by the Commissioner for Trade, Mr. Karel de Gucht, then followed. Mr. de Gucht stressed that only a little more than 5 months remains before the end of the legislature period of the current European Parliament. Accordingly, it is now the time to define priorities. The modernization of the EU's trade defense instruments (TDI) is a clear priority due to several reasons. Firstly, it is important. Trade is an important priority of the EU and the trade instruments in question are very important in order to restore balance to existing trade distortions. Secondly, the modernization of TDI is urgent, as the last update took place in 1995. The world, however, has changed significantly and the global economy has become much more integrated. Furthermore, forms of state capitalism have evolved in China, Russia and other emerging markets, which has resulted in trade distortions. The modernization of the EU's TDI has a number of aspects that are beneficial for both industry stakeholders and stakeholders from the importer and user side. Concerning industry stakeholders, the issue of subsidization of structural raw material distortions and the issue of ex officio is addressed. Concerning importers, duties are reimbursed and the issue of two weeks pre-notification is addressed. The publication of the guidelines will allow a substantive discussion. Another failure of the TDI modernization is not an option. Mr. de Gucht also stressed that there is a general support for the modernization among stakeholders.

The experts panel then followed. Dr. Edwin Vermulst, faculty member of the World Trade Institute and IELPO Barcelona started off with his presentation. Dr. Vermulst stated that the EU's TDI are a legitimate mechanism. However, when considering their modernization also the fact that many third countries have copied the EU system, has to be kept in mind. The US and Canada are two exceptions. As a result of this fact that many countries have copied the system, it would also be possible that such third countries could also implement the modernization measures themselves. He continued that the timeframe of the shipment clause of 2 weeks is arbitrary and that the shipping clause should apply to goods already on the water. He also stated that the publication of guidelines is good for transparency. He also stressed that the idea of regarding threats as a special circumstance for ex-officio was dangerous, as it might lead to retaliation. Obligatory cooperation would be contrary to the needs of industries, as the cases are industry driven. Such obligatory cooperation would also result in high costs for SMEs. Furthermore, without sanctions, this measure would have no teeth. Dr. Vermulst considered the abolition of the lesser duty rule in the cases of subsidization and structural raw material distortions as especially troublesome. It could affect EU exporters in other member states. Furthermore, the concept of structural material distortions has to be defined. Concerning transparency, he proposes the introduction of the APO system. The APO system would not, contrary to criticism, result in higher costs.

In his contribution, Mr. Olivier Prost then pointed out that the main issue concerning TDI is their effectiveness. This is also true as TDI are often the only way of countries to react to trade distortions. Mr. Prost stated that the partial removal of the lesser duty rule is good, as it would remove an anomaly when comparing international TDI. Mr. Prost also stressed the importance of the issues of transparency and predictability. There is good and bad transparency. Transparency is bad if it weakens the TDI. Mr. Prost is in favour of better access to and transparency of the procedures of TDI. He disagrees with Dr. Vermulst on the issue of introducing the APO system, as he considers its introduction to be difficult. Concerning the issue of pre-disclosure, he states that it would be comparable to a guarantee that no measures are taken after such a pre-disclosure. He considers it dangerous to provide such a window of

opportunity. The issue of threat of retaliation addresses a worrying problem. The proposal to reimburse duties is maybe fair on its face, but its realization can have unfair effects for other stakeholders.

The workshop then continued with a first round of a questions and answers session from MEPs.

A first set of comments came from MEP Christofer Fjellner. Firstly, on the issue of the publication of the guidelines, MEP Fjellner stated that the balance of power between the European Commission and the European Parliament needs to be kept in mind. He also stated that the European Parliament's view should be included before such guidelines are published. Concerning the use of TDI on structural raw material distortions, MEP Fjellner asked whether the resulting tariffs should just aim to react to the injury, or whether they should be punitive and higher. He also asked what the exact definition of raw materials is. Furthermore, if there was no clear definition, then this would result in too much room of maneuver for the European Commission, which would not be what the European Parliament wants. He also asked if a more precise definition would be possible according to existing WTO law. On the issue of ex officio, MEP Fjellner stated that the important questions whether we want the European Commission to use more ex officio still has to be answered.

MEP Helmut Scholz asked how subsidies and dumping could be further defined. Furthermore, he asked what steps will be taken concerning such measures between EU member states. He also asked what steps would be taken concerning social dumping and environmental dumping and stated that these considerations should be included into the modernization of the EU's TDI. He stated that the current proposals of modernization take a 20th century approach. He also asked about the relation between the unilateral modernization and the level of multilateral trade law. What would is the relation of the proposed modernization and the existing WTO rules, especially concerning Art. 31?

MEP Yannick Jadot then stated that this modernization was an important debate. He also referred to the importance of a photovoltaic industry case of China. He stated that it is extremely difficult to know the exact price and exact volume of certain exports and that an effective modernization of TDI would therefore require a lot of data. This growing amount of necessary data shows that transparency is not always useful, as it would complicate the process. MEP Jadot also stated that ex official initiation is necessary. Finally, he asked how the questions of social and environmental dumping can be integrated into the modernization of the EU's TDI.

MEP Andrea Cozzolino then stated that an important result of the modernization of TDI would be to speed up the processes in question. However, he asked whether speeding up these processes would actually help. He asked the European Commission representatives to think more about the impact of the modernization. He also stated that there should be a parallel institutional process of acceleration. If there was too much acceleration from the side of the European Commission, this could result in an institutional conflict, for example with the European Parliament. He also stated that the publication of the guidelines was an essential step. Finally, he stated that the world is changing and that particularly the role of the EU in the world is changing. The important question is whether policies are up to the resulting challenges of this change. He therefore warns of excessive acceleration of the processes in question.

A series of answers from the panelists then followed.

Dr. Edwin Vermulst firstly answered. Concerning the questions of definitions, he stated that it would be especially important to define the exact concept of trade distortions more. Concerning ex officio, he stated that it was important to keep in mind that this measure was initially planned as a mechanism for SMEs.

Also Mr. Prost stated that the rationale of ex officio at the beginning was not to provide an instrument of trade retaliation. Furthermore, he stated that anti-dumping and anti-subsidies measures are not able to do everything. There are also other important areas, such as trade barrier regulation. Concerning the question of the partial removal of the lesser duty rule, he pointed out that it is not a matter of punishment, but simply a correction of the trade distortions in question. Finally, he stressed that the system of TDI should not be politicized.

Mr. Karel de Gucht then addressed the question of the publication of the guidelines. He stated that they are already applied internally, and that their publication simply adds to transparency. He also stressed that it is important to not create an artificial conflict concerning this issue. Through the publication, he did not try to impose any guidelines on the European Parliament. He also stated that this publication should not be dramatized. Concerning the issue of the lesser duty rule, he stated that it would be dropped only for subsidies and structural raw material cases. Such cases result from state actions which are trade distorting. He also said that it would be threatening if such practices become part of the game. Concerning the issue of the shipping clause, he stated that the time frame is arbitrary. When it comes to the proposal of an on-the-water rule, he stated that it is not sure if it could be checked easily in real life whether goods were already on the water or not. Concerning the issue of ex officio, Mr. de Gucht agreed that it was initially designed for SMEs. However, he stated that this measure can now be used to address a problem of the EU, especially as there is the growing possibility that third countries actively influence individual EU member states. Such influence is dangerous and the issue is thus a question of survival for SMEs. Mr. de Gucht responded to MEP Scholz that the question of environmental dumping is important, but that the tool of TDI would then become subject of general policy if such issues would be included as well. Mr. de Gucht then stressed that not everything can be pursued with TDI. He then also addressed the issue of raw material sovereignty and stressed that this idea is very dangerous for the EU. The EU has to make sure that raw materials are not kept from it and that it further has the ability to import raw materials. In general, Mr. de Gucht stressed that ideological arguments should be kept out of the discussion of the modernization of the EU's TDI. This is especially true as the previous attempt to modernize them failed due to such ideological questions.

The workshop then continued with a stakeholders panel. Mr. de Gucht had to leave the workshop due to time constraints and was then represented by his deputy chief of staff. The stakeholder panel discussions were started by two discussants.

Mr. Stuart Newman from the Foreign Trade Association stated that he represents both importers and users. He therefore recognizes that the tool of TDI is important and welcomes its modernization. However, he stated that the current program of modernization would not change a lot. He stated that importers need time. Accordingly, a pre-notification would be welcome. However, it is unclear if 2 weeks would really be sufficient. He stated that it would be better to have 6 weeks. He also pointed out that it would be good to include the on-the-water rule. Concerning the issue of re-imbursement of duties, he stated that he welcomes it, but that the resulting advantage for importers could be low. He also pointed out that he is concerned about the removal of the lesser duty rule. He stressed that certain definitions are still too unclear. For example, how big does a distortion have to be? And what exactly is a distortion. He stressed that such concepts still remain very vague. Finally, he pointed out that he strongly supports the introduction of the APO system and greater transparency.

Mr. Gordon Moffat from the European Steel Association then stated that the main difference between the EU and other players is the degree of rigour of implementing trade rules. The EU already represents a "best-practice" example of compliance to these rules among WTO members. He also stated that TDI need to be reinforced, as it is increasingly difficult to tackle abuses and subsidization. He would also support a tightening of the guidelines, which would be in the interest of everyone. Concerning the

shipping clause, he referred to the danger of having imports before the measures in question are even announced. This could occur, for example, due to storage facilities in the EU of many main trading partners. An increase of ex-officio initiations would be welcome. He also stated that circumvention was an increasing problem. He agreed with Mr. de Gucht that the concept of raw material sovereignty is extremely dangerous for the EU. He also stated that the EU is alone in applying a lesser duty rule, it is exceptional and a privilege treatment for its trading partners. It should be withdrawn and its withdrawal should be used as a threat to other trading partners.

The stakeholders panel then continued with contributions from three commenters.

Mr. René van Sloten from the chemical industry stated that he agrees with the modernization. He also stated that he represents interests of both exporters and users. He is not advocating a general elimination of the lesser duty rule as Mr. Moffat. He also stated that the use of TDI has nothing to do with undue penalization of trading partners.

Mr. Ralph Kamphöner from Eurocommerce stressed the need for a good compromise. The current question is also whether the European Parliament can help deliver such a compromise. There is a strong need for realism and compromise when it comes to the modernization of the EU's TDI. The commerce sector needs more transparency of the process. Furthermore, progress on the website has to be made. In addition to that, especially predictability is important. A better shipment clause is therefore needed with more time than just two weeks.

Mr. Milan Nitzschke from the EU ProSun Association then stressed that dumping destroys competition, which affects especially the trade with China. He stated that there is a battle going on between the state capitalism of China and the markets of the EU. Chinese firms are currently being highly subsidized and the first victims of this subsidization will be countries outside of China. He then states that TDI instruments should be as strong as possible and that it would be ridiculous to apply only a lesser duty rule. He also stressed that China is already heavily influencing individual member countries and industries in the EU. The timeframe of the shipping clause should be 2 weeks or shorter. Finally, he stressed the need to truly apply TDI to protect the interests of the industries. He concluded by stating that such courage is currently lacking.

The workshop then continued with a second round of questions and answers which was open to stakeholders.

MEP Jadot again stressed the importance of environmental and social rights. He also stated that these questions should not be excluded from a modernization of TDI although the danger of quick politicization exists.

MEP Fjellner followed up on the comments of MEP Jadot. He stressed the risk of turning TDI into a tool for everything. The question would therefore be how the tool of TDI should be treated. Concerning the issue of the lesser duty rule, he stressed that it was also a question of not giving the European Commission too much power.

Contributions from different stakeholders then followed.

