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**SEVENTH ANNUAL REPORT FROM THE COMMISSION TO THE EUROPEAN
PARLIAMENT**

**OVERVIEW OF THIRD COUNTRY TRADE DEFENCE ACTIONS AGAINST THE
EUROPEAN UNION (STATISTICS UP TO 31 DECEMBER 2009 BUT
COMMENTARY ON CASES AND TEXT IS UPDATED TO MARCH 2010)**

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SEVENTH ANNUAL REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT

OVERVIEW OF THIRD COUNTRY TRADE DEFENCE ACTIONS AGAINST THE EUROPEAN UNION (STATISTICS UP TO 31 DECEMBER 2009 BUT COMMENTARY ON CASES AND TEXT IS UPDATED TO MARCH 2010)

Executive Summary

Despite the international commitments not to introduce protectionist measures in this climate of global economic crisis, the number of new investigations and trade defence measures imposed in 2009 was very high. Regrettably, the standards applied in a number of measures against EU exporters leave something to be desired. This year this was particularly notable in the area of the standards of initiation of investigations. Furthermore, the ever increasing use of the safeguard instrument is preoccupying. The Commission's monitoring activity in this context has been very important. The Commission intervened frequently in order to assist EU exporters and to ensure that their access to foreign markets was not unduly restricted by unwarranted measures. This has often led to positive results, but unfortunately not all the problems could be solved. The Commission will continue to advocate for a prudent and disciplined use of trade defence instruments in order to promote free and fair trade world-wide.

1. INTRODUCTION

Last year's report highlighted the first signs of the global crisis and its impact on trade defence activity. In 2008, an impressive number of new investigations were initiated, in particular during the last two months of that year. Despite the commitment of the G20 to avoid any trade restrictive measures, this report will show that the trend started in 2008 has continued in 2009. The number of new investigations initiated and of measures imposed in 2009 has indeed increased significantly.

As long as trade defence instruments are used in full compliance with WTO rules, they cannot be considered as a protective tool. Their purpose is rather to remedy very specific situations in accordance with strict rules. Unfortunately, the trends and the problems identified in this report seem to indicate that in 2009 these rules were at times applied in a fanciful way. The inappropriate use of the instruments and the all-too-often poor standards applied during trade defence investigations, as continuously deplored by the Commission in the past, have been more prominent than ever.

The Commission's continued efforts in monitoring third country trade defence actions have been further intensified in this context. The Commission assisted numerous industries in individual investigations and also intervened frequently at broader levels in order to avoid deviations from the applicable rules. Furthermore, the Spanish presidency has identified market access as a priority, which has given further prominence to the Commission's activities in this field.

This report describes overall trends, the problems identified and the results achieved. It also gives a detailed analysis of trends and specific cases for the most important users of the instrument.

2. OVERALL TRENDS

The 2009 TDI activity by third countries was very intense, especially in terms of **new initiations**. The increasing trend observed since the end of 2008 has indeed continued. No less than 45 new investigations have been initiated in 2009, which is a steep increase as compared to the 33 new initiations in 2008 (of which almost half took place in the last quarter), and even more so when compared to the 19 new initiations in 2007.

Safeguard is more than ever the most frequently used instrument for new investigations. Indeed, with 31 new safeguard investigations initiated, more than two out of three new cases concern this instrument. Even if, given the *erga omnes* nature of safeguards, the EU does not always export the product under investigation, this trend remains a cause of serious concern. While India has been the most important user with 9 new initiations in 2009, it should be noted that Turkey has prolonged 4 safeguard measures beyond their original period of imposition of three years.

The overall increase of new investigations since the end of 2008 has naturally resulted in a higher number of **measures imposed** in 2009: 33 new measures were imposed, as compared to 18 in 2008. India was again the most important player (7 measures imposed) followed by China (4 measures), Israel and Ukraine (3 measures each). Almost half of these measures were safeguards, meaning 15 out of 33 measures in 2009 (as compared to 6 out of 18 measures in 2008).

Despite the above trend, the total number of **measures in force** increased only slightly. At the end of 2009, there were 136 trade defence measures in force, which is only 3 measures more than at the end of 2008. This is due to the fact that a non negligible number of measures has lapsed or has been terminated during the year 2009.

Anti-dumping remains the instrument with most measures in force (93 measures versus 91 in 2008), followed by safeguards (with 37 measures versus 32 in 2008) and anti-subsidy (6 measures versus 10 in 2008).

