European Yearbook of International Economic Law

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Special Issue:

The Future of Trade Defence Instruments

Global Policy Trends and Legal Challenges

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The Future of Trade Defence Instruments

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Editorial

This *EYIEL Special Issue* is devoted to Trade Defence Instruments (TDIs). On 30–31 March 2017, the University of Passau, the Europa-Institut of Saarland University, the Institute of European and International Economic Law and the World Trade Institute of the University of Bern and Cleary Gottlieb Steen & Hamilton LLP jointly organised a conference in Brussels, which was entitled: "The Future of Trade Defence Instruments: Global Policy Trends and Legal Challenges". The event dealt with the most topical issues in the field of trade defence law, notably the expiry of the transitional provisions in China's Accession Protocol to the World Trade Organization (WTO) and its implications for the legal modifications of the European Union's Trade Defence Instruments. To that extent, this *EYIEL Special Issue* does not only contain papers following the presentations made at the conference, but also specially commissioned chapters with a view to providing a more comprehensive overview of the state of play of trade defence law.

Trade Defence Instruments, or Trade Remedies, are first analysed in their legal and political context. Then, the EU rules as they exist today, 8 years after the entry into force of the Lisbon Treaty and after their first thorough modification since the Uruguay Round of the WTO, are analysed and described in the changing international environment, in particular as regards the WTO legal framework. In addition, the European Union (EU) Trade Defence Instruments are compared with other jurisdictions with a view to outlining a national approach towards trade defence as well as competition law or inter alia regional trade agreements. In this context, the implications for the future relationship with the United Kingdom (UK) after Brexit will also be analysed. In doing so, this *EYIEL Special Issue* seeks to provide an up-to-date overview of the state of play of trade defence in the EU and in the world.

The volume is opened by *Michael Hahn's* introduction to "[t]he Multilateral and EU Legal Framework on TDIs", which addresses the EU as well as the WTO legal system on trade defence. The current uncertainties surrounding China in the WTO, the stance of the United States (U.S.) towards the WTO under President Trump and the composition of the Appellate Body lead the author to call the WTO trade regime "a system in crisis". *Brian Petter* and *Reinhard Quick* outline "[t]he Politics of TDI and the Different Views in EU Member States", questioning whether the reform

process evolves as a "[n]ecessary Safety-Valve or Luxurious Rent-Seeking Device?". In particular, the authors analyse the special case of the chemical industry in their fight against "the rise of the dragon" China.

The second part of this volume concerns the latest legislative reforms in the field of trade defence. *Wolfgang Müller* sheds light on the Commission's perspective of the TDI reform process at the European Union level. In "[t]he EU's New Trade Defence Laws: A Two Steps Approach", both the new methodology for the calculation of normal value in case of distortions in the exporting country and the modernisation package of the Union's trade defence instruments are described from within.

Edwin Vermulst's and *Juhi Dion Sud's* contribution concerns "[t]he New Rules Adopted by the European Union to Address 'Significant Distortions' in the Anti-Dumping Context". It indicates how the market economy criteria have been disguised as the significant distortions rules. In addition, they discuss and question the WTO law compatibility of the EU's reformed trade defence rules, inter alia with regard to a removal of the lesser duty rule. In a similar vein, *Christian Tietje* and *Vinzenz Sacher* analyse the EU's reformed Trade Defence Instruments from a WTO law perspective: "The New Anti-Dumping Methodology of the European Union: A Breach of WTO Law?". Their contribution examines the consistency of the new provisions with WTO law. *Dong Fang*, finally, provides a Chinese perspective on the "[i]nterpretation of Section 15 of China's WTO Accession Protocol" in light of the recent case "*EU – Price Comparison Methodologies* (DS516)".

Stepping away from anti-dumping law, *Sophia Müller* turns to anti-subsidy law. In her paper "Anti-Subsidy Investigations against China: The 'Great Leap Forward' in Reforming EU Trade Defence?", the alternative benchmark methodology, particularly the country-specific benchmarks of China, is discussed and scrutinised against the WTO legal framework. The latest reforms, she concludes, are a missed chance to reform properly.

Third, the EU's Trade Defence Instruments are contrasted with substantively related legal instruments, particularly regional trade agreements and competition law. As one of the most contentious developments in the EU, Brexit and the uncertainties surrounding the future trade relationship between the EU and the UK must, of course, be addressed. *Anna Khalfaoui* and *Markus W. Gehring* provide a deeper analysis of trade defence instruments and competition policy in post-Brexit times in their paper "What Role for TDIs Between the EU and UK After Brexit: A Trade or Competition Solution for a Future Problem?". In particular, their contribution evaluates the potential of the EU-Turkey customs union as a model EU27-UK relationship with regard to TDI and competition policy. The authors conclude that this solution leaves de facto no room for the application of trade defence instruments between the EU27 and the UK. *Till Müller-Ibold* deals with TDI provisions in the trade agreements of the EU and draws conclusions on their implications on Brexit in his contribution "EU Trade Defence Instruments and Free Trade Agreements: Is Past Experience an Indication for the Future? Implications for Brexit?".

