AMCHAM EU
AMERICAN CHAMBER OF COMMERCE TO THE EUROPEAN UNION
SPEAKING FOR AMERICAN BUSINESS IN EUROPE

CONSULTATION RESPONSE

AmCham EU's response to Public Consultation on Modernisation of Trade Defence Instruments

American Chamber of Commerce to the European Union
Avenue des Arts/Kunstlaan 53, 1000 Brussels, Belgium
Telephone 32-2-513 68 92 Fax 32-2-513 79 28
Register ID: 5265780509-97
Email:info@amchameu.eu

Secretariat Point of Contact: Adriaan Scheiris; adriaan.scheiris@amchameu.eu; 0032 (0)2 289 10 19

Date: 3 July 2012

Background and Analysis

Initiative on Modernisation of Trade Defence instruments

Introduction

With the current initiative, DG TRADE would like to explore ways on how to modernise its trade defence instruments. The enclosed questionnaire seeks to draw on the experience and obtain the views of the stakeholders on the issues identified therein.

While the economic environment has changed significantly over the last decade and keeps changing continuously, the rules of the European Union's trade defence instruments (TDI) have remained largely unchanged for more than 15 years. Trade defence instruments are often the only means that companies have in order to react to unfair international trading practices. At the same time, the application of trade defence instruments can have an impact on users and consumers.

Taking into account the difficult economic environment that companies are presently faced with, DG TRADE considers that the time is right to take stock of the strong and weak points of the current TDI rules, as a part of a discussion on whether and if so, how to adapt and improve them in a balanced way, for the benefit of all stakeholders concerned.

More information on the initiative

Questions marked with an asterisk * require an answer to be given.

2. Opinion on the Initiative

2.1. Increased transparency and predictability

Transparency is of great importance and therefore increasing transparency in TDI proceedings is also a top of the list priority in the modernisation process. Various options designed to enhance transparency of the proceedings and to improve predictability for all parties concerned are being considered (described in detail further below).

2.1.1. In your view, should the Commission further improve transparency in trade defence investigations?

Yes☑
No
I don't know

2.1.2. Would such improved transparency have an impact on your activities?

Yes ☑
No

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I don't know

2.1.3. If yes, please explain how. You may also provide additional comments on this issue:
(maximum 400 characters)

AmCham EU
AmCham EU's members include producers, importers and users of products that may be subject to TDI proceedings in the EU and worldwide. As complainants, respondents, importers or users of products that may be subject to AD duties, they consider that a fair and transparent legal process, taking account of all relevant interests and providing legal certainty, is vital in today's globalized economy.

2.1.1. Pre-disclosure / Advance notice

Stakeholders have often been critical of the fact that they have no possibility to comment in advance on provisional anti-dumping and countervailing duty measures. They claim that such a possibility would for instance help to eliminate errors, calculation mistakes etc. which under the current system are only be removed at the stage of definitive measures. More fundamentally, stakeholders claim that they do not know if and how their business will be affected by provisional measures because they do not know the duty rates of exporters etc. In order to increase transparency in anti-dumping and anti-subsidy proceedings, it could be envisaged providing interested parties with a pre-disclosure around three weeks before the imposition of provisional measures. Such pre-disclosure would be comprised of (i) a summary of the proposed measures for information purposes only and (ii) moreover each cooperating exporter and the Union industry would receive the relevant calculations and adjustments. In order not to endanger the time limits of any investigation, parties would be granted a relatively short deadline, to provide comments limited to calculations and adjustments. This would help detect calculation errors and therefore increase the quality of the measures.

2.1.1.1. Should the Commission provide a limited pre-disclosure to interested parties around three weeks before the imposition of provisional measures?

Yes ☑
No
I don't know

2.1.1.2. Would the adoption of such a proposal have an impact on your activities?

Yes ☑
No
I don't know

2.1.1.3. If yes, please explain how. You may also provide additional comments on this issue:
(maximum 400 characters)

AmCham EU:
As pointed out by the Commission, advance notice would be welcome as it would enable businesses to draw attention to any eventual calculation errors and to take provisional duties into account in planning operations.