A representative from the permanent representation of Turkey stated that the guidelines leave many industries frustrated. Helping especially SMEs in bringing complaints is an important issue. However, the process is still very complicated, which results in frustration among SMEs. A representative from the steel industry stated that a level playing field is needed between EU industries and industries in other countries. An academic from the Universtiy of Leuven stressed that the world is changing and that it many countries move more towards a market economy. A representative of the European leather industry stated that this industry suffers greatly from export restrictions of raw materials. There are not a

lot of raw materials in the EU and the practice of predatory purchases by other non-EU countries continues. The EU therefore must impose export restriction of its own. Otherwise there would be no relief for the European leather industries, which is mainly composed of SMEs. A representative from Eurocommerce also stressed that the world has changed and that modernized TDI have to be user friendly to SMEs. He also stated that he disagrees with the distinction of good and bad transparency and that there are only good and bad systems of transparency. Another industry representative stated the need to have more concrete definitions of the issues. Furthermore, this industry representative stressed that SMEs need facilitated access to the process.

The workshop then continued with concluding remarks from several contributors. Mr. Newman again stressed the need of predictability and transparency. He also stated that there should be no removal of the lesser duty rule. Furthermore, the shipping clause should be extended. Mr. Moffat stressed that we should not be obsessed with the issue of the lesser duty rule. The lesser duty rule is a privilege granted by the EU and its removal should be used as a threat to trading partners.

In his closing remarks, MEP Fjellner stated that more could be done. He stressed that more could be done than what is proposed by the European Commission and that more could be done than is possible in the short remaining time. However, as Mr. de Gucht said, he also stated that failure is not an option.

Mr. Paweł Zalewski then closed the workshop by stating that the discussion was fruitful.

A video recording of the workshop is available on the European Parliament's website:

http://www.europarl.europa.eu/ep-live/en/committees/video?event=20131107-0930-COMMITTEE-INTA

PART I: Speech Modernisation of Trade Defence – Getting the Job Done Karel De Gucht (EU Commissioner for trade)

Ladies and gentlemen,

In exactly five months and ten days' time, this iteration of the European Parliament will meet for the last day of its last plenary session.

That allows you time to work on important files but it also means prioritisation is the order of the day.

What I would like to suggest to you this morning is that the Commission's proposal to modernize trade defence instruments should be high on your list of priorities, for three reasons:

– Because it is important,

– Because it is urgent,

– And because – most importantly – it makes sense.

First, why is this dossier important? Why do we need an effective trade defence system in the first place?

The answer is straightforward. International trade is essential to Europe's prosperity. We cannot grow without world-class companies. And companies do not become world class without being exposed both to the opportunities and the challenges of the international economy.

But the international economy is – relatively speaking – a much more lawless place than the economy within the European Union. It is certainly governed by rules but those rules are not strong enough to prevent companies from dumping or governments from giving out unfair subsidies.

Trade defence instruments – anti-subsidy and anti-dumping measures – are the tools we have to defend our businesses against these unfair practices, restoring balance in place of distortion. They are often the only tool available to industries that need an effective and timely remedy.

If you compare the way trade is regulated within the Single Market and at international level this fact becomes plain. Fair trading practices within the European Union are guaranteed both by the treaties – in particular the four freedoms of goods, services, capital and labour – and by our strong competition rules. These are backed up by 10,000 pieces of legislation which lay the framework for how companies can compete and governments can intervene on the European market.

At the international level we have the multilateral trading system enshrined in the World Trade Organisation. Its enforceable rules are – when compared to many other areas of international law – an enormous achievement and an exceptional one. But WTO rules simply do not compare with what we have within the European Union.

And that is why the concept of trade defence is built directly in to the WTO's own fabric: The WTO agreements recognise the need for them and set conditions for their use.

That is why this whole area of trade defence is important – it is an essential tool and that means it must be made effective in today's context.

Second, why is this dossier urgent?

Because the last time we updated our trade laws was in 1995!

And the world has changed in at least two important ways since then – meaning we can't afford to put this reform off any longer.

For one thing, the world economy is considerably more integrated now than it was then. To take one measure of the intensity of trade: The value of world trade amounted to only 20% of global output that year. In 2010 it was more than 30%. In general terms this more globalised economy means that there is a greater potential for our companies to come face to face with unfair trading practices.

For another, the last decades have seen the rise of what has been called state capitalism. It is frequently used to describe China's system but it can also be applied to Russia and other emerging economies.

State capitalism has two consequences for trade defence. First, it implies that a range of government policies could be used to give an unwarranted competitive advantage to a national company – from trade distortive subsidies to cheap raw materials. This kind of distortion is difficult to act against under the current rules.

Second, in state capitalist systems retaliation by governments against companies who exercise their rights to trade defence is a real issue. This is a difficult and sensitive topic. But it is undeniable that many European companies are unwilling to come forward and make justified trade defence complaints due to fear of consequences for their business. The consequences can be serious for companies that export to or invest in the country in question. In our current system it is not clear how we ensure these companies have a fair shot.

Third, if we fail to act now, we may not be prepared in time for new challenges to come. Next year, the Commission will start working under new procedural rules, and in 2016 China will receive market economy status. I would not advice starting another TDI reform process just then.

That then is why we need modernisation and why we need modernisation now.

But why do we need this modernisation in particular?

Because this legislation balances the interests of producers and importers.

Our proposal makes the system more efficient and more effective. And it makes it more user-friendly for smaller companies in particular – who are often the companies that suffer most from dumping or unfair subsidies. But most importantly it does that in a way that takes all interests into account.

For European industry, it re-enforces their position, by sending a strong signal to our trading partners. The Commission will not tolerate the proliferation of unfair trading practices and will support industry when it is faced with such practices.

For example the proposal removes what we call the lesser duty rule in the cases that are most affected by government intervention: subsidisation and distortions of raw materials markets. What this means in practice is that exporters benefitting from unfair government support of this kind will face higher duties to make sure that government distortions are fully corrected.

It will also protect companies who fear retaliation for cooperating with Commission investigations. Under the proposal, companies would be legally obliged to cooperate with the Commission's ex officio procedure. That means that no government could blame a European company for the launch of the case.

But there are also important parts of the proposal that are of clear interest to importers.

For instance, it would increase transparency by forewarning importers and other affected stakeholders when provisional trade measures are going to be introduced. The proposal would let them know two weeks before provisional duties are introduced and even give them the possibility to plan ahead and to comment. This is good not only for importers but for everyone affected as it will result in more accurate provisional duties.

The proposal would also bring more fairness to importers by reimbursing them when they have paid duties unnecessarily during expiry reviews. As you know well, these investigations – which happen at the end of the normal five year application period of the duties to assess whether the measures are still needed – take 12 to 15 months. During that time importers still need to pay duties. Under the proposal those duties would be reimbursed if the investigation concludes that there is no need to continue the measures.

Last but not least, I know that there have been concerns expressed in the Parliament about the guidelines on TDI that we are currently preparing - at the same time as Parliament and Council consider the legislative proposal for modernisation. Let me stress that the issues addressed in the guidelines do not interfere with the broader review. They have to do with the practices that the Commission follows when implementing trade defence legislation, not the legislation itself. That said, I am committed to present the guidelines to you and to the Council before they are finally adopted by the Commission, and to have a substantive discussion on them. My services are now working on revising the guidelines following a public consultation. I hope that work will be finished very soon.

I hope you will agree with me that now is the time to act.

If we let this legislation lapse we may not have another opportunity for a long time again.

The last time we tried to modernise the system was six years ago. We failed then. Another failure is simply not an option.

So I hope I can count on you to work to get this deal done in the coming weeks and months.

There is support among stakeholders for this proposal. And there is support in the Council for this proposal. So if we all work together there is a real chance that we can reach an agreement at the first reading.

But that will depend on Parliament and Council making this legislation a priority for the remaining months.

I am already encouraged by the progress made in Parliament and I am ready to do what I can to support that.

So I hope we can count on each other to get this job done. Please defend a modern trade defence!

Thank you very much for your attention. I am happy to take your questions.

PART II: Modernization of the EU's Trade Defence Instruments: Throwing out the baby with the bath water?

Edwin Vermulst[1]

Abstract

This paper elaborates on the presentation given at the European Parliament on 7 November 2013, and presents the author's analysis of the proposal tabled by the European Commission on 10 April 2013 and the amendments suggested by the European Parliament, regarding the modernization of the European Union's ["EU's"] trade defence instruments ["TDIs"].

The paper concludes that a radical shift in the EU's TDI law and practice notably the abolition of the lesser duty rule in anti-dumping ["AD"] cases in certain circumstances and in anti-subsidy ["AS"] cases as well as resort to ex officio investigations in cases of possible 'threat of retaliation' should not be adopted. The negative repercussions of these changes on the EU's exporting interests will in all likelihood be more significant compared to the eventual benefit, if any, to the EU domestic industry and the objective of using TDIs as punitive mechanisms against trading partners or to address trade imbalances is misplaced. On the other hand, the much needed transparency improvements in the EU system have been given a back seat. Considering the lengthy legal and administrative procedures involved in reforming the EU's TDIs, a broader exercise is desirable to further enhance transparency.

Overall, the European Commission's proposal and certain amendments suggested by the European Parliament if adopted -- especially as regards the non-application of the lesser duty rule -- would result in increased discretion being granted to the European Commission, further politicization of TDIs and amplification of the lack of transparency in the investigatory process. Finally, there is a high probability of some of the proposed changes backfiring against EU exporters.

[1]. Partner, VVGB Advocaten, Brussels; edwin.vermulst@vvgb-law.com; author of, *inter alia*, EU Anti-Dumping Law and Practice (Sweet & Maxwell 2010) and The WTO Anti-Dumping Agreement (Oxford University Press 2006). The author would like to thank Juhi Sud and the students of the 2013 IELPO Programme at the University of Barcelona for their research of third countries' LDR and public interest law and practice.

Executive summary

In this analysis I have attempted to address three key themes:

– perceived shortcomings of the European Commission's proposal with regard to certain aspects;

– drawbacks of certain amendments advanced by the European Parliament; and

– factually incorrect comments made by some EU industry representatives at the European Parliament Workshop on 7 November 2013.

I consider that the EU should strengthen and enhance the use of the WTO+ elements of its TDI laws rather than diluting them which is the current direction that the European Commission and European Parliament's proposals seem to be taking. The abolition of the lesser duty rule in cases of subsidization, 'structural raw material distortions', insufficiency of 'social and environmental standards', and investigations involving fragmented industries is injudicious and appears to have been proposed without any impact assessment of the consequences on EU exporters by other TDI users which tend to mirror the EU system. Additionally, 'threat of retaliation' has been given unwarranted attention. Retaliation in terms of tit-for-tat or cross-sector cases and measures is a common phenomenon. While on the one hand retaliation by China has been over-publicized by EU complainants in recent cases, on the other hand examples provided in the following section prove that this phenomenon is more general and applies across the board. Moreover, increasing resort to ex officio investigations as a means to redress possible retaliation goes beyond the purpose of that provision. Last, increased transparency is the weakest link in the EU TDI system but has regrettably not been given its due. Although anything short of a fundamental change such as the introduction of the APO system would remain insufficient, the lack of transparency can be addressed through various means some of which can be introduced through administrative practice and in fact some such suggestions have been proposed by the European Parliament.

1. ASSESSMENT OF THE KEY PROPOSALS TABLED BY THE EUROPEAN COMMISSION

1.1 Increased transparency and predictability

1.1.1 Pre-disclosure of AD and AS measures

Under this theme, the European Commission proposes to provide interested parties with a limited pre-disclosure -- including a summary of the dumping and injury margin calculations -- two-weeks in advance of the imposition of provisional measures with a possibility to comment so that calculation errors that may have occurred can be corrected, and an advance notice of the non-imposition of provisional measures. The European Parliament on the other hand has opposed this proposed change on the premise that pre-disclosure of information on the planned imposition of provisional duties increases the risk of further politicization of the proceeding.

The pre-disclosure of provisional AD/AS measures is desirable and should be adopted as it would instill legal certainty. The European Parliament's apprehension towards this proposal appears to be unfounded since pre-disclosure would reduce information leaks which presently plague the EU system and are a major cause of advance lobbying. With the pre-disclosure, lobbying would not likely increase as compared to the present situation where parties start 'informal' lobbying the moment the information on the possible measures is leaked.

The above having been said, the pre-disclosure should benefit all parties and not merely the interested parties -- as proposed by the European Commission -- in order to avoid discrimination as it would be in violation of fundamental EU law principles.

