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# ***Global Anti-Dumping Briefing***

Issue 5, June 18 2009

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*This is a review of global anti-dumping and other trade remedy developments. It is not a comprehensive news service but, rather, picks up interesting issues for informal consideration. Before acting on any of these issues please take professional advice.*

## ***1 Global Trade Protection activity increased in 2008 but remains relatively modest***

The new ***Global Trade Protection Report 2009*** covering data for the whole of 2008 (available from [www.antidumpingpublishing.com](http://www.antidumpingpublishing.com)) has found that global trade protection activity increased in 2008 but still remains at relatively low levels.

**Anti-Dumping (AD)** – overall AD activity in 2008 increased over 2007 but still remains below average. India initiated the most cases, followed by Brazil, Turkey & Argentina. These four countries saw the highest level of AD activity for 4 years but the trend for the US & EC is different. EC AD activity was at the 2<sup>nd</sup> lowest level since the creation of the WTO and, for the US, activity actually fell in 2008. As in previous years, China remains the main target of global AD investigations. 2008 saw a dramatic increase in the % of investigations involving textiles & clothing.

**Countervailing duties (CVD)** – the number of CVD investigations has increased for the past 3 years in a row, though overall activity remains modest when compared to AD activity. The US was the biggest user and China faced the most CVD investigations.

**Safeguards** – Safeguard activity remains modest.

It is expected that the global economic crisis will result in an increase in global trade protection activity, though this is not yet evident in the statistics.

## ***2 The zeroing saga approaching its end?***

In February 2009, the Appellate Body issued its report in the dispute “US – continued existence and application of zeroing methodology” (WT/DS350/AB/R). In a series of disputes

over recent years, WTO Panels and the Appellate Body have considered various issues related to the issue of zeroing. One of the controversial issues that has been considered in this case is the use of “simple zeroing” in periodic reviews where there has been some previous differences of opinion between several panels and the Appellate Body. These differences have been particularly focused around certain key questions that come up in the context of the US anti-dumping system: a) can dumping be determined at the level of individual transactions? b) is dumping an exporter specific concept or can it also be determined for individual importers?

Previous panels have found that dumping can be determined for individual transactions, and that simple zeroing is not WTO inconsistent, but this finding has been overturned by the Appellate Body (e.g. US – Stainless Steel (Mexico)). The panel in DS350 found the reasoning of earlier panels persuasive but noted the consistent reversing of findings by the AB. The panel considered the role of jurisprudence in WTO dispute settlement proceedings and decided to recognize the legal effect of the adoption of an Appellate Body report through the DSB.

One of the 3 Members of the Appellate Body Division produced a “concurring opinion” which argued that “there is little point in further rehearsing the fine points of these interpretations”. The Member further states that “in matters of adjudication, there must be an end to every great debate” and that “there comes a time when it is more important for the system of dispute resolution to have a definitive outcome, than further to pick over the entrails of battles past”. This opinion concludes that “with respect to zeroing, that time has come”.

Whether this request is accepted remains to be seen. Some observers claim that the WTO jurisprudence has established that all zeroing is now outlawed. At the same time, it can be observed that a ruling has never been formally made on the use of the so called ‘targeting’ provision in Article 2.4.2 of the WTO anti-dumping agreement. Some of the argumentation in the current jurisprudence would seem to suggest that all zeroing is outlawed. However, this significantly changes the widely understood meaning of Article 2.4.2 and may yet have to go through further dispute settlement for a definitive view to be reached on this issue.

### ***3 Can an importer be responsible for dumping?***

The zeroing disputes mentioned above have raised an interesting issue of whether an importer can be ‘responsible’ for dumping. In DS350, the US argues that prohibiting simple zeroing in periodic reviews would favor importers with high margins vis a vis importers with low margins. This implies that an importer has knowledge of whether any particular transaction is dumped or not.

An importer that is a good negotiator may get a lower price than an importer that is a poor negotiator. If the exporter is not dumping, this is not problematic. However, if the exporter is dumping, who is at fault? Ultimately, it is the exporter that makes the decision as to how much to manufacture and at what price. Thus, it is the exporter that makes the pricing decisions that determine whether it is dumping or not. It is very difficult for an importer, particularly if they are unrelated, to know if any particular transaction is dumped or not. A determination of dumping requires detailed analysis of the ‘normal value’ of a product and it is virtually impossible for an importer to be in a position to know the normal value when it is negotiating a purchase price. Thus, it is perhaps questionable conceptually if importers are held responsible for dumping.

Note that the US 1916 Anti-Dumping Act provided for a private right of action against importers of dumped products with a remedy of treble damages. It also provided for criminal penalties in an action brought by the US government. Implicit in this was a clear understanding that an importer could be responsible for dumping. WTO jurisprudence has now determined that the 1916 Act is not WTO consistent. The importer specific provisions of US periodic reviews are another area of US law where this concept has been applied and this now needs to be amended.

#### ***4 Australian subsidy manual***

Following the release of a draft dumping manual in December 2008, the Australian Customs Service has also released a draft subsidy manual dealing with key aspects of countervailing investigations including :

- Identification of a subsidy – whether a financial contribution exists
- Identification of a subsidy – whether a benefit is conferred
- Specificity;
- Upstream subsidies
- Concurrent imposition of countervailing and dumping duties.

