Observations on the EU Anti-Dumping Regulation
FTA Position for the Expert Meeting

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[This document reflects the views of the author only]

This Paper reflects the concerns of the Foreign Trade Association (FTA) of Council Regulation (EC) 384/96 on protection against dumped imports from countries not members of the European Community, as amended by Council Regulations Nos.: 2331/96, 905/98, 2238/2000,1972/2002 and 462/2004, (herein referred to as "the Regulation"). It addresses concerns on the legislative provisions of the Regulation as well as the manner in which the European Commission applies those provisions. It also examines the political aspects surrounding anti-dumping measures.

Political view

True globalisation and "world-wide trade" is a worthwhile goal and one that is achievable despite the differences between countries that have caused problems in WTO negotiations.

However, it is a simple fact that differences exist; not all countries are equal or homogenous and these differences can be seen in manufacturing, supply and trading systems and costs. It is also true that within the EU these costs are higher than many countries outside the EU. In many non-EU countries low labour costs legitimately lower production costs. Whilst this raises concerns of poor social standards, these are countered by initiatives such as the FTA's Business Social Compliance Initiative which ensures, via independent auditing, that companies comply with minimum social standards.

As a result of these lower costs, European manufacturers have to adapt their own methods to become more innovative and competitive if the EU is to become a true part of the world-wide trade agenda. Many companies within the manufacturing sector – in particular those from northern Europe – have adapted well over the last years; by shifting production outside the EU to take advantage of the lower production costs in addition to being part of the local marketplace. Unfortunately, other companies have not been so diligent. This situation is particularly true of companies producing textiles and footwear, despite a decade of quotas on products from China and other countries.

As is to be expected, with manufacturing costs in the EU being higher than outside the EU, many European retailers source products from outside the EU. Imposing punitive duties on these retailers and importers in order to compensate European manufacturers is not the answer and yet, that is what the Commission does via its anti-dumping regulation. When asking the question "is it within the 'Community Interest' to impose anti-dumping duties?", the

[1] The FTA is the association for European import and retail trade that specialises in foreign trade issues. It is committed to achieving its goal of a true free trade environment. For almost 30 years it has supported its members, consisting of national trade associations and companies from all over Europe, by providing expertise and up-to-date information and by campaigning on their behalf against protectionist measures in the European and international arena

Commission must – aside from considering the Complainant – also pay attention to European retailers, importers and perhaps more particularly European *consumers*; it cannot be in their interest to have increased costs as a result of duties.

It seems that, rather than anti-dumping measures being utilised to combat offensive pricing tactics by companies exporting consumer products to the EU, they are instead being used to protect European manufacturers from competitive, non-European companies. This can be shown by the increase in anti-dumping cases against products whose import levels have increased - often as a result of the expiration of quotas, which were imposed in order to protect European manufacturers and allow them time to adapt to increasing competitiveness from overseas. It is certainly arguable that quotas are a form of protectionism, but it is equally arguable that anti-dumping measures are as well.

There is also the question of hypocrisy. The EU provides third countries with aid programmes - some of which assist in the development of manufacturing industries. Is it an acceptable practice to subsequently punish those countries by imposing TDI measures when their industries use their competitive advantage over EU companies and export low cost consumer products to the EU?

The Commission is not wholly to blame for EU companies using the anti-dumping route as a defence against cheap imports. However, it *is* responsible for the ease at which that route can be taken. A far more rigorous process in selecting which complaints are worthy of investigation is required.

Although the FTA accepts that anti-dumping legislation may be required under the correct conditions, it is legitimate to ask whether an anti-dumping system is at all viable in today's global marketplace. Whilst this is perhaps going a step too far, there are certain aspects of the current EU Anti-Dumping Regulation, both legislative and applicative, that need to be addressed.

1.0 Complaints

Investigations are opened on the basis of complaints that are insufficient. These complaints are filed, discussed with the Commission and then re-filed so that they meet the correct requirements. In addition, the standing of these complaints at 25% of Community production is too low and should be raised to 50%

1.1 Investigations arising from Complaints

Article 5(7) states that "[a] complaint shall be rejected where there is insufficient evidence of either dumping or of injury to justify proceeding with the case".