2.1.2. Advance notice of the non-imposition of provisional measures

On occasions, stakeholders have criticized the Commission for not announcing that it does not intend to impose provisional measures. As a consequence, parties find out that no provisional measures are imposed only when the 9-month deadline for imposing such measures has passed. It is claimed that this is not transparent and impacts also negatively on the predictability of the business environment. The issue could be solved by informing interested parties in good time prior to the 9-month deadline, if it is envisaged not to impose provisional measures.

2.1.2.1. Should the Commission inform interested parties in good time prior to the expiry of the 9-month deadline, in cases where the imposition of provisional measures is not envisaged?

Yes ☑
No
I don't know

2.1.2.2. Would the adoption of such a proposal have an impact on your activities?

Yes ☑
No
I don't know

2.1.2.3. If yes, please explain how. You may also provide additional comments on this issue:
(maximum 400 characters)

AmCham EU:
As soon as it becomes clear that provisional measures are not going to be imposed, interested parties should be informed. Certainty as to the imposition or non-imposition of provisional measures should be provided as soon as possible in order to minimise market disturbance caused by speculation.

2.1.3. Activities of the Anti-dumping/Anti-subsidy Advisory Committee

Certain stakeholders would like to receive more information about the activities of the Anti-dumping/Anti-subsidy Advisory Committee (ADC, ASC)**[1]**. Unlike for definitive measures, where the Commission services discloses the draft regulation to interested parties prior to its adoption, interested parties are not informed of any proposed *provisional* measures. They do not receive an advance notice of the imposition or non-imposition of such measures before the formal adoption by the ADC/ASC. In order to improve transparency, it has been suggested to inform interested parties and provide them with a summary of the documents on which the Commission services formally consult the ADC/ASC on provisional and definitive anti-dumping and countervailing duty measures, shortly after the documents are sent to the ADC/ASC.

[1] The Anti-dumping/Anti-subsidy Advisory Committee is composed of representatives from the 27 EU Member States. It is consulted on all aspects of TDI proceedings. For the time being, the Commission services send to the ADC/ASC the draft regulation proposing the imposition of provisional measures without prior disclosure to interested parties; the regulation is published in the Official Journal only after the formal adoption.

2.1.3.1. Should the DG TRADE send a summary document about the proposed measures to interested parties, at the same time as the documents for consultation on provisional and definitive anti-dumping/ countervailing duty measures are sent to the ADC/ASC?

Yes ☑
No
I don't know

2.1.3.2. Would the adoption of such a proposal have an impact on your activities?*

Yes ☑
No
I don't know

2.1.3.3. If yes, please explain how. You may also provide additional comments on this issue:
(maximum 400 characters)

AmCham EU:
There is no justifiable reason to prevent interested parties, which have spent significant amount of time and resources throughout the investigation to have constructive discussions, if they wish to do so, with Member States on the merits of the Commission findings and proposals.

2.1.4. Shipping clause

Importers often complain that goods already in transit at the time of imposition of provisional measures are subject to those measures. Since it could be envisaged making information about the imposition of provisional measures available to interested parties, it could in addition envisaged making a commitment not to impose measures within a period of around three weeks after the sending of the pre-disclosure. These additional three weeks would increase predictability for all parties and give importers more flexibility to deal with shipments already at sea while not endangering the respect of time limits**[1]**.

[1] Note that Member States can according to Article 7 (5) of the Basic Anti-Dumping and Article 12 (4) of the Anti-subsidy Regulation request the Commission to impose provisional measures. It is not the intention of this possible modification to impact on this right. However, it should be borne in mind that Member States have not exercised this right since 1995, i.e. under the current Basic Regulations.

2.1.4.1. It could be foreseen to make a commitment not to impose provisional measures within a period of around three weeks after the sending of the pre-disclosure?

Yes ☑
No
I don't know

2.1.4.2. Would the adoption of such a proposal have an impact on your activities?

Yes ☑
No
I don't know

2.1.4.3. If yes, please explain how. You may also provide additional comments on this issue:
(maximum 400 characters)

AmCham EU:
A period of 3 weeks would help to resolve many cases of shipments en route. Consideration should also be given to how to deal with cases where shipment is longer than 3 weeks and even cases where sufficient evidence can be provided that the delivery process was already underway.