Likewise, the advance notice of the non-imposition of provisional AD and AS measures is a positive proposition and would curb information leaks and imbalance between parties which is routine in EU TDI investigations. However, such advance notice should also not be limited to interested parties only.

1.1.2 Shipping clause/non-imposition of measures two weeks after the pre-disclosure

The European Commission proposes the introduction of a provision providing for the non-imposition of provisional AD and AS measures for a period of two weeks pursuant to the pre-disclosure. The European Parliament does not support this proposal.

In the author's view, the non-imposition of measures for a certain period following the pre-disclosure should certainly be taken on board. That said, the European Commission's proposal as it stands while being a positive demarche, is insufficient and arbitrary from a practical point of view. The rationale for the introduction of the two-weeks shipping clause is to induce legal certainty by ensuring that goods in transit are not subject to provisional measures. However, the application of the two weeks' time constraint implies that this provision would only benefit imports from those countries which are geographically proximate to the EU whereas imports from countries such as China and India among others -- which are the most frequent targets of AD and AS measures -- will not benefit from it and will be discriminated against. The overall benefit of such a clause to EU importers would therefore also be limited.

The optimal solution would be to exempt from duties the goods which were shipped/dispatched from the country of export for direct shipment to the EU under a valid transportation document, prior to the date of the pre-disclosure.

Concerns raised by stakeholders that such a clause would increase the risk of fraud and stockpiling in the EU appear to be overstated. First, a similar provision regarding the non-application of provisional measures on goods in transit has been applied on previous occasions by the EU in the context of safeguard measures and has worked in that context.[2] The argument that safeguard measures apply to 'increased' but 'fair' imports thereby making them different -- i.e. drawing a distinction between 'fair' and 'unfair' imports -- in this context is irrelevant because the key element is avoiding injury to the EU industry and the underlying purpose of the TDIs is not to punish third country exporters. In fact if anything, legal certainty as regards the imposition of measures would benefit the EU importers who bear the duty burden.

Second, the risk of stockpiling seems to have been exaggerated. For a large variety of products orders are placed months in advance and dispatched according to contractually agreed timeframes especially when the country in question is geographically distant from the EU and the average transportation time is four to six weeks.

Third, the argument of under-protection of the EU industry on the ground that the length of the investigation between the filing of the complaint and the imposition of provisional measures already gives exporters the opportunity to increase shipments to the EU resulting in stockpiling of dumped and subsidized goods in anticipation of measures, does not justify the non-inclusion of this proposed change. It is recalled that pursuant to an original investigation, AD and AS measures can be imposed for a period of five years and in the EU generally the duration of definitive measures is five years. However, the six months' provisional duty period is not counted in the five-year duration implying that effectively measures are in force for around five and a half years. Additionally, the unduly long duration of AD and AS measures in the EU also justifies the adoption of a shipping clause.

Fourth, while it cannot be excluded that there could be fraudulent activities, two points need to be noted in this regard. The risk of fraudulent activities exists also in the context of many other aspects pertaining to the imposition and collection of AD/AS duties and there are mechanisms existing and applied by the EU to address such fraudulent acts as these also constitute customs fraud, for which penalties are severe and may even include jail sentences. The European Commission generally works with the customs authorities of the Member States and OLAF on such matters. Additionally, if a monitoring clause is mentioned in the Regulation imposing measures, it is likely to act as a deterrent as it does in the case of undertakings.

Fifth, suggestions by stakeholders for strict conditions to benefit from the 'goods in transit' exception are justified but these should be practical and reflect modern day business realities. The condition of issuance of an irrevocable letter of credit among other things is extremely restrictive and introduces an unjustified limitation as there are many different payment methods and arrangements used by importers for international business transactions such as telegraphic transfer and delivery upon payment among others.

Finally, suggestions that if advance notice of measures and a shipping clause were to be introduced, in order to avoid stockpiling, registration and retroactive application of measures should be systematically

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[2]. See for instance, Commission Regulation imposing provisional safeguard measures on citrus from China, OJ [2008], L290/3. See http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:290:0003:0031:EN:PDF
See also, Commission Regulation imposing provisional measures on farmed Atlantic salmon, OJ [2004], L267/3. See http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:267:0003:0029:EN:PDF

and increasingly used is also undesirable. Registration has to be requested by the EU industry and should be undertaken only if the latter provides 'sufficient evidence' justifying registration. Therefore, the strict conditions for registration cannot be bypassed and the proposal of the European Parliament to amend Articles 14(5) and 24(5) of the basic AD and AS Regulations permitting ex officio registration of imports by the European Commission is unwelcome. Likewise, retroactive imposition of measures is an exception to the general rule and should be treated as such. The very fact that thus far the EU has never imposed measures retroactively underlines this point.

1.1.3 Introduction of guidelines

Although currently proposed as a non-legislative aspect, the European Commission proposes publication of guidelines concerning the calculation of the injury margin, analogue country selection in investigations concerning non-market economies ["NMEs"], the Union interest test and the duration of measures and expiry reviews. The European Parliament has suggested the inclusion of a special legal provision in the basic AD and AS Regulations clarifying that such documents can be issued by the European Commission only after consultation with the former and the Council and that these documents cannot broaden the discretion of the European Commission in the adoption of measures.

First, it is important to note that the publication of guidelines by the European Commission would not introduce of new rules or provisions. The guidelines simply summarize the existing practice on the four above-mentioned issues, based on their application in past cases. Second, if retained as proposed, their benefit would be limited as their content is limited to aspects already known through existing Regulations imposing AD and AS measures. Moreover, as the guidelines are not concrete law, in the absence of a mechanism for their application, the elements assessed for instance as regards Union interest or for likelihood analysis in expiry reviews would continue to vary from case to case implying that these guidelines would not contribute towards enhancing predictability and transparency for interested parties or the EU institutions.

The guidelines should therefore be concretized in legal terms and the essential elements should be included in the text of the basic Regulations with the other aspects being addressed as non-essential elements such that these (and any future) guidelines can be introduced/amended by way of delegated acts. In the absence of such a mechanism, the European Commission would continue to have unchecked discretion in the assessment of the four elements concerned.

1.2 Retaliatory threats: Initiation of ex officio investigations and obligatory cooperation of Union producers

1.2.1 Ex officio investigations

The European Commission's proposal of using ex officio investigations as a means to "alleviate the pressure resulting from threats of retaliation" is dangerous. The possibility of ex officio investigations is clearly provided in the basic AD and AS Regulations as well as the WTO Anti-Dumping Agreement ["ADA"][3] and the Agreement on Subsidies and Countervailing Measures ["SCM Agreement"].[4] The condition for such investigations is that in addition to the existence of sufficient evidence of dumping/subsidization, and resulting injury, there should be 'special circumstances', a concept which

[3]. Article 5.6 of the ADA.

[4]. Article 11.6 of the SCM Agreement.

has thus far not been interpreted in any WTO dispute. In a nutshell, the European Commission is suggesting that 'threat of retaliation' should be considered a 'special circumstance'. The European Parliament while supporting this approach also suggests clarifying in Articles 5(6) and 10(6) of the basic AD and AS Regulations respectively that 'special circumstances' exist where diverse and fragmented sectors largely composed of SMEs are concerned.

In the author's view, the classification of threat of retaliation as a 'special circumstance' is an imprudent proposition and would result in excessive discretion being granted to the European Commission.

First, the issue of retaliation has been given undue importance. Retaliation in terms of cases and measures against the same product or another product is a common phenomenon in the TDI context. Moreover, while the risk of retaliation by China has been over-publicized by EU complainants in recent cases in order to obtain anonymity of their names, retaliatory cases/measures against EU producers by other trading partners are well documented. To give an example, the EU imposed AS measures in 1998 on broad spectrum antibiotics from India which were terminated in August 2011 following an expiry review. In 2010, the EU producer DSM Anti-Infectives BV filed an expiry review supported by other EU producers of these antibiotics and several Indian producers that were subject to the measures over the years cooperated in the expiry review such as Lupin Limited. Subsequently Lupin filed an AD complaint against imports of another antibiotic (cefadroxil) from the EU targeting DSM and an AD investigation was initiated in February 2013. This investigation was concluded recently with the imposition of measures against DSM as regards its exports from the Netherlands and Egypt. The US-EU sodium metal cases provide another example in this regard. In October 2007 the US producer Dupont Nemours & Co. filed an AD complaint against sodium metal from France accusing the French producer of this product Métaux Spéciaux SAS. Thereafter the latter filed complaints in the EU targeting Dupont and in 2008 AD and AS investigations were initiated by the EU against the imports from the US. Subsequently in the US case, the US International Trade Commission determined the absence of injury as a result of which the investigation was terminated. Following this, Métaux Spéciaux also withdrew its complaints in the EU resulting in the termination of the EU investigations.

Second, the issue of alleged threats of retaliation has been dealt with until now in the EU by granting anonymity to the names of the complainants in TDI cases and this has worked well for them in practice (although it raises due process concerns from the perspective of importers and exporters). Therefore, there is no reason justifying the adoption of a radical shift in practice.

Third, the automatic qualification of 'threat of retaliation' -- by definition a very speculative concept – as a 'special circumstance' is not justified and would result in excessive discretion being granted to the European Commission as well as over-protection of the EU producers. Over the past years, in many EU AD and AS cases EU complainants have obtained confidential treatment of their names based on 'threats of retaliation'.[5] However, in many cases the "confidential" complainants that feared retaliation openly disclosed their names in press reports or court cases following the imposition of measures.[6] Such behavior clearly makes the EU producers' claims of 'threats of retaliation' doubtful.

Fourth, when there are only limited producers of the product in the EU, the 'threat of retaliation' cannot be alleviated as the producers would in any event be known to the third country exporters/government.

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5. For instance see Footwear with uppers of leather from China and Vietnam (2005); ironing boards from China (2009); Solar panels and cells from China (2012); Solar glass from China (2013).

6. Footwear with uppers of leather from China and Vietnam; ironing boards from China; Solar panels and cells from China.

Fifth, the European Commission and the European Parliament have omitted an analysis of the international ramifications of this proposal. Many of the EU's trading partners replicate the EU's practices and methodologies and there are no reasons why any trend of ex officio investigations by the EU would not be adopted by these countries. Clearly, as noted in the impact assessment, the volume of trade affected by EU TDIs is generally insignificant when compared to the EU's total trade activity, i.e. it was 0.5% in 2011.[7] This indicates that, the EU's global export trade is likely to be affected more significantly if the EU were to itself encourage ex officio investigations as the likelihood of the EU's trading partners emulating this approach is very high. Additionally, ex officio investigations will not foreclose cross-sector retaliation by third countries because while tit-for-tat cases targeting the same product are not uncommon, a third country can easily target any upstream, downstream or other products from the EU of which it has significant imports, thereby affecting broader EU interests.

Last, a review of the negotiating history of this provision which was first introduced in the 1967 Anti-Dumping Code,[8] indicates that the purpose of the introduction of this provision was clearly to permit ex officio investigations when the domestic industry was fragmented and consisted of several small companies and such companies were not in a position to gather the relevant sufficient evidence necessary for the initiation of an investigation.[9] Therefore, while on the one hand the use of this provision to cover possible 'threats of retaliation' goes beyond the raison d'etre of this provision, on the other hand, as trading realities and the times have changed, even fragmented industries and SMEs are better placed to gather the relevant information. In summary, the resort to this provision should be discouraged.

1.2.2 Obligatory cooperation of EU producers

The European Commission has also advocated the obligatory cooperation of EU producers in ex officio investigations while the European Parliament suggests that EU producers with the exception of SMEs should be requested -- not obliged -- to cooperate.

Without prejudice to the comments made above against ex officio investigations, first, the obligatory cooperation of EU producers is contrary to the very purpose of trade defence measures as industry-driven and therefore I support the European Parliament's proposal in this regard. Second, non-cooperation of EU producers in an ex officio investigation indicates that they give less importance to domestic protection compared to other corporate interests. Third, the obligatory cooperation of SME producers could amount to unacceptably increased costs for them. Fourth, in the absence of sanctions, the obligatory cooperation or the request for cooperation is unlikely to serve its purpose. Without the

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7. See section I.2 of the Impact Assessment accompanying the proposal for a Regulation of the European Parliament and of the Council on the modernization of trade defence instruments.