The Fourth Session of the Doha Ministerial Conference on 14 November 2001 agreed that "[i]nvestigating authorities shall *examine with special care* any application for the initiation of an anti-dumping investigation where an investigation of the same product from the same Member resulted in a negative finding within the 365 days prior to the filing of the application and that […] the investigation shall not proceed" (emphasis added).

It can be seen from these two instances that the intention is to prevent investigations being initiated on the strength of inadequate complaints alleging dumping and to prevent Complainants from continually filing complaints once an initial attempt has been rejected.

However, it is evident that official complaints are filed, discussed with Commission staff, and re-filed until said complaints meet the requirements necessary to initiate an investigation. It

is for this reason that the majority of investigations conclude with the implementation of definitive measures. It also suggests that the Commission does not receive officially a complaint and subsequently open an investigation unless it already has the intention to impose duties.

1.2 Confidentiality of complaints

Article 5(11) of the Regulation states that the Commission "[s]hall make [the full text of the written complaint] available upon request to other interested parties involved" (whilst giving due regard to the protection of confidential material.

Article 19(2) requires the Complainant to file a non-confidential summary of a complaint if said complaint contains what is deemed to be information of a confidential nature. Under such circumstances, it is this version of the complaint, referred to in Article 5(11) that is made available to interested parties.

Article 19(2) also provides that this summary "[s]hall be of sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence".

However, these summaries are often woefully inadequate (c.f. *AD 506: ironing boards from China and Ukraine*) omitting critical information pertaining to the substance of the case, such as; export price, EU production, Complainant production, product range and Complainant names.

The utilisation of the "confidentiality clause" can even extend to the withholding of the name of the Complainant from the eventual notice of initiation of investigation (c.f. AD 506). In this respect, Article 5(10) of the Regulation, whilst reflecting the provisions of Article 12.1.1 of the WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the WTO Agreement) is inadequate.

Article 5(5) of the Regulation states "authorities" should avoid any publicising of a complaint prior to the initiation of an investigation. Aside from the argument that "final acceptance" of a complaint indicates the decision to open an investigation has already been taken, this restriction is unnecessary.

Full access to files, including confidential material, should be introduced. This is true under the US system whereby the APO system (administrative protective order) provides interested parties with access to the files. Were such a system to be introduced in the EU, it would greatly improve the certainty of the investigation and increase importers' confidence in the legitimacy of an investigation's conclusions.

1.3 Standing of complaints

Article 4(1) of the Regulation defines the "Community industry" as being "[t]he Community producers as a whole of the like products or to those of them whose collective output of the products constitutes *a major proportion* […] of the total Community production of those products" (emphasis added).

Article 5(4) which determines on what grounds an investigation can be initiated following the filing of a complaint defines "major proportion" as 50%. The same article goes on to say that no investigation shall be initiated on the basis of a complaint where this figure is less than 25%.

This is somewhat contradictory but in practice allows the Commission to initiate an investigation on behalf of a complaint by representatives of as little as 25% of Community

production. This is hardly a “major proportion” – indeed, it is a significant *minority* - but unfortunately it is too often taken as a basis to initiate an investigation (c.f. *AD 497: plastic bags from China, Malaysia and Thailand*) where Commission figures - themselves open to considerable doubt - state the Complainants represent 26.7% of Community production. This minimum threshold should be significantly increased - a figure of 50% is not unreasonable - to more accurately reflect what could be called a “major proportion”. This figure should exclude EU companies who import the product concerned.

2.0 Investigation

There is a serious lack of transparency during the course of an investigation. The criteria for choosing an analogue country is flawed and the thresholds assigned to the dumping margin and market share are too low.

2.1 Transparency

The Regulation contains no provisions that insist interested parties should be denied: information received during the course of an investigation, the progress of an investigation, nature of provisional or definitive duties (or whether said duties are likely to be implemented), dates of consultations with Member States and dates and agendas of Advisory Committees.