2.1.5. Injury margin

The calculation of the injury margin **[1]** for EU industry is of particular relevance in the context of the application of the lesser duty rule (please see paragraph 2.3.3). The applicable practice is often not well known. In order to make this area more transparent, the Commission could provide details of the methodologies applied when calculating the injury margin in the form of guidelines. Such guidelines could build on examples taken from past cases.
[1] The "injury margin" is the amount by which import prices need to be increased to ensure that they do not cause injury to the EU producers.

2.1.5.1. Should the Commission envisage drafting and publishing guidelines regarding the calculation of the injury margin?

Yes ☑
No
I don't know

2.1.5.2. Would the adoption of such a proposal have an impact on your activities?

Yes ☑
No
I don't know

2.1.5.3. If yes, please explain how. You may also provide additional comments on this issue:
(maximum 400 characters)

AmCham EU:
Particular attention should be paid to the establishment of the profit margin taken into account for the determination of the injury margin. This should be based on EU-segment-specific industry standards set by an independent group coordinated by the chief economist with due possibility for all interested parties to review and comment on time.

2.1.6. Analogue country

Data from an analogue country is used to establish normal value in investigations involving non-market economy countries such as (e.g.) China. The choice of an analogue country can be a difficult and controversial issue, since it affects the benchmark against which export prices are measured. The applicable practice is often not well known. In order to provide details of the criteria used when choosing an analogue country, the Commission could draft and publish guidelines. Such guidelines could build on examples taken from past cases.

2.1.6.1. Should the Commission envisage drafting and publishing guidelines regarding the choice of analogue country?

Yes ☑
No
I don't know

2.1.6.2. Would the adoption of such a proposal have an impact on your activities?

Yes ☑
No
I don't know

2.1.6.3. If yes, please explain how. You may also provide any additional comments on this issue:
(maximum 400 characters)

AmCham EU:
Guidelines are needed regarding how to:

- determine the comparability of an analogue country producer
- make any necessary adjustments;
- refrain from using producers in analogue country that are related to EU complainants;
- act when no "fair" analogue country producers can be found e.g. exceptional use of EU prices or EU production costs.

2.1.7. Union Interest Test

The Union interest test is another area (besides the lesser duty rule) where the EU applies a higher standard than that required by the WTO. It means that duties may not be applied in cases where it can be clearly concluded that it is not in the interest of the Union to apply such measures. The applicable practice is often not well known. In order to provide details about the methodologies used in the Union interest test analysis the Commission could draft and publish guidelines. Such guidelines could build on examples taken from past cases.

2.1.7.1. Should the Commission envisage drafting and publishing guidelines regarding the Union interest test?

Yes ☑
No
I don't know

2.1.7.2. Would the adoption of such a proposal have an impact on your activities?

Yes ☑
No
I don't know

2.1.7.3. If yes, please explain how. You may also provide additional comments on this issue:
(maximum 400 characters)

AmCham EU:
Guidelines should require:

- Evaluation of costs and benefits though-out the supply chain;
- The use of robust economic analysis.
- Establishment of an independent advisory panel of wise-men to provide broader economic, strategic and political perspective (including global interdependence implications).

2.1.8. Expiry Reviews

Expiry review investigations need to take into account a number of different factors and thus vary according to the market situation prevailing at the time of the review. However, the main difficulty – common to all expiry reviews – is the likelihood analysis which entails, in practical terms, a look into the future. The likelihood analysis has to assess what the situation would be like if measures were repealed. Would dumping/subsidisation and injury continue or recur, and what impact would this have on the situation of the industry? The applicable practice is often not well known. In order to provide details about the methodologies used in expiry review investigations the Commission could draft and publish guidelines. Such guidelines could build on examples taken from past cases.

2.1.8.1. Should the Commission envisage drafting and publishing guidelines regarding expiry review investigations?

Yes ☑
No
I don't know

2.1.8.2. Would the adoption of such a proposal have an impact on your activities?

Yes ☑
No
I don't know

2.1.8.3. If yes, please explain how. You may also provide additional comments on this issue:
(maximum 400 characters)

AmCham EU:
Upon justified request by any interested party, an interim Review should be combined with an Expiry Review.