8. Article 5:1 of the 1967 Anti-Dumping Code. In the AS context this provision was first introduced in the Tokyo Round Subsidies Code.

9. In 1966, the Group on Anti-Dumping policies gave the following assessment as regards the views of the various contracting parties regarding the inclusion of the ex officio provision in the 1967 Anti-Dumping Code:

"*Initiation of investigations and consequences thereof. Most members of the Group held the view that the initiation of an anti-dumping investigation should in general be taken only on the request of domestic producers claiming injury. Such members also agreed that governments should, in special but rare circumstances, be able to initiate themselves anti-dumping investigations. Other delegations held the view that initiation by governments, while not routine should also not be regarded as rare and it was important that governments retain authority to initiate action on their own motion. It was particularly pointed out by those holding this view that it would frequently be difficult for small industries to establish whether dumping by foreign competitors was the cause of their market difficulties or to produce sufficient background material to justify an investigation; in such cases it would be reasonable to provide for action by governments…*"

cooperation of EU producers, the injury determination in an ex officio investigation would not be based on positive evidence and objective examination of facts and would thus be more vulnerable to challenges at the WTO and/or in EU Courts.

1.3 Effectiveness and enforcement of TDIs

1.3.1 Ex-officio anti-circumvention investigations

The European Commission's proposal to enhance monitoring and resort to ex officio anti-circumvention investigations is legitimate. The proposal in this regard -- in addition to being permitted under the basic AD and AS Regulations -- reflects the EU's current practice.

1.3.2 Non-application of the lesser duty rule

The European Commission has suggested the abolition of the lesser duty rule in two contexts namely in AS cases and when 'structural raw material distortions' are found to exist in AD cases. The European Parliament while supporting the Commission's proposal advocates the non-application of this rule in three more situations in AD cases:

– when the exporting country has an insufficient level of social and environmental standards;

– when the complainants are largely SMEs;

– when subsidies are found to exist either in the AD case itself or in an AS case concerning the same product.[10]

From a practical point of view, the European Parliament's proposal basically implies the complete abolition of the lesser duty rule in AD cases in addition to that in the AS context because -

(i) first, the lesser duty rule would not be applicable in investigations against most countries because barely a handful of countries apply the same social standards as the EU. Key import sources/trading partners of the EU including the US, India, Canada, Japan, Korea, Brazil, Thailand, Malaysia, and China to name a few have not ratified the eight core ILO conventions listed in Annex I of the proposal;[11]

(ii) second, a substantial number of cases concern fragmented sectors and comprises SME producers;

(iii) third, raw material distortions or subsidization are easy to find.

Against this background, in the author's view, the non-application of the lesser duty rule in these situations is imprudent and would result in: (i) over-protection of the EU industry, (ii) unnecessary complications in the imposition of AD and AS measures and making them more susceptible to WTO disputes, (iii) setting a bad precedent internationally, and (iv) irreparable damage to EU exporting interests.

First, TDIs are not meant to be used by WTO members as a means to punish or sanction other members for subsidization or – more generally -- behavior considered undesirable by importing country

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10. The justification for this proposal is rooted in the intention to "*discourage the EU's trading partners from engaging in structural trade distortions*".

11. http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11001:0::NO:::#I

authorities as seems to be the general motivation behind the European Commission and Parliament's proposal and also indicated in the impact assessment. To the extent the injury to the EU industry is remedied through the lesser duty rule, it is unnecessary and illogical to remove this WTO+ element and impose higher duties.

Second, the abolition of the lesser duty rule in AS cases and in AD cases -- when 'structural raw material distortions' exist or in other instances as proposed by the European Parliament -- would complicate the imposition of combined AD and AS duties and EU TDI measures could be susceptible to increased WTO challenges. At present, in the context of parallel EU AD and AS measures, the duty rate is capped by the injury margin as a result of which there is no 'double counting' or 'double remedy' which refers to circumstances in which the simultaneous application of AD and AS duties on the same imported products results, at least to some extent, in the offsetting of the same subsidization twice. With the non-application of the lesser duty rule in AS cases, there is a high risk of double remedies in NME cases as the dumping margin is based on analogue country costs/prices. Double remedies can also arise in the context of domestic subsidies granted within market economies when AD and AS measures are concurrently imposed on the same products and an unsubsidized constructed or third country normal value is used in the AD investigation.

Furthermore, although the application of the lesser duty rule is not mandatory, its selective application in certain circumstances resulting in certain countries benefitting from this rule and others being deprived of an advantage -- i.e. when structural raw material distortions exist -- could result in violation of the WTO principle of non-discrimination. Furthermore, to the extent the 'structural raw material distortion' is caused by a countervailable subsidy, the measures imposed could be challenged under Article 32.1 of the SCM Agreement[12] as also indicated by the Rapporteur.

Third, the abolition of the lesser duty rule -- including when undertakings are accepted -- will almost certainly backfire against EU exporters, if followed by third countries. EU exporters very often benefit from the lesser duty rule as their export prices will normally be relatively high compared to the prices of local complaining producers. Dumping or subsidization on the other hand can be found relatively easily, particularly if external benchmarks or facts available are used.

During the TDI modernization workshop at the European Parliament, several stakeholders claimed that no other trading partner of the EU applies the lesser duty rule and that therefore there is no possible risk of negative impact on EU exporters if the proposal were to be adopted. However those statements are factually incorrect as the table below indicates that several countries apply the lesser duty rule.

Countries mandatorily applying the LDR based on mandatory provisions in the domestic legislation	**Countries having discretionary LDR provisions in the AD legislation and applying these in practice**
India[13]; Brazil[14]; Israel	Argentina[15]; Australia[16]; Canada[17]; Colombia; New Zealand; Peru; South Africa[18]; Turkey[19]

[12]. Article 32.1 of the SCM Agreement provides that "*no specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement*."

[13]. Sections 4(d) and 17(1)(b) of the Customs Tariff (Identification, Assessment and Collection of Antidumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995, as amended.

[14]. See Article 78 of Decree No. 8058 of 2013. The lesser duty is not applied in certain contexts such as redeterminations, circumvention etc.

[15]. Article 41 of Decree No. 1326/98.

Many of these countries are active users of TDIs and frequently impose measures against imports from EU Member States. According to the European Commission's report on third country TDI actions against the EU, at the end of 2012, there were 94 AD measures in force against EU originating products out of which India had imposed 19 measures i.e. 20% of the measures. Among other countries, Brazil accounted for 10 measures, 5 measures were imposed by Argentina, and 3 measures by Turkey.[20]

Therefore, EU exporting producers significantly benefit from the lesser duty rule in third country investigations. In terms of some practical examples, in the Indian AD investigation concerning Morpholine from the EU, the dumping margin calculated for the EU exporting producer BASF was between 30% to 40% and the injury margin ranged between 10% to 15%. On account of the application of the lesser duty rule, a lower duty based on the injury margin was applied.[21] Similarly, in the South African AD investigation concerning Tall oil fatty acid from Sweden, the application of the lesser duty rule resulted in a 21% lower duty level for the cooperating Swedish producer (i.e. 19% instead of 24%). In the Israeli AD investigation against Non-woven floor and cleaning cloths from Germany, the German producer Krischhauer was subjected to a 10% lower duty rate based on the injury margin compared to the dumping margin, i.e. 51.2% instead of 56.8%. Similarly, in the AD investigation by New Zealand against Preserved peaches originating from Spain, the Spanish manufacturers benefited from the lesser duty rule.[22]

To summarize, carving out of exceptions for the non-application of the lesser duty rule would give impetus to the EU's trading partners as well to adopt such a practice to the detriment of EU exporters.

Fourth, the specific non-application of the lesser duty rule in AD cases when 'structural raw material distortions' exist, would be arbitrary and discretionary especially in the absence of a concrete definition of the concept in the basic AD and AS regulations. While no definition for this concept has been proposed by the European Commission, the European Parliament's proposed definition of raw materials and 'structural distortion' is extremely board and would grant unfettered discretion to the European Commission in interpreting and applying these concepts. Furthermore, the European Parliament also refers to the term 'significant state interference' but this has not been defined.

Notwithstanding the foregoing, if a 'structural raw material distortion' exception were to be incorporated, in order to avoid excessive discretion -- seen also in the context of MET assessments -- this concept needs to be unambiguously defined based at a minimum on the following parameters –

1. Threshold for the qualification of a raw material subject to the exception: The raw material should represent a certain percentage of the ex-works price of the product under investigation. Additionally, as this would be a value-based calculation, the actual price of the input material in

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16. In the evaluation of the EU's trade defence instruments it is noted that "*in practice, Customs has tended to apply the noninjurious price or lesser duty rule in a little less than half of the measures currently in place, with the specific rate (dollar per unit) duties concerned being reduced, on average, by 15 per cent*". Appendix I2, pg. 51.

17. The Minister of Finance can set a duty lower than the dumping margin pursuant to a public interest inquiry. See also the evaluation of the EU's trade defence instruments, Appendix I3.

18. The lesser duty rule is applied if the exporter and importer cooperate. See Article 17 of the South African AD Regulation.

19. http://www.tariff-tr.com/AntiDumping.aspx

20. Commission staff working document accompanying the report from the Commission to the European Parliament - Tenth report -- overview of third country trade defence actions against the European Union for the year 2012. See http://trade.ec.europa.eu/doclib/docs/2013/april/tradoc_151066.pdf

21. http://commerce.nic.in/writereaddata/traderemedies/adfin_morpholine_china_eu_usa.pdf

22. http://www.med.govt.nz/business/trade-tariffs/pdf-docs-library/current-duties-and-completed-investigations/final-report-preserved-peaches-from-spain.pdf

the exporting country market should be used as the numerator because that is the price that the producers in those countries paid.

2. Threshold for dual pricing and export taxes: The extent of dual pricing or the export taxes that would authorize the non-application of the lesser duty rule should be defined[23] because otherwise even a very small distortion could lead to the non-application of the rule.

Last, in the context of the European Parliament's proposed exception concerning social and environmental standards, it is noted that social and environmental dumping are not actionable under WTO rules because costs are costs and neither concept leads to price differences between domestic and export prices. Therefore, the non-application of the lesser duty rule if the investigated country does not have the same social and environmental standards remains unjustified from a TDI point of view.

1.4 Facilitating cooperation

The core aspect of the European Commission's non-legislative proposal under this theme is the upgrading of the SME help desk and increased assistance to SMEs in terms of standard forms for reporting statistics, diminishing linguistic burdens and establishment of investigation periods coinciding with the financial year. The European Parliament's proposal while not only including these three elements and similar forms of assistance[24] as legislative changes goes way beyond in proposing that the Commission should assist the SMEs in reaching the standing threshold.

The author supports the proposals to improve the SME help desk but considers that the proposal should then also address issues facilitating participation of SME EU importers which is currently lacking. In fact the European Parliament's suggested deletion of Articles 21(2) and 31(2) of the basic AD and AS regulations respectively seems improper and would dilute the Union interest provision. Contrary to the general misconception, the EU is not the only TDI user applying the public interest test. Many countries including Canada,[25] China,[26] Colombia and Russia[27] apply such a test.

Moreover, the European Parliament's proposition of helping EU producers with reaching the standing threshold puts into question the objectivity and fairness of the process and is likely to run counter to the ADA.

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[23]. For instance, if the threshold is set as 20%, in case of dual pricing, the difference between the distorted and the non-distorted price would need to be at least 20% expressed as a percentage of the non-distorted price and in the case of export taxes, the export tax itself would need to be at least 20%.

[24]. This includes addressing questions regarding the completion of the questionnaires, informing SMEs and their associations of initiation of investigations and providing guidance on additional methods of contact and liaison with the Hearing Officer and national customs authorities.

[25]. Study on the evaluation of the EU's trade defence instruments, Appendix I2.

[26]. Study on the evaluation of the EU's trade defence instruments, Appendix I4.