However, in many circumstances, such information is withheld. More confusingly, there is no consistency between case-officers on what information can be provided; some will indicate the likelihood of implementation of duties and on which date the ADC will discuss the proposal, others will withhold even such basic information as the date of the ADC meeting. Importers rely on information regarding the progress and possible outcome of an investigation in order to properly defend their interests and there is no justifiable reason why information should be denied to them. Indeed, doing so merely enforces any suspicions that the Commission is not conducting the investigation fairly.

2.2 Time limits

Since, as already noted, the filing of a complaint is confidential, the announcement that an investigation will be initiated comes as a shock to importers who will be adversely affected should measures be imposed.

Following publication, those who wish to be “interested parties” must make themselves known to the Commission within 40 days – the same deadline is imposed on those interested parties who wish their views to be heard by the Commission. In addition, a mere 10 days is the normal period afforded to those who wish to receive a questionnaire or provide objections as to the appropriateness of the choice of an analogue country.

These time limits are not expressly set out in the Regulation and are wholly inadequate.

2.3 Lack of response from interested parties

Aside from the tight deadlines discussed above, there could be many other reasons for a lack of response to the Notice of Initiation of an anti-dumping investigation. The Commission should not interpret the lack of a response as an indication that there are no objections to the imposition of duties or that the imposition of duties would be in the best interest of the Community.

2.4 Non-Market Economies (NME)

Articles 7(a) and 7(b) of the Regulation list those countries that are considered to be NMEs. However, the Regulation does not include the criteria establishing what constitutes an NME.

2.5 Analogue country

Article 2(7)(a) of the Regulation states that when NME countries are the subject of a complaint, "[A]n *appropriate* market economy third market country should be selected in a not unreasonable manner" (emphasis added). It seems somewhat disingenuous that the party responsible for choosing this "analogue country" is the Complainant.

The FTA, like many others, questions whether the Commission pays due diligence to the reasons behind such choices as often the analogue country is far from being "analogous" to the country accused of dumping (c.f. *AD 499: leather uppers from China and Vietnam* – Brazil was chosen, and *AD 506: ironing boards from China and Ukraine* - USA was chosen). Statistics for the last five years show that the USA was chosen as an analogue country in 40% of cases. This suggests that there is a serious lack of judgment in a significant number of cases.

2.6 Market Economy Treatment

Assigning "MET" to a company accused of dumping a product is of particular importance to importers who source from that company since it is generally the case that the level of duty imposed on that company is lower than companies who do not obtain MET.

The methods assigned by the Commission to assign MET to companies – or more particularly, the arguments given to refuse such – are open to some criticism. This is particularly true of companies in China. In *AD 499: leather uppers from China and Vietnam*, all twelve companies chosen for sampling in China were refused MET (for the provisional stage of the investigation). Several of these were refused MET on grounds of what the Commission cited as "significant State interference" based on corporate charters or business licenses that stated the company would only export, despite the fact that these companies, were acting under WTO consistent Chinese law, that enabled them to decide the level of export and import.

Aside from this, the Commission appears to determine what represents "state interference" differently in different investigations; there is no consistency. In *Urea from Ukraine* the setting of a minimum export price was not considered a barrier to assigning MET. However, in *Bicycles from China* the existence of export quotas and a minimum export price was classed as state interference and so MET was denied.

In addition, it is interesting to compare the EU criteria to that of the USA. The requirement that insists companies must be subject to bankruptcy and property laws which grant legal certainty and stability for the operation of the company, is not seen in the USA. The USA also does not require that production costs and financial situation of firms should not be subject to significant distortions carried over from the former non-market economy system.

In addition, the USA considers the extent to which NMEs permit free bargaining between the employer and the worker whereas the EU does not.

There is also particular concern that the consideration of submissions for MET are rejected for minor faults on the submission forms. Given the restricted deadline for the completion and submission of these forms, such errors are difficult to correct.