Then, *Bruce Malashevich* and *Mark Love* focus on the United States and its trade defence policy. "Trade Defence Instruments: The Leading Edge of U.S. Trade

Policy" outlines the relevant U.S. trade policy instruments and concludes that this existing framework can be expansively used by current Trump Administration for its more protectionist trade agenda. Conversely, *Matthias Oesch* and *Tobias Naef* note that trade defence instruments are almost never deployed in Switzerland. In "[t]rade Defence Instruments and Switzerland: The Big Sleep", the authors identify five reasons that explain the inactivity of Switzerland towards trade defence, taking particular account of the Swiss legal framework, the structure of the Swiss industry and its unique characteristics. *Yusong Chen* gives an overview of the Chinese situation in the WTO after 16 years of membership: "Anti-Dumping Laws and Implementation in China: A 16 Years Review after Accession to the WTO". The paper analyses various WTO cases involving China's anti-dumping measures and concludes that China's practices and investigation procedures are improving its position in the world trading system. Finally, *Julien Chaisse* and *Dini Sejko* elaborate on the Trade Remedy provisions in the recently concluded free trade agreement between the EU and Vietnam: "The Latest on the Best? Reflections on Trade Defence Regulation in EU-Vietnam FTA". The analysis assesses the impact of these provisions on the Vietnamese legal system.

The editing of this volume would not have been possible without the help and assistance of *Pieter Van Vaerenbergh*. Last but not least, we thank *Anja Trautmann* from Springer for cooperating once again and ensuring that this volume could be published as scheduled.

Saarbrücken, Germany — Marc Bungenberg
Bern, Switzerland — Michael Hahn
Passau, Germany — Christoph Herrmann
Brussels, Belgium — Till Müller-Ibold
May 2018

Contents

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Part I
Introduction: TDI in Context

The Multilateral and EU Legal Framework on TDIs: An Introduction

Michael Hahn

Contents

Abstract As a member of the WTO, the EU is obliged to ensure the conformity of its laws, regulations and administrative procedures with its obligations pursuant to WTO law. In turn, these WTO obligations have been strongly shaped by members with significant past experience with TDI use, amongst them the EU. As several contributions analyse and evaluate the new EU regime on TDIs, the purpose of this paper is to highlight the challenges facing the current crisis of the multilateral trade system: in particular, the paper explores the effects the current U.S. blockade of the Appellate Body and the growing pains of the WTO system following the joining of China as a member.

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1 Introduction

WTO and EU lawyers put three very different bodies of law into the category of "Trade Remedies" (or Trade Defence Instruments, TDIs): the term covers countervailing measures against practices that are characterised as "unfair"—dumping and specific subsidisation—as well as safeguards. WTO law and the jurisprudence of the WTO adjudicative organs treat these three areas quite differently.[1] Being a member of the WTO, the EU is obliged, pursuant to Article XVI:4 WTO Agreement, to ensure the conformity of its *laws, regulations and administrative procedures* with its obligations pursuant to WTO law. Because of this link, and also because the WTO system stands on the shoulder of "prior art", namely the laws and regulations of the frequent users of trade remedies, including, in particular the U.S. and the EU, the international trade remedies environment and the European TDI regime are joined at the hip.

1.1 The Pertinent WTO Agreements

In addition to the GATT addressing trade remedies in its Articles VI, XVI and XIX, each of the three TDIs is the subject of a specific WTO agreement: the Anti-Dumping Agreement (ADA, Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994) defines both the parameters for dumping and for countervailing measures; in a parallel fashion, the Agreement on Subsidies and Countervailing Measures (ASCM) addresses both the limits for state aid and the pertinent countermeasures; lastly, the Agreement on Safeguards (SG) deals with the undesirable consequences of too much success. All three TDIs have in common that they are a tool to alleviate pain that the domestic industry suffers as a consequence of not being able to successfully compete with imports. However, this is where the communality ends.

Subsidies and dumping are viewed by WTO law as being inherently or at least potentially unfair: even the biggest corporation cannot compete with the French Ministry of Finance, if she chooses help out the local champion; indeed, already the GATT contracting parties "condemned" injurious dumping.[2] Export subsidies are even outlawed altogether—the ASCM uses the word "prohibited", which is almost unheard of elsewhere in WTO legal texts.[3] He who dumps, i.e. selling in export markets below home market price, is doing that under a cloud of ambiguity: is he ripping off his home constituency by asking (only) the foreign consumers for a fair

[1] For a first overview, see for safeguards, the excellent overview of Piérola (2014); for subsidies, Coppens (2014); for dumping and anti-dumping, Van den Bossche and Zdouc (2017), pp. 696–768.

[2] Cf. Article VI GATT.

[3] Cf. Article 3 ASCM.

price? Or is he selling below costs, which is almost universally treated as a suspicious act, conducive to creating monopolies or cheating consumers. And if the price abroad is fair, whereas the price at home is way too high—what does that say about the home country's market access regime, if re-imports are for all practical purposes impossible?