[27]. In the Russian AD investigation against high-carbon ferromanganese from Ukraine, measures were not imposed on public interest grounds. See http://www.economy.gov.ru/wps/wcm/connect/economylib4/mer/activity/sections/foreigneconomicactivity/cooperation/doc1198658319719

1.5 Optimizing the review practice

The European Commission proposes the introduction of a provision permitting reimbursement of AD/AS duties collected during an expiry review in the event the measures are not extended. The European Parliament opposes this proposed change.

The author supports the European Commission's proposal as it is logical and also necessary in light of the two points mentioned previously, i.e. the fact that the six months' duration of provisional measures is not counted in the five-year duration and a large number of measures in the EU -- such as the AD measures on bicycles,[28] tungsten carbide[29] and silicon metal[30] to name a few -- having been in force for an unduly long period. However reimbursement of the duties should also be extended to interim reviews resulting in the termination of the measures.

2. COMMENTS ON CERTAIN NEW PROPOSALS OF THE EUROPEAN PARLIAMENT NOT COVERED BY THE EUROPEAN COMMISSION'S PROPOSAL

Among the various legislative amendments advocated by the European Parliament to the AD and AS instruments, the legality and practical viability of some amendments appear doubtful.

First, the proposition that AD/AS duties be applied to products imported in connection with the exploration of the Continental Shelf or the Exclusive Economic Zone of a Member State, or the exploitation of its resources may be incompatible with the EU Customs Code which clearly defines the customs territory of the EU as consisting only of the inland waters and territorial waters.[31]

Second, the proposal to reduce the timeframe to maximum six months for the imposition of provisional AD and AS measures and maximum twelve months for the imposition of definitive AD measures and ten months for AS measures is a good proposition but should not come at the expense of conducting a thorough investigation -- especially in multi-country proceedings -- and increased burdens on interested parties which already are subject to tight deadlines. Moreover, this proposal seems to be limited only to complaint-based AD and AS investigations implying that ex officio investigations would be subject to different time frames.

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[28]. The AD measure was first imposed on 09.09.1993 and is due to expire on 07.10.2016 bringing the total duration of the measure to 25 years and 11 months, unless extended further.

[29]. The AD measure was first imposed on 27.09.1990 and is due to expire on 25.03.2016 bringing the total duration of the measure to 25 years and 6 months, unless extended further.

[30]. The AD measure was first imposed on 28.07.1990 and is due to expire on 11.05.2015 bringing the total duration of the measure to 24 years and 10 months, unless extended further.

[31]. Article 3(3) of the EU Customs Code.

3. TRANSPARENCY AND DUE PROCESS-RELATED ISSUES THAT SHOULD BE INCLUDED IN THE MODERNIZATION OF THE TDIS

In light of the lengthy legal and administrative procedures involved in reforming the TDIs, a broader exercise is desirable to further enhance transparency as the lack of transparency of the EU TDI, particularly in NME cases, undermines its legitimacy.

More specifically, in EU AD and AS investigations, not only are the calculations pertaining to the dumping/subsidy and injury margins confidential but many of the key elements of the determinations are not disclosed to importers and other interested parties either. In other words, in AD investigations, the analogue country producers' data are not disclosed and consequently the dumping margin calculations of DG Trade cannot be checked. Likewise, injury margin calculations remain unfathomable as these are based on the confidential data of EU producers and the targeted exporters, thereby depriving both sides of crucial information. Moreover, when the domestic industry comprises a few producers or a single producer, the actual data pertaining to the injury analysis is also not known. The same applies to NME subsidy cases where DG Trade tends to resort to external benchmarks. Therefore, the introduction of an APO system is necessary and would permit all interested parties -- i.e. importers, exporters and EU producers alike -- to double check the Commission's dumping/injury/subsidy margin calculations and understand the basis of the injury determinations.

The APO system would not necessarily lead to increased costs for interested parties because using the APO system is not compulsory and interested parties can furthermore instruct their legal counsel to limit the type of information to be reviewed or time spent on APO documentation. Additionally, any argument that the APO system would weaken the instrument is false as both the US and Canadian systems (with APO) have shorter investigation timelines than the EU.[32]

In fact the introduction of the APO system would serve two purposes. First, it would solve most of the transparency issues plaguing the EU system. Second, as indicated by the European Commission in its annual reports to the European Parliament regarding the use of TDIs by third countries, EU exporters also face significant denial of their rights of defence on account of the lack of transparency regarding the initiation, conduct of investigations, due application of the rules and the outcome among others.[33] Therefore, the APO system, if used by the EU and emulated by other countries that have developed their TDI practice along EU lines, would also benefit EU exporting interests.

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[32]. In the US system, the USDOC makes the preliminary dumping determination at the latest within 190 days in AD cases and subsidization determination within maximum 130 days in AS cases. The final determination is made within 75 days following the preliminary determination and may be extended to 135 days in AD cases. The injury determination is made by the USITC within 45 days of filing of the complaint and the definitive determination is made usually within 45 days after the USDOC's definitive determination or 120 days after the preliminary affirmative determination by the USDOC, whichever is earlier.
In the Canadian system, the Canadian Border Services Agency has 90 days once a decision to investigate has been made, in order to arrive at a preliminary determination regarding dumping/subsidization and to impose provisional measures. In complex cases this time period is extended to 135 days. Pursuant to the imposition of provisional measures, the Canadian Border Services Agency has 90 days to reach an affirmative determination. In parallel, the Canadian International Trade Tribunal has 60 days to arrive at a preliminary determination of injury. Following positive determinations of dumping/subsidization and injury, the Canadian Border Services Agency has 90 days to complete its investigation. The International Trade Tribunal simultaneously continues its injury investigation and once the Canadian Border Services Agency reaches its final determination, the former holds a public hearing, pursuant to which it has 30 days to make a final injury decision.

[33]. See for instance, section 3.3 of the report from the Commission to the European Parliament on the overview of third country trade defence actions against the EU for the year 2012.

Undeniably the introduction of the APO system would require some administrative and legal changes.[34] In the interim there are other ways to address the lack of transparency, some of which can be easily introduced through administrative practice and have in fact been suggested by the European Parliament such as improved notification regarding new non-confidential information, access to non-confidential information through a web-based platform,[35] provision of information to interested parties on import volumes,[36] and systematic access to detailed annual reports on the use of TDIs by the EU including information on undertakings and verification visits.[37]

In addition to the foregoing, the author also considers that information on the receipt and rejection of complaints -- without publicizing as in the US – as well as interim, expiry and newcomer review requests should be disclosed to interested parties. Furthermore, the verification reports prepared by DG Trade's case teams should be made available to the investigated parties concerned as is the practice in the US and Australia among other countries.

4. CONCLUSIONS

The AD and AS instruments are WTO-permitted exceptions to be applied by countries against dumping and countervailable subsidies and can legitimately be used to the extent they serve the purpose for which they were instituted. The European Commission and Parliament's respective proposals seem to be going beyond the mandated objective of these instruments.

Moreover, while modernization entailing legislative changes is welcome, the introduction of over-ambitious changes without fully assessing their likely legal and economic effects, particularly on EU exporting interests, will be damaging to broader and long-term EU trading interests.

Taken as a whole, the stated objective of the modernization exercise as being "balanced and pragmatic" is lacking and the aim of striking a balance between EU producer and importing interests has been given a pass with most of the amendments favoring the former, certainly in the version of the INTA committee.

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34. Unless it were to be adopted on a voluntary basis by (part of) the Brussels trade bar.

35. European Parliament's proposed addition of Articles 6(10)(a) and 11(b) to the basic AD and AS Regulations respectively.

36. European Parliament's proposed amendment to Articles 14(6) and 24(6) of the basic AD and AS Regulations respectively.

37. European Parliament's proposed addition of Articles 22(a) and 33(a) to the basic AD and AS Regulations respectively

PART III: Modernisation of the EU's Trade Defence Instruments: More effective and transparent rules to resist protectionism

Olivier Prost[38]

1. INTRODUCTION

Comments on the Commission's proposals and on the amendments proposed by Members of the European Parliament and by the Parliament's International Trade Committee are based on the following straightforward ideas drawn from our experience:

- The antidumping and anti-subsidy rules are virtually the only tools at the European Union's disposal for confronting unfair competition at the international level. Their effectiveness - including the speed at which they are implemented - is therefore essential;
- Implementation of these rules must take account of economic changes: new anti-competitive practices often the result of State policies, at a time where European-style control of State Aid does not exist anywhere else (lack of reciprocity); new context created by increasingly frequent threats of retaliation against complainants or other sectors of the European industry;
- These rules must be subject to the least possible politicization. This is necessary to maintain the public trust in this instrument in Europe. And, as European exporters are increasingly the target of investigations in third countries, particularly emerging ones, it is indispensable that the EU be irreproachable in its own practice and an example for these countries;
- Progress in transparency and predictability must be continuous and always be reconciled with the need for European companies to benefit from a tool that is effective against unfair practices.

Failing to keep these simple ideas in mind in the context of the modernization exercise would be the best way of playing into the hands of those who are advocating a return to protectionism.

2. PRELIMINARY REMARKS

TDIs, particularly anti-dumping, have been a subject of intense controversy between supporters of free trade, who denounce these instruments as protectionist devices without economic justification, and supporters of fair trade - in the first place the European industries - who consider that the Union does not use them vigorously enough, leaving its market insufficiently protected against unfair trade practices by foreign countries.

Each attempt to reform these legislations consequently runs the risk of reactivating acrimonious debates between the two camps and of ending into an impasse, thus leaving legislators a very narrow margin of maneuver.

For proposed modifications of these legislations to have any chance of success it is therefore crucial that all those involved in this process keep in mind the rationale of the TDIs and the need that they remain an efficient remedy against unfair trade, while addressing in a balanced way the concerns of those that can be the most directly affected by their implementation.

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These amendments will be analyzed in the light of the general considerations exposed above.

3. ASSESSMENT OF THE COMMISSION'S PROPOSALS AND THE PARLIAMENT'S SUBSEQUENT AMENDMENTS

The package presented by the Commission combines proposals of very different importance, from legislative changes - of which some are quite significant -, statements of intent – which do not give the same degree of guarantee regarding their implementation if only for reasons of resources - to guidelines - some already presented, others possibly to come.

Some proposals would clearly improve the functioning and efficiency of the instruments, others would have little impact, if any, or are at best unnecessary, or would add to the difficulties for the EU industry to obtain protection against unfair trade practices.

The amendments introduced by Members of the EU Parliament – 188 for the antidumping Regulation; 109 for the anti-subsidy Regulation – reflect a wide diversity of positions and sharp divisions within the Parliament. Part of these amendments goes in the direction of those proposed by the Commission, in some cases reinforcing them or adding to them; others reject them or would deeply modify them.

The Committee on International Trade of the European Parliament (INTA) has recently adopted a draft Parliamentary position on the amendments proposed by the members of the European Parliament, which should be put to the vote at the plenary mid-February.

This paper, after briefly going over the variety of proposals presented by members of the Parliament, will focus on those amendments approved by the INTA Committee.

3.1 Transparency and Predictability

3.1.1 Pre-disclosure

a) The proposal of the Commission

A limited in scope pre-disclosure of provisional anti-dumping (AD) and anti-subsidy (AS) measures - or of the decision not to apply provisional measures in case of a negative outcome - would be given to interested parties two weeks before the imposition of provisional measures. This would represent a positive step in the direction of more transparency and predictability for parties to the investigation. It would give them the possibility to react to manifest errors in the calculation of dumping and injury margins on which proposed measures are based. It would also help quash, at least somewhat, the spread of uncontrolled rumors, based on leaks, encouraged by the blackout on measures until the day of their imposition.

The Commission is also proposing a two weeks advance notice of imposition of provisional measures. This proposal would provide a guarantee to foreign exporters that no measure will be taken during the period of two weeks after the pre-disclosure. This would not only appear unnecessary, but also a non-justifiable encouragement to beat the imposition date of the measures.

The length of the investigation (in particular between the moment when the industry first raised its problems with the Commission and the time where the provisional relief is granted – in most cases, more than a year and a half -) already offers all the opportunities possible to foreign exporters to load

boats and stockpile dumped and subsidized goods in the EU in anticipation of measures, at a time where the Commission has already *prima facie* evidence of dumping and subsidy. Generally, any change to the Basic regulations that would create further incentive to foreign exporters to rush goods into the EU in anticipation of measures would legitimately raise great concern among European industries.