2.7 Sampling

Article 17(1) of the Regulation says "[t]he investigation may be limited to a *reasonable number* of parties…" (emphasis added) when the number of exporters is large. Article 17(2) says "[t]he final selection of parties […] shall rest with the Commission […] to enable a *representative sample* to be chosen" (emphasis added). Although no specific definition is given to determine what is meant by the two above italicised terms, in many cases there is some considerable doubt that the Commission's interpretation is a valid one.

In *AD 499: leather uppers from China and Vietnam* of the 154 cooperating exporters, only 12 where chosen for sampling. Commission Regulation 533/2006, which imposed provisional duty measures in the aforementioned case, states in recital 61 that those companies represented 25% of the quantities exported during the investigation period. However, the General Disclosure Documents notes that exports from these companies totalled 6,546,728 pairs. When this figure is seen alongside the total export figure quoted under recital 160 of Provision Regulation 533/2006 of 53,470,000 the true representation of the 12 companies sampled is 12.2%.

2.8 De minimis principle

Article 9(3) says "[t]here shall be immediate termination [of an investigation] where it is determined that the margin of dumping is less than 2%, expressed as a percentage of the export price". This level could be raised by several points without having a detrimental effect on the domestic industry and dumping could be said to have occurred. Furthermore, Article 2(11) provides that the dumping margin may be calculated on the basis of "[a] comparison of a weighted average normal value with a weighted average of prices of all export transactions to the Community". However, when the export prices to the Community differ between purchasers, regions or time periods, the calculation can be based on a comparison of the weighted average normal value with all individual export transactions to the Community. This can distort the margin upwards.

Article 5(7) says "[P]roceedings shall not be initiated against countries whose imports represent a market share of below 1%". Considering that in EU Competition policy a case of dominant market position is generally not even considered at market share levels below 40%, the 1% threshold applied to anti-dumping cases seems excessively low. The threshold is should be raised to at least 25% to be more realistic.

3.0 Anti-Dumping Committee

The voting procedure in the Anti-Dumping Committee is totally prejudicial in favour of Commission proposals being accepted. The "abstention equals a vote in favour" principle must be abolished.

3.1 Member States consultation

It has already been said that the information provided to interested parties is inadequate. However, it appears that the same can be said of information provided to Member States. Many have complained that the information received is often insufficient to make a proper analysis of the investigation's conclusions. Whilst it is true that Member States do have access to Commission files during the course of the investigation, we recognise that their time is limited. If the Member States themselves have concerns on this point then it is a matter that should be addressed.

The same Member States have also commented that the 10 day period afforded to them in which to assess working documents is very tight. Considering it is the Member States who ultimately are responsible for whether the proposed measures are implemented, these two issues combined are very concerning.

3.2 Transparency

As already mentioned, importers have the right to defend their own interests. This includes the right to lobby Member States. However, there are two barriers to this process. First, at the preliminary duty stage, owing to the fact that proposals are released so close to the date the ADC meet it is very difficult for interested parties to lobby the Member States in sufficient time. Second, following the implementation of preliminary duties, as the positions of the Member States following an Advisory Committee are not published it is difficult to lobby respective Member States appropriately. We see no reason why this should be so; in many circumstances the information becomes available through unofficial means which can result in inaccuracies. With this in mind, it is surely prudent to release the information officially.

3.3 Voting

The amendments to the Regulation via Council Regulation 461/2004 of 8 March 2004 established that Member States abstentions on a Commission AD proposal counted as votes in favour. This ruling is unique to anti-dumping proposals and ostensibly means that it is extremely difficult for Member States to vote down any proposal. The absurdity of this situation was particularly evident in the vote by the Advisory Committee on provisional duties under *AD 499: leather uppers from China and Vietnam* where only 3 Member States voted in favour, 10 voted against and 12 abstained.

The FTA has protested this rule change since it was first proposed and we take this opportunity to do so again.

4.0 Implementation of measures

The five year period assigned to definitive duties is too long based upon the life-cycle of today's consumer products. A more appropriate period would be three years. The "Community Interest" provision should also be extended to allow product exclusion.

