newsletter

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ANTIDUMPING RULES ENSURE FAIR COMPETITION AT INTERNATIONAL LEVEL BY ADDRESSING LATEST AND HIGHLY DAMAGING TRADE DISTORTIONS

Trade distortions resulting from artificially low raw material costs must necessarily be reflected and adjusted through the antidumping instrument. Any attempts to prevent it would leave such distortions unsanctioned with a highly damaging impact to the detriment of EU growth and development.

In Europe, voices challenging the legitimacy of antidumping rules, whose purpose is to restore fair conditions of competition at international level, are becoming few and far between - even from the user sector. On the contrary, a consensus seems to be emerging, recognising that such rules are as legitimate at international level as anti-trust rules are within the European Union.

This is a welcome reaction that, over the last few years, prevented all attempts to adopt reforms that would have weakened the antidumping instruments. It is indeed illusory to believe that one might reasonably start discussing such reforms, including for example on transparency issues[1], without recognising the need for antidumping rules that offer prompt and effective remedies against unfair trade practices in order to protect growth and development in the EU.

Such a recognition is all the more important that the antidumping rules are among the rare instruments available to the EU industry to combat unfair trade practices at an international level. It is also important in view of the fact that third countries are becoming major users of the antidumping instruments, including against the EU (104 measures) and are often using these rules more than the EU (252 measures in force in the USA, 208 in India, 134 in Turkey, 128 in Brazil and even 102 in China, while the EU has 107 measures in force).

Such a recognition covers in particular the need for the antidumping calculation to capture situations combining market segmentation and price discrimination, leading, for example, to severe artificial distortions in the costs of raw materials and, subsequently, to extremely damaging impacts for the EU industry.

[1] This issue will be the subject of the next newsletter from Gide International Trade and Regulation team.

This article will briefly recall how the antidumping calculation may be biased – to the detriment of the EU industry – when raw materials costs of foreign producers/exporters are artificially low, and how such a distorted situation must necessarily lead to cost adjustments when calculating a dumping margin (1). It will also explain why such cost adjustments are fully compatible with the terms and purpose of the relevant antidumping rules (2). It will then conclude on the reasons why cost adjustments are fully justified and necessary to respond to the proliferation of schemes that distort prices and costs in foreign countries (3).

1. DISTORTIONS RESULTING FROM ARTIFICIALLY LOW RAW MATERIALS COSTS MUST BE REFLECTED IN THE DUMPING CALCULATION IN ORDER NOT TO SEVERELY PENALIZE THE EU INDUSTRY

In simple terms, dumping exists and is sanctioned when a product is exported to the EU at a price lower than the domestic price of a similar product on the export market, most of the time in a context where markets concerned are still segregated, allowing foreign exporting producers to set up trade distortive practices, while being protected from competitors.

In principle, dumping is an issue of price comparison between export and domestic prices. However, it may occur that the price of the product on the domestic market fails to meet the market's conditions, for instance when the price is controlled by the State or any other particular market situation. In such cases, the domestic price must be built (constructed) on the basis of the product's manufacturing costs, including the costs of raw materials.

However, if these raw materials costs fail to reflect market conditions, the investigating authorities must necessarily adjust them to be able to calculate the existence of dumping on sound market foundations, just as though the behaviour of the exporting producer concerned was not distorted.