What would rather be necessary would be (i) a more systematic use of registration - a possibility that the EU Commission has so far used sparingly - and (ii) the imposition of retroactive measures - which the Commission has never used – in order to discourage speculative exports during the nine months of investigation where measures have not yet been imposed but where the EU industry remains fully exposed to the effects of unfair foreign imports. These two options seem to have been considered by the members of the European Parliament and the INTA Committee.

b) Amendments proposed by the Parliament

Concerned by the risk of stockpiling, a large number of Members have proposed amendments rejecting the possibility of a shipping clause or of a delay in the imposition of measures after the pre-disclosure. Other amendments support the Commission's idea of two weeks without measures after the pre-disclosure. An amendment introduced by one Member proposes a shipping clause subject to a series of strict conditions. One amendment even rejects the idea of pre-disclosure.

Making a clear cut choice on this point, the INTA Committee has not only rejected all possibility of a shipping clause or any measure of similar effect, but gone as far as to reject the Commission's proposal for a two-week pre-disclosure to parties prior to the imposition of provisional measures. It is to be noted that the INTA Committee, consistent with its opposition to any measure which could encourage speculative imports, has also proposed an amendment reinforcing significantly the possibility of registration of imports.

c) Assessment of the Parliament's amendments

While it would be regrettable that the proposal of a pre-disclosure at least two weeks before provisional measures - which corresponds to a long standing demand of all the parties - be dropped, the reluctance of the Parliament vis-à-vis the idea of a shipping clause or provision of similar effect is quite justified in the case of proceedings involving unfair trade, for which decisions must always be taken in light of the primary objective of the anti-dumping instrument, which is to protect the European industry against such unfair trade[39].

The introduction of a shipping clause is neither mandated nor forbidden by WTO law. In this regard however, to our knowledge most countries do not apply a shipping clause in AD or AS proceedings. The United States does not have one and never considered the possibility of one. While the EU Regulation on safeguard proceedings contains a shipping clause, it should be recalled that safeguard

[39] See Decision of the Court of First instance, in T-2/95,: *256 "(...) To consider that the efforts made by [the first producer] did not demonstrate a willingness to supply the applicant and that the causal link was therefore broken by reason of the conduct of the European industry would be tantamount to making it impossible to impose anti-dumping duties on imports of dumped raw materials where the Community industry is unable to supply certain importers because of the special features of their production processes. That would be incompatible with the aim of the basic regulation, which is to protect the Community industry against unfair price practices of non-member countries."*

does not concern unfair competition - unlike anti-dumping and anti-subsidy - and thus may justify such a shipping clause.

If such a clause would however be reintroduced at some point, it will have to be submitted to the following strict and cumulative conditions, in order to provide sufficient protection against speculative imports and abuse of the system:

- the goods should have been shipped to be directly imported and put to consumption in the EU without transiting through a custom warehouse;
- the transport documents, issued before the date of pre-disclosure, should clearly establish from the outset that the product concerned were solely and exclusively destined to the EU and left the country of origin before the date on which the pre-disclosure has taken place;
- an irrevocable letter of credit should have been issued by the banker of the buyer to pay the seller if the latter present him with documents specified in the credit and showing the good execution by the seller of his obligations;
- registration of imports after the notice of initiation is decided to make sure that the risk of retroactivity will not cover the two duty-free weeks, but will cover the period of time before the pre-disclosure.

3.1.2 Guidelines

a) The proposal of the Commission

The Commission intends to adopt and publish guidelines with regard to (i) the union interest test, (ii) expiry reviews, (iii) injury margins and (iv) the choice of analogue country. This undeniably represents a positive step towards transparency and predictability.

However the adoption and publication of guidelines raise a problem of timing and content. Regarding their timing, guidelines should not be published before the amendments made to the Basic Regulations are adopted, and the final form of the provisions they are meant to interpret is known.

This is a matter of logic. The Commission should then reexamine the proposed guidelines in close consultation with the AD Committee. Indeed, it may and should do so in light of Article 13§2 of the Treaty on European Union, which provides that "*each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation*" (emphasis added).

Guidelines also raise a delicate problem of substance. In conformity with the prescriptions of the Lisbon treaty (TFEU Article 290), according to which "*The essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power*", guidelines should be limited to a mere technical interpretation of the existing provisions and should only reflect well-established practice. Innovations should thus be left to the legislative process with control of the Parliament and Council.

While the Commission appears to have respected this line for two of the proposed guidelines (analogue countries and injury margin), may be different for guidelines on Union interest and on expiry reviews. The Union interest is a concept of which the interpretation has been, and still is, the

subject of intense debates and disagreements. Elaborating on this concept, adding new criteria - which do not always appear to reflect the established practice - can thus have the effect of changing essential elements of the provisions of the Basic Regulations on the Union interest, its definition and the conditions of its application. This would overstep the boundary between what is of the responsibility of the Parliament and Council and what is of the responsibility of the Commission, and thus raise an inter-institutional problem.

b) Amendments proposed by the European Parliament

While certain amendments direct the Commission to adopt guidelines on the calculation of the injury margin, on expiry reviews and on the Union interest, other amendments reflect the will of the Parliament to carefully control the adoption of guidelines.

An amendment stipulates that the Commission will have to consult the Parliament and Member States before adoption and publication of guidelines; others require that the Commission formally submit proposed guidelines to the Parliament and Member States for approval before adoption and publication. An amendment further provides that guidelines should be "*fully in conformity with the provisions of (the) Regulation*" and that "*no such guidelines can broaden the discretion of the Commission, as interpreted by the Court of Justice, if applicable, in adopting measures*". An amendment specifies in detail the conditions under which the Commission can adopt delegated acts, including guidelines. It provides in particular that ''*a delegated act adopted pursuant to this regulation shall enter into force only if no objection has been expressed by either the European Parliament or the Council within a period of two months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object*.''

The amendment approved by the INTA Committee on this point is a compromise solution under which the Commission, when it intends to adopt or publish guidelines clarifying established practice shall, prior to the adoption or publication, "*consult the EP and Council, aiming at a consensus in view of the approval of the given document*". It adds that any such guidelines cannot "*broaden the discretion of the Commission as interpreted by the Court of Justice, in adopting measures*".

c) Assessment of the Parliament's amendments

The publication of guidelines by the authority is an administrative step through which such authority clarifies its practice and which has a certain legal value. The Court of Justice has held that where "*in adopting rules of conduct and announcing by publishing them that they will apply to the cases to which they relate, the Commission imposes a limit on the exercise of its aforementioned discretion and cannot depart from those rules under pain of being found, where appropriate, to be in breach of general principles of law, such as equal treatment or the protection of legitimate expectations*"[40].

Other authorities have published similar guidance, notably in the US, and to a lesser extent in Australia, Canada and New-Zealand[41].

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[40] See case-law relating to state aids, and notably Case C-464/09 P, *Holland Malt BV v European Commission*, 2.12.2012, ECR I-12443, §46

[41] See for instance the US International Trade Commission's Antidumping and Countervailing Duty Handbook, 13th edition, dated December 2008 (Publication 4056). See also the Australian Anti-Dumping Commission's Dumping and Subsidy Manual, last updated in December 2013.

For reasons explained above, it is understandable that the Parliament, while being supportive of the adoption and publication of guidelines, would want to make sure that the Commission will not modify the Basic Regulation through the publication of guidelines, and thus impinge on its powers and those of Member States. However, subjecting the adoption of guidelines to a too burdensome procedure would discourage the adoption, highly necessary and overdue, of such guidelines by the Commission.

In this respect, the Commission is indeed considerably behind the US practice, as well as other countries like Australia and Canada, which for many years have had a very detailed manual of procedure, regularly updated through an open and transparent procedure.

The formula suggested by INTA, although it remains to be seen what actually implies a consultation of the EP and Council "*aiming at a consensus in view of the approval of the given document*", would appear to be a reasonable middle ground, stopping short of requiring formal approval of guidelines but ensuring a certain degree of control by the Parliament and Council.

3.1.3 Access to information

a) The proposal of the Commission

The Commission does not specifically address this issue in its proposals.

b) Amendments proposed by the European Parliament

Members of the Parliament devote several amendments to it, requiring "*the Commission to ensure the best possible access to information to all interested parties by allowing for an information system whereby interested parties are notified when new confidential or non-confidential information is added to the investigation files*" and requiring that non-confidential information shall be also made accessible through a web based platform.

Proposed amendments tend to favour transparency through enhanced access to the non-confidential file rather than resorting to an APO system similar to the one found in the US regulations for instance.

The INTA Committee approved one of these amendments, as well as a proposed new recital providing that the Commission should *''ensure greater transparency with regard to proceedings, internal procedures and outcome of investigations''*. It also approved an amendment requiring more transparency in the content of undertakings, and an amendment requiring the Commission to report annually in detail to the EP and Council on application and implementation of the anti-AD and AS Regulations.

c) Assessment of the Parliament's amendments

The efforts of the European Parliament are welcome, as access to information is an area where further improvements are necessary. One can simply regret that the requirement for greater transparency does not more specifically mention that the need to improve the quality of the non-confidential file should be achieved. The content of non-confidential files on elements of fact and arguments presented in confidential submissions is indeed often inadequate for other parties to allow a reasonable understanding of their substance.

If parties are dissatisfied with the content of non-confidential files, they should have the possibility to ask the mediation of the Hearing Officer, a possibility that may be indirectly foreseen by an amendment requiring the Commission ''*to safeguard procedural rights and ensure that proceedings are handled impartially…,through a Hearing Officer*''.

There are of course no provisions under WTO law that would prevent the adoption of such rules. Conversely, transparency and access to information is encouraged by *inter alia* articles 6.4 and 6.5 of the AD Agreement and 12.3 and 12.4 of the AS Agreement.

At the present time, the content of non-confidential files on elements of fact and arguments presented in confidential submissions is often inadequate to enable other parties to have a good understanding of such facts and arguments. The Commission should make efforts to improve the content of non-confidential files and, more generally, to facilitate access to the public file. Initiatives in this respect should also be taken by the parties concerned.

Some have for many years campaigned in favor of the adoption by the EU of a system of confidential information disclosure under an APO similar to the US system. However such an innovation may, in the EU context, raise one particular legal problem. There is currently no harmonization regarding confidentiality obligations in the EU-28. Proceedings against lawyers that fail to respect their confidentiality obligations are to be instituted before the President of the relevant Bar and under the local law, in particular regarding the level of damages. This would be an extraordinary source of complications. Moreover, European harmonization is very unlikely to happen as the Commission does not have the power to regulate and impose sanctions on the legal profession.

In addition, an APO system would add significantly to the cost already far too high of TDIs procedures, in particular for EU producers, which - contrary to exporters of third countries - are the ones who are harmed by the dumping or subsidization practices and are too often less inclined to allocate sufficient funds and efforts to such proceedings. This would therefore likely worsen the imbalance between the position of EU producers and that of foreign exporters.

For these reasons, such a system, which after careful reflections the Commission has again decided not to propose, would appear to raise difficulties disproportionate with what could be gained from it.

A possible solution to address concerns regarding access to confidential information may lie in an APO-like solution that involved the Hearing Officer: he would be in charge of receiving confidential documents, analyzing them and would carry an assessment as to which elements should be transmitted to other parties, if possible in a way that preserve to the best extent possible the most sensitive aspects in terms of confidentiality of such elements.

While it is generally recognized that the EU uses AD and AS in a very moderate way – as attested by the significantly lower level of duties it imposes compared to those imposed by most other countries in similar cases –, the EU is still often criticized regarding the transparency of its procedures. A further improvement of the transparency and predictability of procedures - significant progress have been made in recent years – is therefore desirable. Beyond being clearly in the interest of all parties, it is also indispensable, at a time where EU exports are increasingly the target of AD and AS investigations in third countries, that the EU be irreproachable in its own practice.

Any reform of the AD and AS legislation must therefore have as one of its component the improvement of the transparency and predictability of the EU procedures. Great care should however be taken that this should not be at the expense of the effectiveness of these instruments.