4.1 Period of Notice

Both when preliminary duties and when definitive duties are introduced, the Notice of Implementation is published the day before the measures apply. This offers the importers affected by the implementation of those measures no time in which to reorganise their sourcing methods in an effort to avoid the extra cost these measures place upon them.

This Notice should be published sooner – ahead of implementation – in order to accommodate those affected. The result could be essentially the same as that intended by the imposition of duties; no dumping. A Notice period of one month would be desirable.

Article 7(1) of the Regulation limits the period of investigation before provisional duties are implemented to 9 months. This perhaps restricts the possibility of earlier notification. However, Article 5.10 of the WTO Agreement states "[I]nvestigations shall […] be concluded within one year, and in no case more than 18 months, after their implementation". Should the Regulation reflect this, the Notice period of one month would not be unreasonable.

4.2 Product exclusion

In *AD 499: leather uppers from China and Vietnam*, it was established – quite reasonably – that it would not be in the interest of the Community to subject so-called "children's shoes" to provisional duties.

However, certain parties in support of the complainants have objected that the Community interest criteria do not permit this type of "product exclusion".

Article 21(1) of the Regulation says the measures "[m]ay not be applied where the authorities […] can clearly conclude that it is not in the Community interest to apply such measures".

There is clearly some room for interpretation of the scope this article covers and the FTA should like much more specificity to enable certain product categories within those under investigation to be excluded on the basis of Community interest.

4.3 Lack of provisional measures

The decision not to impose provisional measures – normally resulting from the investigation's findings being inconclusive at the 9 month deadline – is not an indication that definitive measures will not be imposed at the 15 month deadline for such. When this occurs, no announcement is made (another example of non-transparency) and furthermore no indication as to whether definitive duties will be implemented.

Some parties have expressed the opinion that in circumstances where preliminary duties are not implemented, definitive duties should be implemented sooner than the normal 15 months after the initiation of the investigation. This is not a view shared by the FTA.

4.4 Implementation of definitive measures

Article 11(1) says that "[definitive duties] shall remain in force only as long as, and to the extent that, it is necessary to counteract the dumping that is causing injury".

That notwithstanding, Article 11(2) then sets out a minimum period of five years; "[a] definitive anti-dumping measure shall expire five years from its imposition".

However, Article 11.3 of the WTO Agreement does not specify an absolute minimum period saying "[a]ny definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition".

Innovation is changing technology at a pace more rapid than before; the life-cycle of consumer products is getting shorter and shorter. With this in mind, the five year period for definitive duties is outdated. In effect, goods accused of being dumped are, owing to the normal 15 month period of investigation before definitive duties are implemented, more than 6 years old by the time those duties expire.

A more reasonable period for definitive duties would be 3 years.

5.0 Reviews

Importers should be permitted to claim reimbursement of duties paid between the normal expiry of duties and the negative conclusion of an expiry review. In addition, the 15 month period permitted for the conclusion of interim and expiry reviews is too long. Furthermore, there is no consideration of "Community Interest" when deciding on the extension of duties.

5.1 Period: Interim and Expiry

The 15 month deadline for the conclusion of these reviews is too long. Considering that a period of 9 months is suitable to determine whether provisional duties should be introduced, it is not unreasonable to assign a similar period to interim and expiry reviews.

5.2 Expiry: extension of duties

The provisions within Article 11(2) of the Regulation, that determine when an expiry review should be initiated to determine whether the measures in place should continue for a additional five year period, do not include any consideration of "Community interest". Considering that this is a consideration included in the original investigation, it seems illogical to exclude it during an expiry review. It is also a reason why it has proven difficult to remove duties following the initial five year period.

5.3 Expiry: Reimbursement of duties

During the period of an expiry review, the duties implemented remain in force. This means that importers can be subjected to duties for more than six years.

When a review concludes that duties should not be extended, there is no recourse under the Regulation for the reimbursement of duties paid during the period following the normal expiry of the measures and the conclusion of the review.

This is a shortcoming that must be rectified.