Particularly in light of today's very rapidly changing market circumstances, guidelines should clarify how:

- to define the scope of the Interim Review;
- to assess **if the methodology should be changed,**
- to determine the likelihood of recurrence of injury and the causal link

2.1.4. In order to increase transparency, do you think it would be useful to draft guidelines in any other areas?
(maximum 400 characters)

AmCham EU:
Guidelines should exist for:

- Initiation: (complaint office practice)
- Measure: (what type of measure and why; chosen based on ability to limit unfair trade transactions and not on limiting trade)
- Sampling (how sampling is done and why)
- Length and choice of investigation period
- Product definition (broad product scopes are impractical and can cause massive potential collateral damage)

2.2. Fight against retaliation

Fear of retaliation is a serious and increasing obstacle to an effective use of trade defence instruments by EU industry. For example, authorities of exporting countries exercise undue pressure on European companies in order to prevent them from lodging anti-dumping or anti-subsidy complaints. Addressing this issue is of primary importance for the operation of the instruments.

2.2.1. Has your business already been subject to retaliation in the past?

Yes
No
I don't know

2.2.2. If yes, please explain how. You may also provide any additional comments on this issue:
(maximum 400 characters)

2.2.1. *Ex-officio* AD and CVD investigations

In ensuring the continued availability of the EU's trade defence instruments to EU industry, one of the most challenging issues currently faced is the threat of retaliation against the Union industry if trade defence actions are started. In the recent past, certain sectors of the Union industry have indicated a reluctance to lodge trade defence complaints for fear of retaliation, notably from authorities in third countries. In order to ensure that EU industry can avail itself of its right to use trade defence instruments without fear of retaliation, the Commission could consider being more pro-active in opening investigations *ex-officio*. *Ex-officio* initiations are already permitted in exceptional circumstances under the EU's current basic regulations but they are a very rare occurrence. The threat of retaliation could constitute such an "*exceptional circumstance*".

2.2.1.1. Should the Commission initiate ex-officio investigations in situations where there is threat of retaliation?

Yes
No ☑
I don't know

2.2.1.2. Would the adoption of such a proposal have an impact on your activities?

Yes ☑
No
I don't know

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2.2.1.3. If yes, please explain how. You may also provide additional comments on this issue:
(maximum 400 characters)

AmCham EU:
Any retaliation should be taken seriously, but a general provision of ex-officio initiation by qualifying the risk of retaliation as a special circumstance is not the solution to this problem. The TDI instruments are instruments to address unfair trading practices but not unethical practices which may be better addressed through other legal routes. Other tools and other means should be applied.

2.2.2. Obligation to cooperate in ex-officio investigations

To ensure the effective functioning of investigations which are opened on an *ex-officio* basis, the Commission services must obtain the information necessary for carrying out an investigation. Companies' fear of retaliation can translate into a refusal to cooperate with the Commission services, i.e. EU companies are not willing to provide the necessary information to the Commission services. There are a number of means to ensure that the Commission services obtain the necessary information. The Commission services could, for example, invite parties to communicate in confidence the relevant information, and the supplier of that information would subsequently not be disclosed. Another possibility could be to grant the Commission the power to determine fines in cases of non-cooperation or even conduct on-the-spot checks at the premises of EU-based companies.

2.2.2.1. Should the Commission establish procedures for the purposes of *ex-officio* investigations, to allow parties to communicate relevant information in confidence?

Yes
No
I don't know

2.2.2.2. What should be the appropriate sanction in cases of non-cooperation?
(maximum 400 characters)

2.2.2.3. Would the adoption of such a proposal have an impact on your activities?

Yes
No
I don't know

2.2.2.4. If yes, please explain how. You may also provide additional comments on this issue:
(maximum 400 characters)

2.3. Effectiveness and enforcement

In striving to provide stakeholders with the best possible instruments to defend their interests, the possible modifications of the following section could improve the efficiency of proceedings and the effectiveness of measures.

2.3.1. In your view, is the EU trade defence system effective?

Yes

No ☑
I don't know

2.3.2. Comments: (maximum 400 characters)

AmCham EU:
Application of TDI does not always achieve the intended effect. Certain measures appear to cause disproportionate collateral damage.