The main user of the instruments against the European Union is still the USA with 23 measures in force, even though in 2009 there was no activity in terms of new measures or initiations. India remains the second biggest user, with 15 measures in force, and has been very active in 2009, as explained above. China is now almost catching up with India and is together with Turkey in third position with 12 measures in force against the EU in 2009. The other important users are Brazil with 11, closely followed by Ukraine with 9 measures in force.

3. ONGOING PROBLEMS

The Commission's interventions have often resulted in improvements in individual cases, or even their termination without any measures. However, the problems described in previous reports still exist. Due to the pressure created by the difficult economic situation, it seems that certain problems got even worse in 2009. This is the case in particular for the (weak)

standards of initiation and the ever increasing use of the safeguard instrument. The lack of transparency also remained an important issue. In the worst cases we have even seen a combination of these three issues.

3.1. Poor standards of initiation

Many industries worldwide have suffered and are still suffering from the difficult economic situation since the end of last year. In this context, operators may be tempted to look for a shield against foreign competition, e.g. protective measures. Therefore, national authorities have to be particularly careful when they receive applications to impose trade defence measures. Investigations should only be initiated when there is genuine evidence that the legal conditions required for initiation are met.

Even though the pressure to initiate investigations may be very high, only technical grounds should serve as a basis for initiation. Unfortunately, in 2009 this was not always the case. This led to an increase of new initiations of over 80% when compared to 2008, i.e. 33 new investigations were initiated in 2009 as compared to 18 in 2008. For most of these initiations e.g. the evidence on injury was based on only a few negative financial indicators covering a very short period (often only one quarter). The causality analyses were also flawed since businesses tried to impute the negative impact of the financial crises on dumped, subsidised or increased imports, thus conveniently overlooking causes other than the imports that impacted negatively on their situation.

Although these investigations did not and may not always lead to measures, the initiation already has a disturbing effect on trade flows because it creates an uncertainty in the business environment. Furthermore, cooperating in an investigation implies a significant investment in human and financial resources for the economic operators concerned. Therefore, initiations that do not meet the WTO criteria should be avoided at all times because they are unlawful, and, particularly in the present framework, because they put unnecessary additional pressure on businesses that are already suffering from the current economic crises.

In addition to the issues identified above, a new trend has emerged in 2009. On various occasions, it has been found that, following the imposition of anti-dumping measures by the European Commission, investigations concerning similar products have been initiated by the country targeted by these measures. While it is too early to conclude that this is an established trend, it is difficult to believe in a pure coincidence. The Commission is closely following this issue.

3.2. Extensive use of safeguards

In 2009 the use of the safeguard instrument virtually exploded after an already steep increase in 2008. 31 new safeguard investigations were initiated and 15 new measures were imposed in 2009. This represents more than two thirds of all new investigations initiated and almost half of all new measures imposed.

It should be recalled that safeguard measures are the most restrictive trade defence instrument because they concern 'fairly traded' imports (i.e. neither dumped nor subsidised) from all countries of origin, and also imports that do not cause injury to the domestic producers. Thus, they remove unilaterally and temporarily the tariff concessions that have been granted in the various rounds of GATT/WTO negotiations. Therefore, panels and the Appellate Body have

always interpreted WTO rules regarding safeguards in a very strict way. It is questionable whether all these measures imposed in 2009 do actually comply with the strict legal standards required. More importantly, even if, due to the very poor standards of initiation, measures are ultimately not imposed, trade flows will have been disturbed during the investigation. Furthermore, for the first time in 2009 certain countries (i.e. Turkey and Russia) have extended safeguard measures beyond their initial 3 year period of application. This is also a cause of concern because in some of these cases imports had almost completely disappeared due to the measures, and the domestic industry had recovered. In other cases, the domestic industry was still in a weak situation, either as a result of the economic crisis, or because measures were ineffective. In all of these situations, measures should have been removed.

The European Commission has intervened in many cases in order to highlight WTO incompatibilities and, as will be explained below, in some cases measures could be avoided while in others, at least European exports could be spared. This is however far from satisfactory, as safeguards became the most frequently used instrument in 2009.

3.3. Procedural aspects

The lack of transparency in trade defence investigations is a recurrent problem, and it is damaging because it deprives interested parties of their legitimate right of defence.