3.2 How to Deal With Threats of Retaliation

a) The proposal of the Commission

The Commission proposes that an *ex officio* investigation be opened, where possible, in case Union producers are exposed to threats of retaliation and if there is sufficient prima facie evidence of injurious dumping/subsidization. It is also proposing to "*oblige*" companies to cooperate in ex-officio investigations.

b) Amendments submitted by the European Parliament

The INTA Committee's amendment is proposing to initiate ex-officio proceedings, specifically in case a sector largely composed of SME's is concerned. While this amendment does not explicitly mention threats of retaliations as one of the "special circumstance" justifying the self-initiation of an investigation, the new proposed recital 6 does[42]. It is also proposing to replace the word "*obliges*" by "*are requested*" since there are no sanctions foreseen in case of non-cooperation.

c) Assessment of the Parliament's amendments

The existing AD and AS Regulations already allow for self-initiation of cases.

Threats of retaliation against complainants or other sectors not necessarily connected to the sector which has complained or obtained measures is an increasingly worrying phenomenon which is also specific to the EU and its decision-making process involving 28 Member States. Such threats are totally unacceptable in a system based on the rule of law: Would one accept retaliation when the UK authorities impose anti-trust remedies against a German company? Why should the "rule of law" apply differently at the international level? It is the ability of the EU to defend itself against unfair foreign trade practices which is at stake and which will be further undermined if no suitable response to threats can be found.

While the recognition by the Commission of the unfairness of such situations and the need to do something for the companies and sectors concerned is positive, one may well doubt whether self-initiation of cases, and the complementary obligation for other firms of the industry to cooperate, would by themselves solve the problem.

While there is probably no perfect solution to this problem, a measure that could help a great deal would be the institution of secret voting on proposed Commission's decisions.

As regards the amendments presented by the Parliament, and more specifically those adopted by INTA to address the issue of access to and participation of SMES in TDIs procedures, which provide for the possibility of self-initiation of cases where the complaining industry is largely composed of SMEs and for assistance of the Commission to SMEs through the SME Help desk all along the procedure, such amendments would represent a very positive step forward.

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[42] Recital 6, as proposed, provides that: "(…) In order to ensure effective measures to fight against retaliation, Union producers should be able to rely on the Regulations without fear of retaliation by third parties.
Existing provisions, under special circumstances, (…) provide for the initiation of an investigation without having received a complaint, where sufficient evidence of the existence of dumping, countervailable subsidies, injury and causal link exists. Such special circumstances should include threat of retaliation from third countries" (emphasis added)

SMEs indeed suffer from very serious handicaps in such procedures[43]. It would thus be entirely justified that they could benefit from simplified and adapted procedures to make sure they are fully able to argue and defend their case. This, however, does not exempt them from the need to cooperate during the course of the proceeding.

3.3 Effectiveness and reactiveness

3.3.1 Prompt Imposition of Provisional Measures

a) The proposal of the Commission

The Commission in the introduction to its Communication states that it will "*seek to reduce in general the time needed for deciding provisional measures in AD/AS cases by two months*".

This commitment is welcome, but is not even part of its formal proposals and is only couched in extremely tentative language that gives no guarantee that it would actually become normal practice.

b) Amendments submitted by the European Parliament

Several amendments have been submitted by members of the European Parliament with a view to render mandatory a prompter imposition of provisional measures. While some recommended that the investigation as a whole be shortened to either 7 or 9 months with a possible extension to respectively 10 and 12 months in specific cases, other propose that provisional measures ought to be adopted within 6 or 7 months from the opening of the investigation. One specific proposal offers to keep the 9 months maximum delay where exceptional circumstances justify it, while the general delay for adoption of provisional measures would be brought back to 7 months.

The amendment approved by the INTA Committee has decided to require the Commission to adopt provisional measures within 6 months and to reduce the overall length of investigations to 9 to 12 months for antidumping investigations and to 9 to 11 months for countervailing investigations.

c) Assessment of the Parliament's amendments

Nothing in the WTO agreement prevents the adoption of provisional measures as long as they do not apply sooner than 60 days from the date of initiation of the investigation. However, provisions relating to the duration of the provisional measures should also be taken into account.

Thus, Article 7.4 of the AD Agreement provides that provisional measures can only be applied for a period of 4 to 6 months - upon request by exporters representing a significant percentage of the trade involved - except in case of the application of the lesser duty rule for which delays are extended to 6 and 9 months. Article 17.4 of the WTO Countervailing Agreement only provides for a maximum duration of 4 months, which bears no exception.

The reduction of the duration of investigations is thus legally possible.

For the time being, in practice, provisional measures are imposed after a nine-month period. Given the time that is generally necessary for the preparation of a satisfactory complaint, this means that usually much more than a year - most of the time more than a year and a half - would have passed

[43] See in particular the study made by GIDE, "*Study of the difficulties encountered by SMEs in Trade defense Investigations and possible solutions*", *30 November 2010*, available on DG Trade website: http://trade.ec.europa.eu/doclib/docs/2011/february/tradoc_147475.pdf

between the moment when the industry raised its problems with the Commission and the provisional relief is granted.

The amendments of INTA Committee to adopt provisional measures within 6 months and to reduce the overall length of investigations to 9 to 12 months for antidumping investigations and to 9 to 11 months for countervailing investigations are thus welcome, provided that it does not affect the overall practice of the Commission. Indeed, speeding up investigations within 6 months, particularly the imposition of provisional measures (or even 7 months) therefore goes in the right direction, but this should not be at the expense of the thoroughness and quality of investigations.

3.3.2 Non-Application of the Lesser Duty Rule (LDR) in certain cases

a) The proposal of the Commission

The Commission is proposing not to apply the lesser duty rule on a countrywide basis in cases of subsidization and in cases of structural raw material distortions.

The EU is, to our knowledge, one of the major users of the AD and AS to automatically apply the lesser duty rule, a rule that is only optional in the WTO AD and AS Agreements. Such rule has a significant impact on the level of measures imposed: more than half - this varies from year to year - of the duties imposed are set not at the level of the amount of dumping or subsidization found but at the lower - sometimes much lower - level of the so called injury margin.

While the laudable objective of the lesser duty rule is to avoid to totally exclude imports from the EU market and to maintain a certain degree of competition, it has also the effect, in cases where the level of dumping is significantly higher than the level of the injury margin, to let foreign exporters continue to benefit from part of their artificial advantage.

This is particularly unacceptable in cases where the distortion is caused by subsidies or other form of State interferences such as export taxes and more generally dual pricing schemes. In such instances, it would be perfectly justified to fully correct the distortion. To do so would also act as a useful deterrent for such unfair practices, which in recent years have proliferated, and against which there is no other efficient international tools available.

It should be added that the difference of duties applied on a same product in the US, which has no lesser duty rule, and in the EU - a relatively frequent occurrence as there are often similar cases on both sides of the Atlantic - creates a strong risk of reflux of products to the EU.

It is difficult to understand however why, as would seem logical, the Commission has not explicitly extended the proposed rule to situations of dual pricing, in particular of energy and entrants.

b) Amendments submitted by the European Parliament

Very controversial, this issue has triggered a flurry of proposals and counter-proposals from Members ranging from reinforced versions of the Commission's proposal to a flat rejection of the idea.

It is notable that those who support the idea of partial non-application of the LDR are in majority going much further than the Commission regarding the situations where the lesser duty rule would not apply: some amendments make it non-applicable in AS cases, and in AD cases where either the cost of raw materials are distorted or where energy prices are distorted. Others extend the non-application of the LDR rule to situation of dual pricing in general; others to imports from countries

that apply environmental and labor standards lower than those stipulated by international conventions to which Member States of the Union are party; others to countries in which the State interfere with exchange rates; or when the complainant represents a diverse and fragmented industry, largely composed of small-and-medium-sized enterprises.

The most far reaching of these proposals however stipulate that the benefit of the lesser duty rule shall always be granted when structural raw materials distortions are found to exist with regard to the product concerned in the exporting country and such country is a least-developed country listed in Annex IV to Regulation (EU) No 978/2012 of the European Parliament and of the Council. Proponents of partial non-application of LDR also propose to apply the same rules to undertakings.

In the other direction, a significant number of amendments flatly oppose any non-application of the LDR whether in AD or AS cases.

Looking at the positions expressed through these amendments, one can sense the strength of feelings and the very strong divisions of opinions within the Parliament on this subject. Such divisions raise the distinct risk of an impasse within, and between EU Institutions which would endanger the whole modernization exercise.

Faced with this diversity of views, the INTA Committee has, here also, made a clear cut choice by approving the most far reaching of the amendments offered, as it would indeed extend the non-application of the LDR to a variety of situations. It provides notably that such rule would not apply in case of (i) structural distortions or significant state interferences, (ii) absence of sufficient level of social and environmental standards in the exporting country, as compared to international agreements to which the EU is a party, (iii) the EU complainants are mainly SMEs, (iv) subsidies has been provided to the exporting producer.

It is noteworthy that INTA defines raw materials and structural distortion to raw materials as "*the outcome of interference from third countries, which includes, inter alia, export taxes, export restrictions and dual pricing schemes*" (emphasis added).

It also prescribes, in the above mentioned amendment and in recital 10, the benchmark for determining whether an exporting country has an insufficient level of social and environment standards by reference to ILO conventions (see also new recital 11) and multilateral Environmental Agreements. State interferences regarding, inter alia, currency exchange rate and fair trade finance conditions are, for their part, not further defined.

Finally, the LDR would still apply where albeit structural raw materials distortions have been found to exist, the exporting country is considered as a least-developed country on the basis of Regulation No 978/2012.

c) Assessment of the Parliament's amendments

The vote of the INTA Committee calls for two remarks:

- In spite of the strong opposition of some Members of the Parliament, INTA has approved the principle of partial non-application of LDR;
- Its proposal goes significantly further than that of the Commission.

While such reinforcement of the EU AD and AS legislations will be viewed as positive by large segments of the European public opinion, some will raise questions as to its WTO compatibility, as well as regarding the negative reactions it may trigger from the EU trading partners.

Among the arguments that could be raised by opponents to this proposal, is the fact that even if the LDR is option under the WTO AD Agreement, the EU remains under the obligation to apply AD and AS duties on a non-discriminatory basis. The non-application of the LDR in certain specific cases would thus have to be justified. This should raise no issue for anti-subsidy cases, since the clause of non-application of the LDR would apply generally. But it may be more complicated in AD cases where the non-application of the LDR would only be partial, particularly when the justification for the non-application of the LDR is based on non-transparent, subjective and discriminatory conditions.

On the other hand, the proponents of this proposal will argue that the LDR is a favor given to third countries that the EU is in no way forced to grant to countries that, through State interferences and policies that do not respect certain international standards, distort trade at the expense of the EU industry. There should not be any taboo as to what should be the exact scope of the non-application of the LDR, so long as the conditions upon which such non-application is decided are objective, transparent and non-discriminatory.

In this respect - and even though the context is different - one might draw a parallel with the EU Generalized Scheme of Preferences ("GSP") which, for some years now, conditions the granting of non-reciprocal EU tariff preference to countries upon the respect of fundamental labor rights contained in specific international conventions[44]. .

In addition, one may further point that other countries only apply partially LDR, in particular Australia, which has recently decided not to systematically grant the benefit of the lesser duty rule in certain circumstances, e.g. where the Australian industry is composed of at least two SMEs, where there is a particular market situation on the exporter market making it impossible to use domestic selling prices as a basis for normal value or where subsidies have not been reported to the WTO[45].

Linking the rejection of the LDR to labor policies (or other general measures) is likely to provoke sharp reactions. This will probably be an aspect that will be carefully weighed by the Commission and the Council.

More precisely, extending the scope of the non-application of the LDR from product-specific issues (like subsidization or structural raw material distortions) to general policy issues (labor, environment or exchange rate) raises the question of whether it is still up to the AD/CVD instruments to deal with such concerns or whether it should be part of future new rules of international governance, which are still largely deficient. Where applicable, such provisions would need strict and relevant framework for its implementation.