When decisions on anti-dumping measures are taken with full consideration of Union interests, they should be enforced effectively.

2.3.1. *Ex-officio* anti-circumvention investigations (Article 13)

Anti-circumvention investigations are normally initiated following an application by the industry experiencing circumvention practices. In exceptional circumstances the Commission has also initiated such investigations on its own initiative. Since DG TRADE is already monitoring trade flows **[1]**, it could take a more pro-active approach and open anti-circumvention investigations whenever appropriate. Thus proceedings could be speeded up and anti-circumvention practices counteracted more effectively.
[1] Pursuant to Article 14.6 of the basic anti-dumping regulation (Council Regulation (EC) 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community, Official Journal L 343/51 of 22.12.2009) and to Article 24.6 of the basic anti-subsidy regulation (Council Regulation (EC) 597/2009 of 11 June 2009 on protection against subsidised imports from countries not members of the European Community, Official Journal L 188/93 of 18.7.2009).

2.3.1.1. Which circumvention practices have you experienced, if any?
Mis-declaration of origin☑
Mis-declaration of custom classification☑
Mis-declaration of customs value at importation
Slight product modification
Assembly operation in a country not subject to the duty
Other

2.3.1.2. If "other" please explain: (maximum 400 characters)

2.3.1.3. Should the Commission initiate *ex-officio* anti-circumvention investigations, if it has sufficient evidence at its disposal?
Yes ☑
No
I don't know

2.3.1.4. Would the adoption of such a proposal have an impact on your activities?
Yes ☑
No
I don't know

2.3.1.5. If yes, please explain how. You may also provide additional comments on this issue:
(maximum 400 characters)

AmCham EU:

We agree with the position that the Commission should have the possibility to launch Anti-Circumvention investigations, provided that due process is respected.

2.3.2. Verification visits

Currently, case handlers spend two or three days investigating an exporting producer. It is not always possible to verify all relevant aspects of the situation of the exporter in this time frame. In order to allow for a more thorough verification, these visits could be prolonged.

2.3.2.1. Would it be useful for DG TRADE to increase, where appropriate, the length of investigation visits to four or five days per company?

Yes ☑
No
I don't know

2.3.2.2. Would the adoption of such a proposal have an impact on your activities?

Yes ☑
No
I don't know

2.3.2.3. If yes, please explain how. You may also provide additional comments on this issue:
(maximum 400 characters)

AmCham EU:
The Commission should be the best judge of the time required to complete any investigation. We emphasise that the prime objective must be the quality of the investigation and that the Commission should not compromise thereon.

2.3.3. Lesser Duty Rule

Certain provisions in the EU anti-dumping and EU anti-subsidy legislation provide for higher standards than those required by WTO law; and one of these is the lesser duty rule **[1]**. While WTO rules provide for the possibility to apply a lower duty (than that determined by the dumping/subsidy margin) in cases where such a lower duty is sufficient to offset injury, the application of the lesser duty rule is obligatory according to EU law. However, in cases of clear evidence of fraud, circumvention or subsidisation in the exporting country concerned, it has been suggested that the lesser duty rule should not be applied in order to dissuade parties from engaging in such practices. The non-application of the lesser duty rule could apply to the original investigation in case of fraud and subsidisation. In case of circumvention it could apply to the anti-circumvention investigation.
[1] The lesser duty rule provides for a lower duty than the dumping/subsidy margin to be applied, if such lower duty is sufficient to offset injury.

2.3.3.1. Should the Commission not apply the lesser duty rule in cases of fraud, circumvention or subsidisation?

Yes
No ☑
I don't know

2.3.3.2. Would the adoption of such a proposal have an impact on your activities?

Yes ☑
No
I don't know

2.3.3.3. If yes, please explain how. You may also provide additional comments on this issue:
(maximum 400 characters)

AmCham EU:
Using TDI instruments through the suspension of lesser duty rule to punish companies/countries which have been found to misbehave is misusing the instruments rather than solving the problem. Other instruments exist and should be applied to correct such misbehaviour. In particular, subsidisation is a government practice and must be dealt with as such government-to-government.