Safeguards are a safety valve to undo potential "carnage"[4] in the domestic industry as a consequence of the sharp, sudden and unforeseeable rise of imports.[5] That means that without violating WTO rules, an importing state may (partially) undo the commercial success that was achieved fairly and squarely in the market place due to the overwhelming competitive success of foreign producers. This is in sharp contrast to the normal way things are done in WTO law: as a matter of principle, the WTO system is somewhat pro-competition, pro-choice and against direct (enterprise or industry-specific) state intervention absent a justification other than the competitor's success. It comes as no surprise then, that the Appellate Body has interpreted the safeguard provisions in a restrictive fashion.[6] In fact, the safeguard provisions of the WTO Agreement have become largely unusable by Organisation for Economic Co-operation and Development (OECD) countries, as they would almost certainly not withstand attacks in a WTO Dispute Settlement Understanding (DSU) complaint. It may thus come as no surprise that the EU statistics for 2016 shows zero safeguard investigations.

1.2 The EU Instruments

In the EU, the Basic Anti-Dumping Regulation 2016/1036[7] codifies how protection against dumped imports from countries not members of the European Union works, whereas its sister Regulation 2016/1037[8] codifies how the EU protects itself against subsidised imports from countries not members of the European Union (Basic Anti-Subsidy Regulation). In both areas, litigation is common.[9] Finally, Regulations 2015/478 and 2015/755[10] lay down the ground rules for safeguard measures. The

[4] Remarks of President Donald J. Trump, Inaugural Address, Washington, D.C., 20 January 2017, https://www.whitehouse.gov/briefings-statements/the-inaugural-address/ (last accessed 30 April 2018).

[5] The "*language in both Article 2.1 of the Agreement on Safeguards and Article XIX:1(a) of the GATT 1994, (…) requires that the increase in imports must have been recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause "serious injury"*.", Appellate Body Report, *Argentina – Footwear (EC)*, WT/DS121/AB/R, adopted 14 December 1999, DSR 1999:VII, para. 131.

[6] Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 14 December 1999, DSR 1999:VII, para. 131.

[7] OJ 2016 L 176/21–54 as amended by OJ 2017 L 228/1–7.

[8] OJ 2016 L 176/55–91 as amended by OJ 2017 L 338/1–7.

[9] Further references see e.g. Van Bael and Bellis (2011), *passim.*

[10] OJ 2015 L 83/16–32; OJ 2015 L 123/33–49. See Müller (2017), pp. 205–226.

recent reform of the EU's TDIs is shaped, inter alia, by the increasing political popularity of trade defence measures (the Parliament has become a *demandeur* for trade remedies), the expiration of the transitional period established by the Chinese Protocol of Accession in December 2017 and the reaction to the *EU – Biodiesel* decisions. This reform will only be touched upon briefly below.[11]

2 The WTO Trade Remedies Regime: A System in Crisis

2.1 The China Shock

The most commonly mentioned reason why TDIs have regained prominence everywhere in the world is the success of Chinese exports. Whereas some see the success of a competitive economy that reclaims the position it had prior to the stifling contact with the British Empire, others see an export oriented economy that combines aggressive market forces and strategic coordination from the government and party apparatus.

By joining the WTO in 2001, China undertook to abide by the rules and obligations of the WTO. Knowing that an actual military and geopolitical superpower and a (then potential) economic superpower was joining, China's Western partners insisted that the obligations accepted by China surpassed those of its emerging power peers who had been original members of the WTO.[12] The fact that China had undertaken, in a legally binding fashion, to open its markets and adapt some of its internal rules to the requirements of the WTO agreements contributed in important ways to China's ongoing success story. Not the least, it greatly facilitated internal reform: modification of the status quo was thus not just a function of the wisdom of the leadership, but rather an obligation undertaken to restore China's position as an integral (and important) part of the international economic order. Not the least due to that narrative, internal resistance remained manageable, while at the same time the changes effectuated allowed China to develop as destination for Western investment.

Of course, the Western partners of China knew that they were not admitting just another emerging economy. While the rise of China to the world's biggest producers of goods was even faster than expected, it was abundantly clear in 2001 that China would become the centre of global production for low and medium price products: already then, China was the seventh biggest exporter and eighth biggest importer of merchandise trade.[13]

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[11] See infra, Sect. 3; for more information on the different perspectives of this reform are addressed in Part II of this book.

[12] Kennedy (2013), pp. 46 et seq.

[13] See World Trade Organization, WTO successfully concludes negotiations on China's entry, 17 September 2001, https://www.wto.org/english/news_e/pres01_e/pr243_e.htm (last accessed 30 April 2018).

The provisions of the protocol of accession[14] are evidence that there was an understanding of short term risks: for example, the prohibition of certain restrictions on the exportation of raw materials[15] was supposed to avoid creating a monopoly for Chinese producers of the products that need that input; the provisions on dumping and subsidies clearly indicate a realisation that for the near future the Chinese political system would use the market economies of its trading partners in ways that they wanted to avoid by inserting special obligations.[16] The same applies to the special

[14] World Trade Organization, Ministerial Conference Decision of 10 November 2001 on the Accession of the People's Republic of China, WT/L/432, 23 November 2001.