A very good example of this was given by the EU "biodiesel" antidumping proceedings concerning a mechanism set up by Argentina consisting of differentiated export tax (DET) applicable along the oil seed value chain. In addition to regulated prices for biodiesel, a very high tax (35%) was imposed on export of soybeans creating a strong and effective incentive for the beans to be kept on the domestic market. Soybeans were then crushed to produce soybean oil which could be exported with a lower export tax rate than soybeans, or sold on the domestic market. In any case, the artificial impact of the DET led to an abundant domestic availability of soybeans and soybean oil, at very low prices. This offered very cheap raw materials to the local producers of biodiesel who could then produce very cheap biodiesel exported to the EU – the most attractive market in the world – with an export tax at the even lower rate of 14.5%. Through this DET mechanism, not only were EU producers of biodiesel facing extremely damaging and unfair imports of biodiesel, but they could not have the same access to the artificially low-priced raw materials (soybeans and soybean oils). The difference was far from being negligible since, as a result of the DET mechanism, Argentinian biodiesel producers had an artificial access to raw materials almost 50% cheaper than the prices paid by EU producers, which were the international prices. The DET mechanism was so pernicious that it sometimes led to situations of complete economic aberration in which the prices of soybean oil in the EU (representing 80% of the biodiesel cost of production) was imported at a higher price than the biodiesel end product. For this reason, when it calculated the dumping margin for this particular case, the European Commission disregarded the domestic price of biodiesel as well as the costs of raw materials indicated in the records of the exporting producers concerned since they did not reasonably reflect the costs associated with the production and sale of biodiesel.

2. COST ADJUSTMENTS IN THE CONTEXT OF THE DUMPING CALCULATION ARE FULLY COMPATIBLE WITH THE TERMS AND PURPOSE OF THE RELEVANT ANTIDUMPING RULES

Several EU anti-dumping decisions, which involved adjustments to “artificially low” input costs of foreign exporters, including the above-mentioned “biodiesel” case, are presently being challenged at the WTO.

These countries claim that the cost adjustment methodology used by the EU to calculate dumping in these cases is inconsistent with the WTO Anti-dumping Agreement (ADA). They argue that the ADA does not allow such upward adjustments of costs in situations other than an incorrect transposition in the exporter’s accounting books of the costs actually incurred.

A negative ruling by a WTO panel on this point would further undermine the anti-dumping instrument which, for a number of years, has been the target of repeated attacks to weaken it by anti-trade defence instruments lobbies.

The claims raised in these cases are based on an erroneous interpretation of the ADA. This provision clearly allows investigators to disregard costs recorded in the books of the exporter when such costs do not reasonably reflect the costs associated with the production and sale of the product concerned. Can anyone seriously argue that input costs amounting to a fraction of the export or world market price of such inputs should be considered as “reasonably” reflecting the costs associated with the production and sale of the product concerned?

The claims also ignore the general purpose of the anti-dumping instrument, which is precisely to restore fair conditions of competition. Anti-dumping laws logically impose that such costs be adjusted to the level at which they would have been incurred without such market distortions. Whether caused or not by government action, particular market situations may distort costs and thereby provide producers and exporters an artificial competitive advantage. Anti-dumping laws logically impose that such costs be adjusted to the level at which they would have been incurred without such market distortions. Drawing on the advantage of such lower costs, exporters may sell at prices below constructed value. The resulting dumping therefore needs be corrected. To act otherwise would be inconsistent with the purpose of anti-dumping and inequitable unfair vis-à-vis the complainant, who would have to continue to bear the effects of unfair competition, in particular when, as in past EU cases, distortions result in input costs that are considerably lower than those practised on representative markets whose market forces are not impeded.

Who could claim, in good faith, that input costs that are significantly lower than the export prices of such inputs, or lower than prices observed on other representative markets, do not constitute a “particular market situation” that makes proper comparison impossible? Particularly when such inputs represent a high proportion of the total costs of the exported product?

3. COST ADJUSTMENTS IN THE CONTEXT OF THE DUMPING CALCULATION ARE A JUSTIFIED AND NECESSARY RESPONSE TO THE PROLIFERATION OF SCHEMES THAT DISTORT PRICES AND COSTS IN SOME COUNTRIES

With the rise of State capitalism, primarily but not only in Russia and China, and with the increasing use by natural resource-rich countries of dual pricing systems for energy and raw materials, there has been a proliferation in recent years of schemes distorting trade and that negatively impact EU industries, particularly those that are dependent on the import of inputs.