The most frequent problems occur in relation to issues of confidentiality. While it is obvious that information submitted on a confidential basis by parties should not be disclosed, every interested party has the right to receive sufficient information to be able to understand the substance of the data submitted in confidence. However, often all figures in public versions of applications lodged by the industry and/or public notices of preliminary or final determinations are simply blanked out, without giving a summary of this information. In addition, data such as aggregated figures relating to more than three companies are often unduly considered confidential, since their disclosure would not have any adverse effect on the party supplying the information.

Other procedural shortcomings make trade defence investigations unnecessarily burdensome. This mainly concerns excessive requests for information such as are seen in sampling cases, where exporters are asked to provide detailed information beyond that necessary for the selection of a sample. In other cases, complete information (including sales, costs, third country sales, etc.) for an overly long investigation period of two years or more has been requested. Sometimes exporters are asked to provide very detailed information that is not necessary for the establishment of dumping but is considered a business secret, e.g. specific cost items in the production process. These excessive requests may discourage companies from cooperating, which has inevitably negative consequences usually in the form of higher duties.

The Commission tries to remedy such situations by intervening directly with the investigating authorities and by providing assistance to the parties concerned. Although in many cases such interventions were successful, this was unfortunately not always the case. The Commission will thus continue to raise these issues in the framework of bilateral contacts and during the appropriate WTO committees in Geneva with the aim of ensuring that WTO legislation and high standards are applied by all users of the instruments.

4. MAIN ACHIEVEMENTS

The Commission's role in relation to third country cases goes far beyond merely monitoring investigations. In fact, the Commission provides advice and assistance to European exporters who are concerned and intervenes directly with third country authorities on case-specific and systemic issues. These efforts aim at supporting the companies concerned, but also at generally improving disciplines among trading partners when applying trade defence instruments. In this context, the Commission also continues to organise specialised trade defence seminars in order to spread best practices throughout the trade community.

Although achievements in these areas are not always easy to measure, the Commission's perseverance did bear fruit, and in several cases, the outcome for the companies was more favourable than it would have been without the Commission's intervention, in particular:

4.1. India: termination of 7 safeguard investigations

India initiated 9 safeguard investigations in 2009. This is about one third of all safeguards initiated that year, and also an extraordinary high number when compared to the 10 safeguard investigations initiated by India over the past 10 years. 7 of these cases concerned products exported from the EU for an estimated value of no less than 500 million €/year, and covering sectors such as steel, paper and chemicals. All these cases were initiated on very weak grounds. The Commission, in cooperation with exporters, strongly opposed the proceedings and intervened at different levels. These interventions had positive results and despite the recommendation by the Indian authorities to impose provisional measures, all the investigations which directly concerned EU exports were terminated without the imposition of any measures. However, it has to be born in mind that during almost one year trade was negatively affected by on-going investigations that should not have been initiated in the first place.

4.2. New Zealand: termination of the expiry review concerning countervailing measures on canned peaches

This case is important because it concerns the new scheme introduced as part of the reform of the EU Common Agricultural Policy, which is considered to be in full compliance with WTO standards and should thus not be subject to any countervailing measures. In the framework of the expiry review initiated in 2008, New Zealand has accepted the arguments put forward by the Commission, which demonstrated that the new scheme has no trade distorting effects and is thus not countervailable. As a result, the duties in force for more than 10 years were terminated.

4.3. Croatia: termination of the safeguard measure on cheese and cheese supplements

Croatia imposed provisional measures on these products in June 2009, on very weak procedural grounds and lack of transparency (no disclosure showing that the legal conditions to introduce measures were met). The annual EU exports originally at stake were around 80 million €. Given the high economic impact and the serious flaws of the case, the Commission has strongly intervened at technical and political level. As a result, the product scope was significantly reduced. The types of cheese excluded represented 80% of the EU exports and

the corresponding measures were revoked and reimbursed. For the remaining products measures were imposed for 6 months only and expired in January 2010.

4.4. Israel: no imposition of safeguard measures

Israel became an important user of trade defence instruments in 2009. Amongst others, a safeguard investigation against imports of *steel products* was initiated. The case was initiated on weak grounds, and provisional measures were imposed despite the fact that imports decreased in 2009 and average import prices increased. Following various interventions, including from the Commission, the measures were suspended and duties reimbursed. The Commission nevertheless continues to monitor this case since the investigation has unfortunately not been terminated yet. It is however difficult to see how Israel could still justify the imposition of any measure.

4.5. Russia: termination of the anti-dumping investigation concerning flat-rolled polymer coated steel and temporary non-application of safeguard measures on grain-harvesting combines

The anti-dumping investigation against imports of *flat rolled polymer coated steel* from Belgium and Finland was concluded in September 2009. The Commission had intervened in order to highlight weaknesses identified in this case, such as lack of injury and transparency. Subsequently, in November 2009, the investigating authorities have proposed not to impose measures due to a negative injury determination.