[15] Espa (2012), pp. 1399–1424.

[16] Cf. Section 15 CAP (Price Comparability in Determining Subsidies and Dumping):

> Article VI of the GATT 1994, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement") and the SCM Agreement shall apply in proceedings involving imports of Chinese origin into a WTO Member consistent with the following:
>
> (a) In determining price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement, the importing WTO Member shall use either Chinese prices or costs for the industry under investigation or a methodology that is not based on a strict comparison with domestic prices or costs in China based on the following rules:
>
> (i) If the producers under investigation can clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product, the importing WTO Member shall use Chinese prices or costs for the industry under investigation in determining price comparability;
> (ii) The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product.
>
> (b) In proceedings under Parts II, III and V of the SCM Agreement, when addressing subsidies described in Articles 14(a), 14(b), 14(c) and 14(d), relevant provisions of the SCM Agreement shall apply; however, if there are special difficulties in that application, the importing WTO Member may then use methodologies for identifying and measuring the subsidy benefit which take into account the possibility that prevailing terms and conditions in China may not always be available as appropriate benchmarks. In applying such methodologies, where practicable, the importing WTO Member should adjust such prevailing terms and conditions before considering the use of terms and conditions prevailing outside China.
> (c) The importing WTO Member shall notify methodologies used in accordance with subparagraph (a) to the Committee on Anti-Dumping Practices and shall notify methodologies used in accordance with subparagraph (b) to the Committee on Subsidies and Countervailing Measures.
> (d) Once China has established, under the national law of the importing WTO Member, that it is a market economy, the provisions of subparagraph (a) shall be terminated provided that the importing Member's national law contains market economy criteria as of the date of accession. In any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession. In addition, should China establish, pursuant to the national law of the importing WTO Member, that market economy conditions prevail in a particular industry or sector, the non-market economy provisions of subparagraph (a) shall no longer apply to that industry or sector.

Transitional Safeguard Mechanism[17] to prevent market disruption in importing countries due to the influx of Chinese products. However, with the benefit of hindsight, it seems evident that expectation that the Chinese system would evolve after a prolonged contact with the market economy and become a fully Western economy, despite the maintenance of a Communist one party system, has proven to be not quite correct: Notwithstanding the question whether China is a "market economy",[18] it is clear that the role of the party today is closer to the vision of the founder of the People's Republic than to that of the chief architect of China's economic reforms.[19] Thus, the notion that the central leadership may influence the behaviour of firms and business partners (banks, upstream and downstream associates, but even customers) which have a presence in China and are thus exposed to Chinese measures is far from specious: every private actor has a party cell, every actor will try to act in accordance with wishes of the political leadership. This may render the dividing lines between dumping and subsidies, between private and public somewhat fuzzy.[20] The situation does not become easier in light of the fact, that many strategic actors in China are state-owned. Therefore, it was expected that:

> China's government-owned, or state-operated or owned, enterprises are a big challenge to the system, and it is hard to believe this will not shape some of the thinking about subsidies.… There are … going to be some big problems in those areas and one can predict that in a couple of years some of the definitions in the subsidies code will have to be revised, if that is manageable.[21]

Clearly, the separation of private market and public regulation of state and society—which is an integral part of the concepts underlying WTO law in general and trade remedy laws in particular—will be a helpful distinction in the vast majority of cases. No one doubts that China has used the market to build quickly a very successful economy. However, once a specific determination by the Chinese leadership as to political and economic goals has been determined, it would seem that specific "entrustment or direction"[22] is not required: rather, it would seem the duty of every operator to implement those policy preferences regardless of their specific legal quality. Not doing so may be viewed as opposition to the party line.

In *US – Anti-Dumping and Countervailing Duties,* the Panel seemed to offer an incremental and partial solution to this issue: While state ownership was not *determinative* for assuming that an enterprise (the state-owned enterprise, SOE) would be a tool of the state, it was to be assumed, unless it could be shown that the SOE

[17] Paragraph 16 of the Protocol of Accession; see Appellate Body Report, *United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China,* WT/DS399/AB/R, adopted 5 September 2011, DSR 2011:IV, paras. 120 and 131 et seq.

[18] Vermulst et al. (2016), pp. 212–228; see also Part II of this book, *passim*.

[19] Illustrative: Phillips T, China told to follow the leader Xi Jinping in thought, word and deed. The Guardian, 5 March 2018, https://www.theguardian.com/world/2018/mar/05/china-told-to-follow-the-leader-xi-jinping-in-thought-word-and-deed (last accessed 30 April 2018).

[20] Wu (2016), pp. 261–324.

[21] Jackson (2003), p. 26.