In countries practicing State capitalism, distortions are numerous and varied: State-owned companies that operate at a loss or that provide components or capital to industries downstream on non-commercial terms; price regulation for certain goods, in particular energy; competition restrictions; financial and/or commercial links between companies that do not operate at arm's length; and many other trade barriers, such as trade-distorting subsidies granted in non-transparent conditions.

Dual pricing practices are also more widespread, as countries whose economies rely on natural resources seek to develop their processing industries. Dual pricing practices can derive from regulated prices of energy and/or raw materials; sales of semi-transformed products by State-owned companies to local transformers on non-commercial terms; export taxes and other forms of restriction on the export of raw materials, which depress the internal prices of such materials to the benefit of the local processing industry; State industrial policies that use private companies as a relay to achieve certain policy objectives; and many other schemes such as different transport rates for products, depending on whether they are exported or sold domestically.

The distortive effects of these practices are often significant, and sometimes considerable, resulting in input costs that are substantially lower than the export prices of the same product or than its price on the world market – in some instances by a large amount.

Since these distortions enable exporters to sell at dumping prices, they cannot remain unaddressed and unsanctioned. As discussed earlier, this is precisely the purpose of the anti-dumping instrument, i.e. to restore fair conditions of competition by neutralizing the effects of distortions on prices and costs. Thus, when an anti-dumping investigation finds that prices and costs are distorted, such distortions should be addressed and remedied in that context, unless they specifically fall within the scope of another instrument or rules, such as subsidies or violations of other WTO rules.

In this respect, and given present WTO rules, as interpreted by the Appellate Body, a number of the distortions listed above cannot always be remedied through other instruments. This is particularly the case of certain export schemes, which have so far neither been considered as subsidies falling under the Agreement on Subsidies and Countervailing measures (SCM), nor as prohibited export restrictions in violation of article XI of the GATT. It is also the case of certain sales of components by State-owned enterprises to companies downstream at concessional prices, which may not be considered as subsidies according to the very narrow interpretation of the term "public body" adopted by the Appellate Body. There are a variety of other regulations that artificially lower prices and costs, that the WTO has so far refused to consider as subsidies on the ground that they do not involve a government financial contribution. While certain schemes can, on paper, be remedied through countervailing duties or other actions under the SCM, finding out about the existence of such schemes may in itself pose overwhelming practical problems since the governments that grant them do their utmost to conceal their very existence and nature.

If, in such cases, adjustments to costs were to be ruled out, the distortions concerned would remain unsanctioned. This would create a serious issue as regards the discipline – based on the underlying philosophy that trade flows should be determined by market forces – that the WTO seeks to impose upon its members, in particular through trade defence instruments. It would indeed be construed as a clear encouragement to governments, which are often tempted to come back on past liberalisation, to resort to schemes that are immune to attacks by other countries. The European industry, for its part, would consider such tolerance as a serious injustice. Indeed, it would be in sharp contrast with the very rigorous system of control of all forms of direct or indirect support that the EU imposes on national States and firms. All forms of support must indeed be notified to the Commission, and when any support is considered to distort competition, the firms concerned must renounce it – with retroactive effect. Schemes such as those establishing a dual pricing system, which in any event would be unfeasible in a market where goods circulate freely, would be inconsistent with the EU Treaty.

It would be very awkward if certain schemes that seriously distort prices and costs and that are clearly within the purview of anti-dumping were to completely escape redress. This would hardly be compatible with the fundamental objective of WTO rules to expand international trade through "open, market-oriented policies", as reaffirmed in the preamble to the Marrakesh declaration of 15 April 1994. The pursuit of such objective implies not only the elimination of barriers to imports but also that of practices distorting the free interaction of market forces.

It is worth noting that, at a time when the question of whether China should benefit from Market Economy Status is being largely discussed, any cost adjustments under the ADA cannot be viewed as an alternative to the special method used for the calculation of normal value applied by the EU in the case of non-market economy countries (NME). Indeed, special NME methods cover a broader range of distortive practices than those that can be captured through article 2(5).

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