This must also be analyzed in light of the need to find a compromise between the three institutions without delaying considerably the legislative process. One should keep in mind that a strengthened AD/CVD instrument, as a result of the TDIs modernization, is better to combat unfair trade than a *statu quo* situation that would deprive the EU industry from many - even if not always spectacular - provisions that could definitely make easier for EU industries the process of launching proceedings against unfair trade and obtain efficient and swift measures against it.

[44] See notably recital 24 and Article 19 of Regulation (EU) No 978/2012 of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008

[45] See Sections 8, (5BAA) and 10, (3CA) Australian Customs Tariff (Anti- Dumping) Act 1975, No. 76, 1975 as amended by Act No. 94, 2013

3.3.3 Reviews

a) The proposal of the Commission

Two proposals of the Commission relating to reviews procedure need to be highlighted: (i) the reimbursement of duty paid if an expiry review is terminated without renewal of measures and (ii) the fact that that exporting producers with a zero or *de minimis* margin in an original investigation will not be subject to any review.

b) Amendments proposed by the Parliament

Members of the Parliament have expressed different views on this topic.

On the one hand, some members of the European Parliament rejected the refund of duties in case of negative conclusion of expiry reviews, arguing that "*the reimbursement of duties after expiry of the provisional measures, where definitive duties are not imposed, is a complex and administratively cumbersome procedure*". On the other hand, it has been argued that the refund should not only concern the duties paid, but also bear an accrued interest thereon.

It has also been suggested that one possible way to mitigate the asymmetry of treatment resulting from the refund of duties in expiry reviews, would be to systematically register imports. Registration of imports has – as explained below – been in any case made more effective and systematic in the draft INTA proposals.

Finally, another amendment proposed for expiry review provides that "*such likelihood may also be indicated by continuing interference by other countries*".

INTA has chosen this last wording and deleted references to the refund of duties in expiry reviews.

c) Assessment of the Parliament's amendments

First, the refund of duties in case expiry reviews are terminated without renewals of the measures in cause would constitute another WTO+ obligation. Indeed, both articles 11.3 of the AD Agreement and 21.3 of the AS Agreement provide clearly that "*the duty may remain in force pending the outcome of [an expiry] review*." There is therefore no WTO obligation to refund duties imposed during an expiry review.

In addition, while seemingly fair, the proposal of the Commission to reimburse duty paid where an expiry review is terminated without renewal of measures would create an asymmetry of treatment between EU producers that suffered for more than one year (between the moment when the industry raised its problems with the Commission and the provisional relief is granted without retroactive application of duties for this period and importers that could be refunded during a similar period at the end of an expiry review. While retroactivity would thus apply automatically in the case of an expiry review, such possibility has been consistently refused to the EU industry in investigations. Should such a provision be adopted, it should have as a counterpart, as a matter of equity and fairness, a change of the Commission's attitude regarding the registration of imports and retroactivity at the initial stage. However, in any case, retroactivity could not be automatic, without breaching provisions of WTO law.

Second, the inclusion of state interventionism as an indicator that there is a likelihood of resurgence of dumping might be in violation of the WTO case-law and would need to be further clarified. Indeed,

the Appellate Body has held that in the framework of the analysis to be carried under Article 11.3 of the AD Agreement, "*Article 11.3 does not, however, set out a specific methodology for making such determinations. In principle, therefore, investigating authorities are not restricted in the choice of methodology they will follow in making their sunset determinations. In their choice of methodology, however, the investigating authorities should have regard to both 'investigatory and adjudicatory aspects' of sunset reviews and make forward-looking determinations on the basis of evidence relating to the past. They must arrive at reasoned conclusions on the basis of positive evidence. In so doing, the investigating authorities may not remain passive. Rather, the authorities have to act with an 'appropriate degree of diligence'*"[46]. Therefore, to avoid any conflict of interpretation as to whether this would actually be in breach of the case law of the WTO, any interference by other countries, on their own, should not lead to a systematic and definitive conclusion that recurrence of dumping is likely to happen, but that assessment should be based on facts and positive evidence according to a case by case analysis, an element of which would be the degree of intervention of another country.

4. OTHER ISSUES OF PARTICULAR INTEREST

– **Access to the procedure should be made easier, in particular for SMEs**

While the Commission proposal to give parties more time to register as interested parties and to reply to questionnaire is a positive step, it does not address the main problems raised by the Union interest test for many companies, and more particularly SMEs: Arguing their case, which over the years has become more and more demanding, is beyond the capabilities and means of many of them.

The complication, the length and the cost of procedures represent a serious deterrent for SMEs to resort to TDIs. In the course of the study made by GIDE on SMEs and TDI[47], a number of SMEs complained that they were suffering from unfair practices by foreign exporters, but were either unaware of the possibilities offered by TDIs or had renounced to use these instruments for the combination of reasons mentioned above. The various actions that the Commission proposes to correct this situation are certainly welcome, but they will be of no effect if adequate resources are not assigned to such tasks.

This issue has been recognized and included in the proposal of the INTA Committee. A recital notably provides that "*SMEs have difficulties to accede to trade defence proceedings due to the complexity of the procedures and the high costs related thereto. SMEs' access to the instrument should be facilitated by strengthening the role of the SME Help Desk, which should support SMEs in filing complaints and in reaching the necessary thresholds for investigations to be launched. Administrative procedures related to trade defence proceedings should also be better adapted to SMEs constraints*".

It therefore proposes to introduce a new paragraph *a)* relating to the measures to be taken by the Commission and the SME Help Desk in Article 5 of the Basic AD Regulation and Article 11 of the Basic AS Regulation. These articles provide that the SME Help Desk shall raise awareness and provide information on TDIs proceedings, inform and assist SMEs at all steps of the proceedings.

In addition, it now provides for questionnaires to be available upon request in all official languages of the Union, so as to "t*o reduce the burden placed on SMEs in proceedings, and to improve the level of cooperation"*

[46] Panel Report WT/DS268/R of 16.07, US — Oil Country Tubular Goods Sunset Reviews, § 7.34

[47] See footnote 6

The amendments as proposed by the INTA Committee are welcomed in so far as they will significantly help SMEs willing to participate to a trade defense investigation.

– **Registration of imports**

The Commission's initial clarification on the fact that registrations *ex-officio* were possible was already going in the right direction, to the extent that the Commission would be prepared to show more willingness and readiness to resort to registration than it had done so far.

Indeed, to partially mitigate the length of the procedure leading up to the adoption of provisional measures, registration of imports should also be imposed routinely so as to facilitate the possible retroactivity of the duties up to 3 months prior to the adoption of provisional measures.

The proposal adopted by the INTA Committee on this point - following calls from members of the European Parliament - goes even further and not only foresee *ex-officio* registration of imports, but more importantly impose, so as "*to mitigate the risk of stockpiling*", that registration of imports takes place following the submission of any justified request from the Union industry, and from the date of initiation, when justified by the complaint.

The amendments proposed by INTA's proposal, must be supported, as they constitute an effective way to combat stockpiling and would counterbalance the length of proceedings.

– **Transparency of procedures**

Further improvements to the transparency of procedures should be made.

a) ***Communication to interested parties of information received from Member State on imports***

A particular amendment proposed that "*with a view to improving transparency, the Commission should, upon receiving a specific reasoned request from an interested party, provide that party with the necessary information concerning the volume and import values of the products in question*". This decision would be up to the Commission, after receiving the opinion of the Anti-dumping's Advisory Committee.

This amendment has been included – although under the form of a possibility for the Commission, rather than an obligation (use of "*may*" instead of "*shall*") and the opinion of the Advisory Committee would now be required – in the proposals of the INTA Committee.

This proposal would however not appear indispensable as in practice, contacts with the services of the DG Trade allow for such data to be reasonably obtained.

Such a facilitated access to privileged information would only present an interest if it was also reciprocally granted under similar conditions by foreign authorities. As this is not the case at the present time, an additional non-reciprocal burden on the Commission and on the Member States to the eventual benefit of exporters from third countries should not be given away by way of regulation.

While transparency is and should be a key feature of any modernization effort, pushing it to the furthest extent possible, the institutions ought not to be unnecessarily naïve.

b) Transparency of undertakings

Members of the European Parliament have also submitted amendments aiming at increasing the transparency of undertakings. Two main points were raised in this regard: (i) the content and nature of undertakings should be disclosed in a "*meaningful*" non-confidential version and (ii) the Union industry shall be consulted with regard to the main features and appropriateness of the undertaking proposed before accepting it. These amendments were adopted the INTA Committee.

In further efforts to enhance the quality of non-confidential versions of elements of the case, this could be welcomed for the same reasons exposed above.

Nevertheless, one may understand that the rationale behind this amendment lies within recent undertaking cases, and notably with the debates surrounding the Chinese solar panels case. Therefore, while enhancement of the transparency of TDI procedures in general is in principle a step forward, special considerations apply to the case of undertakings. The outcome of price undertaking offers are rather clear-cut: either they are accepted, or they are not. But once accepted, the precise delimitations of a price undertaking, i.e. the level of the minimum price must strictly remain confidential under the antidumping or countervailing procedure.

Should transparency be pushed too far, this may raise competition concerns and risks of - either direct or indirect - international cartels.

In concluding, if consultation of the Union industry on the undertakings offered and publication of a *"meaningful*" non-confidential description of the undertakings accepted are provided for in the amended regulations, it should be ensured that this is a "*soft*" transparency, which does not affect the interests of the parties entering into price undertakings by disclosing too much information. In particular, information relating to sensitive substantive elements should not be available to all interested parties. However, publication of data pertaining to the type of undertakings accepted, e.g. methodology used by the Commission in the establishment of the minimum price and the duration thereof would be acceptable.

– **More substantive and business-oriented annual report on the use of TDIs**

Members of the European Parliament have submitted amendments relating to reporting obligations of the Commission in two respects:

- With regard specifically to undertakings, on a semi-annual basis and so as to assess the functioning of such undertakings.
- General reports on the implementation of the AD and AS regulations, including - for instance for the most complete one - information about "*application of provisional and definitive measures, the termination of investigations without measures, reinvestigations, reviews and verification visits, and the activities of the various bodies responsible for monitoring the implementation of this Regulation and fulfillment of the obligations arising therefrom. The report shall also cover the use of trade defence instruments by third countries targeting the Union, information on the recovery of the Union industry concerned by the measures imposed and appeals against various measures imposed. It shall include the activities of the Hearing Officer of DG Trade and those of the Export Helpdesk*"

The INTA Committee has decided to include this last amendment and require the Commission to prepare annually a report relating to the aforementioned topics. This report would be to be made public no later than six months after its presentation to the European Parliament and the Council.

While it is true that the Annual Activity Report of DG Trade, along with the reports of the Hearing Officer of DG Trade, may lack substantive content with regard to the implementation of the TDIs regulations, it should be noted that the Commission is already publishing on a yearly basis its annual Report on the EU's Anti-Dumping, Anti-Subsidy and Safeguard activities. It may however lead the DG Trade to make an additional effort to render the its reports more accessible, notably by highlighting key topics and developments of the year in a more practical and direct way and thus allow for a higher degree of scrutiny by the European Parliament.

– **Union's interest**

While individual Members of Parliament had made proposals to modify Article 21 of the basic Regulation, the INTA Committee has declined to do so.

5. CONCLUSION

Viewed from a practitioner perspective, the proposals of the Commission and the subsequent amendments proposed by the INTA Committee rightly identify and address the main problems which affect trade defense instruments.

In its package, the Commission has clearly been anxious to ensure a balance between proposals that would satisfy the different categories of stakeholders concerned.

On this, INTA has taken a strong stand, even going sometimes far beyond the initial Commission's proposal, with legitimate objectives of strengthening the AD and AS instruments.

However, it must be kept in mind that failure to strike a balance between the interests of the stakeholders concerned would be the best way of playing into the hands of those who are advocating a return to protectionism.

Our practical experience shows that the European manufacturing sector needs to be open to the world, favour innovation and competitiveness, but also that it needs to be able to rely on remedies that, while in line with international rules, are adopted to present economic realities and are operated efficiently, swiftly, as well as in a transparent manner.

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