[22] Cf. Article 1.1(a)(1)(iv) ASCM.

acted pursuant to a business plan independently to party or state guidance. For all practical purposes, this would have created a rebuttable presumption. However, the Appellate Body would have none of that. It refused[23] to follow the Panel's line of reasoning to acknowledge that state-owned enterprises are presumably an instrument of the government; under the conditions of a one-party State, the rebuttal, of course, would not always succeed. Whereas the Panel had accepted "primacy to evidence of majority government ownership",[24] recognising that the assumption of control by the State would be undone by showing that the state-owned enterprise was insulated from State control, the Appellate Body rejected that approach. Rather, it demanded a complainant to show that the Government had vested the operator in question with governmental function or authority and exercised control over its acts ("entrusts and directs").[25] It goes without saying that, under the conditions of a one-party state, it is systemically difficult for foreign operators and even states to show this linkage. The Panel's acceptance of a prima facie rule that state ownership implies government control would have reversed the burden of proof, thus making a review of Chinese practices more realistic.[26]

It is somewhat ironic that the jurisprudence of the Appellate Body does accommodate the lack of specific provision for exempting *research and development* from the regular disciplines of the ASCM (since the fading away of the non-actionable subsidy category) through the recognition of state's right to negate a competitive relationship by creating normatively distinct markets—one for electricity, the other one for energy from renewable sources[27]—but fails to recognise that the paradigm underlying anti-dumping and anti-subsidy law, namely that the normal price is the result of a market mechanism. If it is not, a substitute mechanism is to be applied that leads to "as-if" results.

In a similar vein, the complete ban of "zeroing"[28] is perceived—certainly in the collective U.S. recollection—as a unilateral modification of a foundational political deal. The seriousness of the resistance is made obvious by the unheard opposition of several panels to follow the Appellate Body (not without the contribution of a future Appellate Body member, Mr. David Unterhalter) and by the continuing resistance within the Appellate Body, where, in the *Dishwasher* case, the effort to allow

[23] Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 11 March 2011, DSR 2010:III.

[24] Panel Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China,* adopted 22 October 2010, para. 8.136.

[25] Invoking the ILC (International Law Commission) Draft Articles on Responsibility of States for Internationally Wrongful Acts.

[26] Cartland et al. (2012), p. 1001.

[27] Appellate Body Report, *Canada – Measures Relating to the Feed-in Tariff Program,* WT/DS412/AB/R and WT/DS426/AB/R, adopted 6 May 2013, DSR 2013:I, paras. 5.106 et seq.

[28] The practice of the U.S. to put the value of "zero" on any negative dumping, thus leading to dumping whenever there was some dumping (i.e. a positive dumping margin (e.g. with the value "five", i.e. the product is sold "five" below the home market price) during, e.g., 6 months, as it cannot be cancelled out by corresponding (or greater) negative dumping margins during the remainder of the year, because negative dumping is valued at "zero".

zeroing at least in the case of targeted dumping was voted down by a majority.[29] Also, the refusal to read Article 17.6 ADA as a norm granting substantial leeway to investigating authorities and instead insist of full judicial review was perceived as an affront. And lastly, and most currently, the ruling in in *EU – Biodiesel*[30] which rejects the use of costs other than those resulting from the accounts of the exporting producer—thus ultimately referring investigations of alleged Chinese dumping practices back to China and putting in question the common practice to use third-country data—has been perceived, rightly or wrongly, as making it difficult, if not impossible, to cope with certain Chinese practices.

2.2 The Trump Shock

It is fair to say that the jurisprudence of the WTO adjudicative organs, in particular the Appellate Body, had created strong feelings in the United States; this is a somewhat counter-intuitive development: the U.S. was "present at creation" of the GATT/WTO System and had the dual role of midwife and godmother. This is not the place to describe in detail the measures of the United States government to undo the Appellate Body and thereby change the substantive law applicable to countervailing measures relating to dumping and subsidies and, maybe less so, the law relating to safeguard measures. It suffices to remind readers that the U.S., already during the Obama administration, weakened both the Appellate Body and its presence in it by not proposing an American Appellate Body member for renewal in 2011. In 2016, the United States Trade Representative (USTR) chose to escalate its manifestation of disenchantment with the Appellate Body and did not join the otherwise certain consensus for the renewal of a sitting (Korean) Appellate Body member. The 2016 Annual Report of the Appellate Body[31] restates that:

> [O]n 11 May 2016, the DSB Chairman had been informed by one delegation [the US'] that it would be unable to support Mr Chang's reappointment. Shortly thereafter, this delegation publicized its reasons for its opposition to Mr Chang's reappointment. Subsequently, Appellate Body members other than Mr Chang, in a letter signed by the Appellate Body Chair, expressed concerns about the public statement of reasons given for opposition to Mr Chang's reappointment.[32]

In a move that did not win sympathies in Washington D.C., the Appellate Body Members stated in a letter to the Chairman of the DSB that they were "*concerned*

[29] Appellate Body Report, *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*, WT/DS464/AB/R, adopted 7 September 2016, DSR 2016:II, paras. 5.191 et seq.

[30] Appellate Body Report, *European Union – Anti-Dumping Measures on Biodiesel from Argentina,* WT/DS473/AB/R, adopted 6 October 2016, DSR 2016:IV, paras. 6.37 et seq.

[31] World Trade Organization, Appellate Body Annual Report for 2016, WT/AB/27, 16 May 2017.