The Commission and the EU industry have also been very active in the safeguard case concerning *grain harvesting combines*, given its high economic interest (110 million € in 2007). The conditions to impose safeguard measures were indeed not met and Russia has therefore decided not to apply safeguard measures. Unfortunately import duties were increased instead, which is more difficult to be legally challenged. The possibility of Russia's introducing safeguard measures at a later stage cannot be excluded, i.e. if customs duties are reviewed downwards, and the Commission thus remains vigilant on this issue.

4.6. Morocco: extension of EU quota for safeguard measures on ceramic tiles

In 2009 Morocco initiated an investigation in order to explore the need to prolong safeguard measures imposed in 2006. The Commission, together with the industry, actively intervened in this case. Although, the prolongation of measures could not be avoided, the quota allocated to EU exporters has been significantly liberalised as compared to the original measures, and the conditions to obtain import licences have been improved. As a result EU exporters have access to the Moroccan market again.

4.7. Termination of investigations or absence of measures in various cases

In the *petrol extraction pumps* case initiated by Argentina in May 2008 against imports from Romania, the continued interventions by the Commission and the industry resulted in the acceptance of undertakings offered by the Romanian exporter concerned. The Commission also actively supported the EU industry in a safeguard investigation initiated by Ukraine

concerning *liquid chlorine* and an anti-dumping investigation initiated by Turkey concerning *textile products*. Both investigations were terminated without measures in 2009.

4.8. MES new Member States

It is recalled that in June 2009, after a long and difficult struggle and numerous interventions by the Member States and the Commission, Bulgaria and Romania were finally also granted market economy status by Brazil.

4.9 US: Zeroing

The EU challenged the zeroing practice in two WTO dispute settlement cases DS 294 and DS 350. The Panel decided in favour of the EU in both cases, but the US did not comply with the Panels' decisions in a reasonable timeframe. Therefore the EU asked for a compliance Panel in the first case (DS 294) and received confirmation on certain claims and appealed certain aspects of the Panel's additional findings. The final ruling found that the US had to stop this unfair practice immediately. Since the US still has not complied, the EU imposed sanctions. Currently an arbitrator is deciding on the level of these sanctions.

In the second Zeroing case (DS350), the AB confirmed the main EU claims on appeal, rejected all grounds of appeal put forward by the US and upheld the Panel's findings that the US was in breach of its WTO obligations by applying zeroing in periodic reviews. The EU is now considering further steps also in this case, in order for the US to comply with the final ruling.

5. CONCLUSION

As predicted in last year's report, the TDI activity in third countries has been very intense in 2009. The increasing trend of the number of new initiations which started at the end of 2008 has continued in 2009, and the number of measures imposed has increased significantly as compared to previous years. The relatively limited increase of measures in force at the end of the year does therefore not fully reflect the true situation. In reality, the high number of new measures has partly been compensated by the expiry of many measures in 2009. In addition, some investigations have either not yet been concluded or have been terminated without the imposition of measures. However, as explained above, even if an investigation is terminated without measures, trade flows are nevertheless disturbed while the investigation is ongoing due to its uncertain outcome. Moreover, in many cases, due to the lack of evidence required for opening a proceeding, investigations should not have been initiated in the first place.

The overall increase in activity is preoccupying as such, and certain aspects of it are especially worrying. In particular, the low standards of initiation and the extensive use of the safeguard instrument continue to be problematic. It seems that the economic situation since the end of 2008 has resulted in a particularly wide interpretation of WTO rules. Therefore, the Commission increased its efforts in order to prevent any deviations from these rules whenever possible.

In this context, the Commission intervened in many cases and contacts with industries have been numerous. Often these efforts have been successful and investigations were either terminated without measures or measures did not unduly harm EU exports. This shows the particular importance of the Commission's monitoring activity in these economically difficult

times. Ensuring legitimate market access for EU producers is even more important in times of crisis.

There is certainly a need to maintain and even enhance the Commission's efforts. The Commission is continuously trying to improve its actions and the most important challenge for the coming years, besides assisting the EU exporters concerned in on-going investigations, is to try to anticipate and avoid the initiation of unwarranted new investigations. Intensifying exchanges with other investigating authorities in order to increase standards, transparency and predictability could help in achieving this aim.