Although this relates to Australian CVD law, it provides a useful reference on these complex issues. The document is available at the website of the Australian Customs Service ([www.customs.gov.au](http://www.customs.gov.au)).

#### ***5 Is price undercutting a good measure of injury?***

A recent academic paper on antidumping by Bryan Hindley (“Cause of injury analysis in European Antidumping actions “- ECIPE Working Paper No 05/2009), amongst other things, discusses the paradox of price undercutting in anti-dumping investigations. Price undercutting is taken by the EC, as well as other anti-dumping administrations, as being a significant indicator that dumped imports are causing injury. Hindley poses the question that, if price undercutting is occurring, how are high price sellers able to make any sales? He offers four possible answers a) products are different b) buyers have imperfect information c) contractual rigidities d) inertia of buyers in switching to low cost sources. He concludes that product differences cannot be considered to be “price undercutting”. He further concludes that, if there is inertia, price cutting behavior is “economically virtuous” in allowing new entrants to enter the market. Thus, he argues, only b) and c) “leave intact the Commission’s methodology” and, where the European Commission relies on price undercutting in concluding that dumping has caused injury, it should be required to demonstrate that one or the other explanation has some basis in fact.

The argument that price undercutting should not be found when the difference is due to product differences is certainly correct. However, at a practical level, it is extremely difficult to take into account all differences in products that could be creating a difference in price. It is possible that price undercutting appears to be occurring merely because the anti-dumping authority had no way of accurately measuring the value of differences in products.

Hindley would presumably argue that, if price undercutting is found that cannot be explained by b) or c), it doesn't matter whether a) or d) apply i.e. price undercutting should not be used to make a finding of injury caused by dumped imports.

This can be a tricky issue in practice. For example, price differences might be caused where the domestic industry is selling large quantities to long term customers that are prepared to pay high prices for good service and guarantee of supply. Imports may be more ad hoc sales made on an opportunistic basis. In this case, it is perfectly consistent that price undercutting may occur in the absence of any of the 4 situations mentioned by Hindley. That said, this factor could be considered under a) but this is a good example of a factor that is very difficult to value particularly if there is a requirement to provide some form of documentary evidence.

An authority running a thorough investigation should not rely on price undercutting to make the injury/causation determination. It is merely one indicator and, given some of the issues mentioned by Hindley, relying it on as a principal indicator of injury may be problematic. Price undercutting is not, in itself, a reliable indicator of injury. When price undercutting is used in making an injury/causation determination, investigating authorities should be particularly careful about identifying all product and sales differences when assessing whether price undercutting is occurring. Even if they cannot be valued, they can be identified which at least could be taken into consideration when assessing the usefulness of price undercutting as an injury indicator and the extent to which it could be relied on. But Hindley usefully emphasizes the point that anti-dumping authorities should consider the question as to how it is possible that price undercutting could occur before using it as part of an injury/causality determination.

## ***6 WTO negotiating text identifies difficult issues in AD negotiations***

At the end of 2009, the chair of the rules negotiations produced a draft text on anti-dumping. The chair points out that it should not be expected that this new text will offer any magic solutions and that members' positions in many areas remain "very far apart". However, the chair does identify a series of issues where there is a wide range of views and where there is a great deal of work still to be done.

- Zeroing – positions range from total prohibition to authorizing zeroing in all circumstances.
- Causation of injury – wider range of views on extent to which authorities should be required to quantify and weight the effect of dumped imports and other factors of injury.
- Material retardation – widely varying views on whether there has to be no domestic production in order for an industry to be considered "in establishment".
- Exclusion of related/importing producers from domestic industry – widely varying views on the need for, and nature of, criteria governing such exclusions.
- Product under consideration – concerns that a provision is not necessary or would be complex. Differences of view on substantive aspects such as breadth of product definition and the role of physical & market characteristics.
- Information requests to affiliated parties – difference of view on whether language should be included to ensure that affiliated parties are not deemed to be non-cooperative if they fail to provide information from affiliates that they did not control.

- Public interest/lesser duty – sharp divisions on procedure for public interest test. Issues include extent to which it would apply to Article 11 reviews, whether the ADA's requirement for judicial review would apply, and the extent to which WTO dispute settlement should apply. On lesser duty, both strong support and opposition exist.
- Anti-circumvention – delegations disagree on whether there should be rules.
- Sunset reviews – some favor automatic termination after 5 years without review while others are opposed to this.
- Third country dumping – some believe that current position is unworkable and should be improved while others believe it should be deleted entirely.
- Special and differential treatment/technical assistance – further consideration required.

From the current overall state of negotiations in the “DDA” round, it is clear that many complex issues in other areas of the WTO agreements need to be resolved before Members will be prepared to make any concessions in the area of anti-dumping. However, it is clear from this inventory of difficult anti-dumping issues that progress in this area will be extremely difficult. That said, it is useful that the chair has produced this list of difficult issues as it does provide focus for further discussions.

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