[32] World Trade Organization, Appellate Body Annual Report for 2016, WT/AB/27, 16 May 2017, Annex 4.

about the accuracy of some of those reasons and, in particular, about the risks they may carry for the trust that WTO Members place in the independence and impartiality of Appellate Body members, on which the dispute settlement system depends."[33]

With the 45th President of the U.S., the relationship between the institution and its onetime mentor reached a new low: President Trump is on record as describing the WTO as a "disaster"; he has stated that he would leave the WTO, if he considered that it did not serve U.S. purposes.[34] In particular, it has been reported that if the Chinese complaint against the U.S.' and the EU's treatment of China as Non-Market Economy (NME), currently pending at the panel phase (DS 515 and 516) end with a win for China, the U.S. would walk away from the system. Given that the current administration has pulled out of the Trans-Pacific Partnership (TPP), these threats are not perceived as being completely implausible.

As per early 2018, the United States refuses to agree to any appointment to the Appellate Body. It is clear that this is not so much an expression of no-confidence in the Canadian, South American, Asian and EU candidates so far proposed. Rather, the U.S. has expressed in the strongest possible terms criticism of the Appellate Body performance in the last decade: it alleges that the Appellate Body has usurped powers not attributed to it. The implication is that the Appellate Body is operating without proper mandate. The alleged points range include, but are not limited to: "disregard of the 90-day deadline for appeals", "continued service by persons who are not longer AB members", "issuing advisory opinions on issues not necessary to resolve a dispute", "Appellate Body review of fact and review of a Member's law *de novo*" and "the Appellate Body claims its reports are entitled to be treated as precedent".[35] The purpose of this contribution is not to discuss the substantive merit of these reproaches or to evaluate the appropriateness and legality of the U.S. course of action in that context, but rather to highlight the institutional crisis of the WTO dispute settlement mechanism as context and background for the future of TDIs. Not surprisingly, specific criticism is reserved for the Appellate Body's jurisprudence regarding TDIs: The Trump administration voices "*systemic concerns with what it sees as an overly judicially activist Appellate Body that seeks to fill gaps in WTO agreements, which in turn creates new obligations for members and reinterprets what has already been agreed to. Several U.S. administrations have complained that the Appellate Body opines on issues not raised in the appeal and creates jurisprudence with no input from members – largely abandoning deference to*

[33] World Trade Organization, Appellate Body Annual Report for 2016, WT/AB/27, 16 May 2017, Annex 4.

[34] See also infra, Malashevich and Love.

[35] All quotes from Office of the United States Trade Representative, 2018 Trade Policy Agenda and 2017 Annual Report of the President of the United States on the Trade Agreements Program Office, March 2018, https://ustr.gov/about-us/policy-offices/press-office/reports-and-publications/2018/2018-trade-policy-agenda-and-2017 (last accessed 30 April 2018), pp. 22–28.

members in the context of trade remedy investigations."[36] It would not seem a far-fetched assumption that the main reason for the U.S. behaviour is indeed the sense that the Appellate Body's interpretation of WTO trade remedies law is flawed. Indeed, the current administration has both not revealed what their desired outcome of its aggressive stand regarding the Appellate Body is and voiced explicit scepticism as to the role of *any* WTO dispute settlement mechanism with regard to trade remedies:

> Congress delegates trade negotiating power to the President, which gives the President considerable control over the outcome of a disagreement with a trading partner. This power can be exercised without relying on a third-party arbiter such as the WTO, which ensures that the United States maintains its sovereignty with respect to economic issues.[37]

As a consequence of the U.S. refusal to appoint new Appellate Body members, the Appellate Body currently consists only of four members. One member's term ends this year (2018); by the end of 2019, there will be one Appellate Body member left, the Chinese citizen Hong Zhao.

2.3 WTO TDI Law Without Appellate Body Monitoring?

Despite the U.S. rhetoric and hostile actions, it continues to use the WTO Dispute Settlement Mechanism actively; the USTR highlights its use in its recent report.[38] Not only "*China is confused by the fact that, on one hand, the U.S. is demanding that the WTO dispute settlement system to continue operating "as normal" as it did in this dispute [China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States], and on the other hand, (…) is actively working to undermine the system by blocking the selection process for vacancies of the Appellate Body.*"[39] However, the U.S. declined on 28 February 2018 to support

[36] Inside U.S. Trade's World Trade Online, Appellate Body, China NME fights to dominate WTO dispute settlement debate in 2018, 26 December 2017, https://insidetrade.com/daily-news/appellate-body-china-nme-fights-dominate-wto-dispute-settlement-debate-2018 (last accessed 30 April 2018).

[37] Economic Report of the President, Together with The Annual Report of the Council of Economic Advisers, Updating American Trade Policy, February 2018, https://insidetrade.com/sites/insidetrade.com/files/documents/2018/feb/wto2018_0082.pdf (last accessed 30 April 2018), p. 277.

[38] Office of the United States Trade Representative, 2018 Trade Policy Agenda and 2017 Annual Report of the President of the United States on the Trade Agreements Program Office, March 2018, https://ustr.gov/about-us/policy-offices/press-office/reports-and-publications/2018/2018-trade-policy-agenda-and-2017 (last accessed 30 April 2018), pp. 19 et seq.