2.4. Facilitate cooperation

Good quality investigations typically depend on the cooperation of interested parties. However, cooperation often represents a significant burden for the parties concerned. DG TRADE has therefore screened procedural rules and the investigation schedule in order to identify changes that could facilitate the cooperation of interested parties without compromising the overall duration and the quality of investigations.

2.4.1. Has your business experienced difficulties in cooperating in trade defence investigations?

Yes
No
I don't know

2.4.2. If yes, please explain how. You may also provide additional comments on this issue: (maximum 400 characters)

2.4.1. Time-limits: longer time-limits for users to register as interested party and to reply to the questionnaire

Interested parties are currently required to make themselves known to DG TRADE within 15 days of the publication of a Notice of Initiation in the Official Journal and to submit replies to questionnaires within 40 days. These deadlines are perceived as potential obstacles to the participation of small users/importers of the products subject to investigation. It is a fact that the level of cooperation of such parties in TDI investigations is usually very low, and greater participation should be encouraged. It has been suggested that the current 15-day deadline for users to make themselves known should be extended to one month; and that the deadline for replies to questionnaires should be extended to 60 days. This could encourage greater numbers of small users to cooperate in the investigations, and thus further improve the evidentiary basis of Commission proposals without affecting the overall amount of time taken to conduct investigations.

2.4.1.1. Should the Commission extend the deadlines for users to make themselves known to the Commission and to submit questionnaire replies?

Yes ☑
No
I don't know

2.4.1.2. Would the adoption of such a proposal have an impact on your activities?

Yes ☑
No
I don't know

2.4.1.3. If yes, please explain how. You may also provide additional comments on this issue:
(maximum 400 characters)

AmCham EU:
It is in our interest that the broadest possible number of interested parties has time and possibility to make themselves known. The 15 days deadline may be an obstacle and should be prolonged.
A serious review of the questionnaire, making it considerably more approachable for non-experts, would be a great help to all interested parties in particular SME's.

2.4.2. Simplification of refund procedures

Under the provisions of the EU's basic anti-dumping and anti-subsidy regulations, importers may claim a refund of all or part of the duties paid if certain conditions are met. Stakeholders claim that it is not always clear how such refund requests should be presented to the administration. This should be clarified. Moreover, the Commission's decisions on such claims are currently only addressed to the party making the claim. In the interests of transparency, consideration could be given to making such decisions in future more easily accessible to the public.

2.4.2.1. Should the handling of refund applications be reviewed with a view to facilitate such requests and to make such decisions more easily accessible to the public?

Yes ☑
No
I don't know

2.4.2.2. Would the adoption of such a proposal have an impact on your activities?

Yes
No ☑
I don't know

2.4.2.3. If yes, please explain how. You may also provide additional comments on this issue:
(maximum 400 characters)

AmCham EU:

If the option for the claim of a refund is available it should be fully transparent for all interested parties on how to claim such a refund. The procedures should be simplified and fully accessible even for SMEs.

2.4.3. Small and Medium Sized Enterprises (SMEs)

Many of the proposals set out in this consultation document would undoubtedly benefit SMEs, notably the extension of time limits for the submission of replies to questionnaires, or the simplification of refund procedures. In addition, DG TRADE could consider upgrading the SME help desk. The SME helpdesk is a specific facility run by the Commission services to address the concerns and enquiries of SMEs. Such an upgrade could include raising the awareness of its existence through (e.g.) improving the SME part of DG Trade's website, and holding seminars in Member States. These seminars could also be an important tool for improving SMEs' knowledge on the functioning of trade defence instruments in the broader sense, including for European SMEs that export to third countries.

2.4.3.1. Should DGTRADE upgrade the SME helpdesk?

Yes ☑
No
I don't know

2.4.3.2. Would the adoption of such a proposal have an impact on your activities?

Yes
No ☑
I don't know

2.4.3.3. If yes, please explain how. You may also provide additional comments on this issue:
(maximum 400 characters)

AmCham EU:
We fully support optimization of possibility for SME's to contribute and participate in proceedings, but we do not believe in activities such as seminars.
We propose:

- a strong SME helpdesk
- understandable questionnaires (less legalistic)
- guidelines

2.5. Optimizing review practice

The review practice has been screened and a number of aspects have been identified which could be fine-tuned in order to better meet the objectives and purposes.

2.5.1. Expiry reviews – re-imbursement of duties paid if the investigation is terminated without renewal of measures

Expiry reviews are initiated just before the end of the 5-year period of applicability of TDI measures. The measures remain in place pending the outcome of the expiry review, and anti-dumping/anti-subsidy duties continue to be collected. In cases where it is found – following the conclusion of an expiry review (which normally lasts 12 to 15 months) – that the conditions for the prolongation of the measures for a further period of 5 years are not met, the

investigation is terminated without re-imbursement of the duties collected during the investigation. Re-imbursement would cover any duty collected during the review investigation which had been paid after the most recent 5 year period of application of the measures.

2.5.1.1. Should consideration be given to reimbursing the duties that had been collected since the opening of the review investigation in cases where, after investigation, the measures are not prolonged?

Yes ☑
No
I don't now

2.5.1.2. Would the adoption of such a proposal have an impact on your activities?

Yes ☑
No
I don't know

2.5.1.3. If yes, please explain how. You may also provide any additional comment on this issue:
(maximum 400 characters)

AmCham EU:
In the event of reviews which result in the non-imposition of duties, the interested parties should be eligible to obtain a refund in a timely and transparent manner of the duties paid during such review periods.

2.5.2. Expiry reviews combined with interim reviews

TDI measures are imposed initially for a period of 5 years, after which they may be extended for a further period of 5 years following an expiry review. When measures have been in force for a total of 10 years, it is often the case that the market situation has changed (e.g., different Union industry; more exporters on the market; new imports from other sources; etc.) since the measures were originally imposed. Given that the legal basis for expiry reviews does not foresee that the level of measures can be amended to take account of any new market situation, the measures are either maintained at the same level or repealed.

2.5.2.1. Should the second and any further expiry review of measures be combined with an interim review, in order to allow for the level of the duty to be changed if appropriate?

Yes ☑
No
I don't know

2.5.2.2. Would the adoption of such a proposal have an impact on your activities?

Yes ☑
No
I don't know

2.5.2.3. If yes, please explain how. You may also provide additional comments on this issue:
(maximum 400 characters)

AmCham EU:

See comments above. Upon simple request by any interested party, an interim Review should be combined with an Expiry Review,
Market circumstances may be considerably different than during the original investigation and this should be taken into consideration in the scope of the expiry/interim review.

2.5.3. Ex-officio interim reviews

Competition issues are occasionally raised in the context of TDI investigations. For example, the Commission has found cartel behaviour in sectors where anti-dumping/anti-subsidy measures are in force. In such circumstances, provided that the time-frame and the product concerned were relevant, DG TRADE has in the past reviewed the need for the continuation of the anti-dumping/anti-subsidy measures.

2.5.3.1. Should the Commission systematically initiate interim reviews of measures when relevant anti-competitive behaviour has been identified?

Yes ☑
No
I don't know

2.5.3.2. Would the adoption of such a proposal have an impact on your activities?

Yes ☑
No
I don't know

2.5.3.3. If yes, please explain how. You may also provide additional comments on this issue:
(maximum 400 characters)

AmCham EU:
We support the Commission's proposal.
Illegal market behaviours should be, when appropriate, taken into consideration by the TDI services in form of a review of on-going measures. This should not be limited to Competition issues.

2.6. Codification

These changes could be considered to bring EU legislation in line with current practice or developments, or to make necessary amendments following WTO jurisprudence. Most of the technical changes mentioned in the following section have also been recommended in a recent evaluation of the EU's trade defence instruments.

2.6.1. Registration of imports *ex officio*

Article 14(5) of the basic AD regulation provides for the possibility to register imports in the context of an investigation. Article 24(5) of the basic AS regulation contains similar provisions. Registration is done in full transparency only after the publication of a regulation ordering such registration, and with a view to applying duties at the end of the investigation, if necessary. This provision is routinely applied in a number of limited circumstances (new exporter review; anti-circumvention review etc.). The current text of article 14(5) stipulates that registration can only be done following a request by the Union industry. However, registration should also be possible on the initiative of the Commission ('*ex officio*'). The basic regulations should therefore be amended

accordingly in order to improve coherence. Note that this amendment would not extend the areas where registration can be used today.