[39] See Inside U.S. Trade's World Trade Online, China jabs U.S. for using WTO dispute settlement as it complies in poultry fight, 28 February 2018, https://insidetrade.com/daily-news/china-jabs-us-using-wto-dispute-settlement-it-complies-poultry-fight (last accessed 30 April 2018).

a proposal sponsored by 63 WTO members to begin filling three vacancies in the WTO Appellate Body.[40]

Where do these developments leave us? It seems quite possible that the current administration will indeed bring the activities of the WTO Appellate Body to an end, at least temporarily. Discussions are taking place that explore the use of the WTO's voting mechanisms (that allow, as ultima ratio to take majority decisions)[41] or, alternatively, a controlled medically-induced *coma* of the Appellate Body by using its members as arbiters pursuant to Article 25 DSU. If this route is taken, it is not impossible that Trump will get back on his campaign promise to leave the WTO.

In light of this highly aggressive approach, the common concerns of many countries, not just OECD members but also developing countries, with regard to the necessity of an adaptation of WTO law to the changed parameters of state involvement in export-oriented economies is taking second and third place, despite the fact that there are significant overlaps in views:[42] After all, it was the EU that suggested in *EU – Biodiesel* that the Appellate Body should move beyond a mechanical application of the ASCM and take the underlying aim of Article VI GATT into account which required, in the EU's view, the necessity to rely on "reasonable" determination the home market value, i.e. a determination that excludes, as much as possible, the state control exercised in a system in which state and economic operators are closely intertwined.

What seems clear, though, is that both the (temporary) incapacitation of the Appellate Body (and, as a consequence, the greater diversity of Panel reports) and the need to reconsider the current rules on subsidies and dumping in light of the surge of state capitalism will merit further attention.

3 The EU Reaction

In the EU, the political pressure to strengthen the TDI toolbox have increased since the first Barroso Commission. Parliament, for obvious reasons particularly receptive to changes in perception, has been at the forefront of the pertinent efforts, whereas Member States have had difficulties to come up with a consolidated

[40] See Inside U.S. Trade's World Trade Online, China jabs U.S. for using WTO dispute settlement as it complies in poultry fight, 28 February 2018, https://insidetrade.com/daily-news/china-jabs-us-using-wto-dispute-settlement-it-complies-poultry-fight (last accessed 30 April 2018).

[41] Article IX:1 WTO Agreement.

[42] See for example the shared EU/U.S. Legal Interpretation—Article VI:1 of the General Agreement on Tariffs and Trade 1994, the Second Note Ad GATT 1994 Article VI:1, the Practice of the GATT Contracting Parties in the Application of GATT 1994 Article VI:1, the Accessions of Poland, Romania, and Hungary to the GATT, Article 2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, and Section 15 of the Protocol of Accession of China to the WTO, https://ustr.gov/sites/default/files/enforcement/WTO/US.Legal.Interp.Doc.fin.%28public%29.pdf (last accessed 30 April 2018).

position.[43] The Commission, on the other hand, has tried to reconcile the different views, while simultaneously increasing its pertinent administrative powers, comply with the Appellate Body's view in *EU – Biodiesel* and avoid a scorched earth policy vis-à-vis the Chinese partners.[44]

In December 2017, the EU undertook two important steps to address these concerns. On 12 December 2017, the EU legislator changed its methodology in Regulation 2017/2321[45] to establish the appropriate home market price ("normal value") for exporting countries in which state or other influences may lead to "significant distortions" of market conditions, thus rendering the benchmark for the calculation of dumping margins unreliable. Already on 5 December 2017, based on a Commission initiative originally presented to EU legislators in 2013,[46] the EU institutions also agreed to "modernise" the Union's TDIs.[47]

> The proposed regulation sets out to:
>
> – Increase transparency and predictability as concerns the imposition of provisional anti-dumping and anti-subsidy measures. This includes a pre-disclosure period of three weeks after the information is made public in which provisional duties will not yet be applied, as well as additional safety nets addressing the issue of stockpiling.
> – Enable investigations to be initiated without an official request from industry, when a threat of retaliation by third countries exists.
> – Enable trade unions to submit complaints together with the industry and allow them to become interested parties in the proceedings.
> Shorten the investigation period to a normal period of 7 months, but no later than 8 months. The definitive duties will have to be imposed within 14 months.
> – Enable higher duties to be imposed in cases where there are raw material distortions and these raw materials, including energy, account for more than 17% taken individually. This would allow for an adaptation of the level of duties imposed under the "lesser duty rule" if it is in the interest of the EU. The imposition of higher duties will include a target profit set at a minimum of 6%.
> – Enable importers to be reimbursed duties collected during an expiry review in the event of trade defence measures not being maintained.
> – Take into account social and environmental standards when assessing the acceptability of an undertaking and when establishing the injury elimination margin.[48]

[43] Under the Slovak Presidency, the Council finally agreed to a position, Council of the European Union, Trade defence instruments: Council, Council agrees negotiating position, 13 December 2017, http://www.consilium.europa.eu/en/press/press-releases/2016/12/13/trade-defence-instruments-general-approach/pdf (last accessed 30 April 2018).

[44] Overview at Hoffmeister (2015), pp. 365–376.

[45] OJ 2017 L 338/1, pp. 1–7.

[46] European Commission, Communication from the Commission to the Council and the European Parliament on Modernisation of Trade Defence Instruments, Adapting trade defence instruments to the current needs of the European Community, 10 April 2013, COM(2013) 191 final.

[47] See Council, Trade defence instruments: EU ambassadors confirm the outcome of the final political trilogue with European Parliament, 20 December 2017, http://www.consilium.europa.eu/en/press/press-releases/2017/12/20/trade-defence-instruments-eu-ambassadors-confirm-the-outcome-of-the-final-political-trilogue-with-european-parliament/pdf (last accessed 30 April 2018).

[48] Council of the European Union, Trade defence instruments: EU ambassadors confirm the outcome of the final political trilogue with European Parliament, 20 December 2017, http://www.consilium.europa.eu/en/press/press-releases/2017/12/20/trade-defence-instruments-eu-ambassadors-confirm-

Several contributions below tackle in detail the new package.[49] For the purposes of this introductory paper, two aspects merit attention: Firstly, the new rules facilitate to some degree the initiation of investigation and, accordingly, are somewhat more burdensome for third-country-operators. Secondly, while significant doubts remain as to whether the new anti-dumping methodology of Regulation 2017/2321 takes sufficiently on board the findings of the Appellate Body in *EU – Biodiesel* and the law of the ADA, it has been noted by critics and supporters alike that the EU has made an effort to enact legislation that does not single out China. Given China's sensitivity with regard to any measure that is reminiscent of the infamous "uneven treaty" situation prevalent with Western powers in the nineteenth century, this effort by the EU is clearly noted; indeed, one does hear that this is a "Kowtow" to the Middle Kingdom that goes too far. This having said, the Commission has published on 19 December 2017[50] the first and so far only Commission staff working document on significant distortions in the economy of a trading partner that would be thus subject to this methodology: it concerns the People's Republic of China.[51]

4 Conclusion

In contrast to its U.S. partners, the EU tries to advance its trade defence interests in ways that do not endanger the multilateral trading system and its relationship with China. Of course, the devil is detail: there are those who see in the EU TDI reforms defensive measures mainly directed against China that unfairly sanction a very successful emerging country that remains on average poor by OECD standards and has opted for a government system that emphasises less the separation of society and state than Western liberal democracies. Others see a (maybe too) late effort to adapt TDIs to the threat of unfair trade practised by certain trading partners.

The crisis of the WTO dispute settlement mechanism is endangering the relative order that prevails currently with regard to trade remedies. The aggressive uses of trade remedy investigations are well known and so is the unhappiness of the U.S. with some of the Appellate Body jurisprudence and its (somewhat condoned) reluctance to implement some of the pertinent DSB decisions. The possibility, though, that soon the Appellate Body may be a fading memory would endanger the very

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the-outcome-of-the-final-political-trilogue-with-european-parliament/pdf (last accessed 30 April 2018).

[49] See Part II of this book.

[50] Corrected version on 20 December 2017: see European Commission, Commission staff working document on significant distortions in the economy of the People's Republic of China for the purposes of trade defence investigations, 20 December 2017, SWD(2017) 483 final/2, http://trade.ec.europa.eu/doclib/docs/2017/december/tradoc_156474.pdf (last accessed 30 April 2018).

[51] European Commission, Commission staff working document on significant distortions in the economy of the People's Republic of China for the purposes of trade defence investigations, 20 December 2017, SWD(2017) 483 final/2, http://trade.ec.europa.eu/doclib/docs/2017/december/tradoc_156474.pdf (last accessed 30 April 2018).

basis of the rules-based international trading system: not because the Appellate Body did everything right (it clearly did not), but because it creates a precedent for any big player to walk away from international legal obligations when it suits them. This is a state of international affairs known to Europe and the reason why it embraced more than anyone else the U.S. led post-war effort to have enduring peace coupled with welfare-creating economic stability based on rules.

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The Politics of TDI and the Different Views in EU Member States: Necessary Safety-Valve or Luxurious Rent-Seeking Device?

Brian Petter and Reinhard Quick

Contents

Abstract The article discusses the tightening of the European Union's Anti-Dumping Regulation as a consequence of the debate on the "Market Economy Status" for China. It gives some facts and figures on the European Union's current anti-dumping activities, in particular those against China. Given China's treatment as a Non-Market Economy, the anti-dumping duties imposed are considerably higher than those imposed against "injurious dumping" from Market Economy countries. The article gives some insights into the chemical industry's thinking on anti-dumping. The industry's export dependency and its quest for further trade liberalisation provides for an interesting case study on how an industrial sector views the politics of anti-dumping. The main part of the article is an analysis of the political discussions and legislative initiatives in the context of China's MES. The European Commission's proposals are discussed as well as the reactions of the European Parliament, the Council of Ministers and those of business stakeholders. With respect to the position of stakeholders, the article elaborates on the difficulties

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