2.6.1.1. If you have any comments regarding this proposal, please provide them here:
(between 1 and 400 characters)

AmCham EU:
In the same line as it is the obligation of the Commission to monitor and ensure the enforcement of the imposed measures it should be the obligation of the Commission to survey the evolution of specific market developments when deemed required. Therefore, the Commission should have the possibility to register imports for this purpose.

2.6.2. Delete article 11(9) of the basic AD regulation and article 22(4) of the basic AS regulation

Article 11(9) provides: *'In all review or refund investigations carried out pursuant to this Article, the Commission shall, provided that circumstances have not changed, apply the same methodology as in the investigation which led to the duty, with due account being taken of Article 2, and in particular paragraphs 11 and 12 thereof, and of Article 17.*' The application of this provision in practice has created uncertainties, in particular as to what constitutes a relevant change in circumstances. It has also led to a situation where the use of a methodology has to be perpetuated although this methodology is clearly outdated and no longer applied in other more recent cases.
Article 22(4) of the basic AS regulation contains similar rules. Therefore, in order to ensure coherence, article 11(9) of the basic AD regulation and article 22(4) of the basic AS regulation should be repealed, to allow the Institutions to apply the current methodology in all investigations.

2.6.2.1. If you have any comments regarding this proposal, please provide them here: (maximum 400 characters)

AmCham EU:
Given the time lapse between original and review investigations, there appears to be very limited grounds to justify that the methodology chosen in an initial investigation should be maintained in reviews. Therefore, the Commission and the interested parties should have the opportunity to change (request a change) of methodology after allowing interested parties to comment.

2.6.3. Ensure that exporting producers with a zero or *de minimis* dumping margin in an original investigation (as opposed to a review investigation) will not be subject to any review)

Article 9(3) of the basic AD regulation stipulates, amongst others, that individual exporting producers with a dumping margin of less than 2% shall not be subject to an AD duty but *'they shall remain subject to the proceeding and may be reinvestigated in any subsequent review carried out for the country concerned pursuant to Article 11.*' In a WTO dispute settlement case opposing the USA and Mexico**[1]**, the WTO Appellate Body ruled that exporters with a dumping margin of less than 2% in an original investigation must not be subject to any review investigation, as this would amount to a violation of article 5.8 of the

WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994. Therefore, article 9(3) should be modified in order to reflect this ruling. Instead of including such companies in reviews, new investigations can be opened against them.
[1] Appellate Body Report WT/DS295/AB/R of 29.11.2005, Mexico – Definitive anti-dumping measures on beef and rice – complaint with respect to rice

2.6.3.1. If you have any comments regarding this proposal, please provide them here:
(maximum 400 characters)

AmCham EU:
We approve the WTO ruling and propose that this is should be extended to also include countries where measures has been imposed, but no exports has been recorded for the last 15 months prior to the expiry of measures.

2.6.4. Provide the possibility for exemption also to related parties if they are not involved in circumvention practices

The purpose of article 13(4) of the basic AD regulation is to ensure that companies subject to anti-circumvention investigations are exempted from any anti-circumvention measures if they can demonstrate that they are not engaging in circumvention practices. However, the aforementioned provision stipulates: *'Where the circumventing practice, process or work takes place outside the Community, exemptions may be granted to producers of the product concerned that can show that they are not related to any producer subject to the measures and that are found not to be engaged in circumvention practices as defined in Article 13(1) and 13(2).*' This text does not fully achieve its purpose. The following example illustrates this: Exporter E in country 1 is subject to an AD duty.
Subsequently, DG TRADE carries out an investigation in order to determine whether the AD measures against imports from country 1 are circumvented via imports from neighbouring country 2. If neither E nor its related company located in country 2 are engaged in circumvention practices, the company in country 2 could not be exempted if the text of 13(4) is followed by the letter. Article 23(6) of the basic AS regulation contains a similar provision. Therefore, article 13(4) of the basic AD regulation and article 23(6) of the basic AS regulation should be changed to allow for an exemption in these circumstances, and to formalise what is already current practice.

2.6.4.1. If you have any comments regarding this proposal, please provide them here:
(maximum 400 characters)

AmCham EU:
We agree to the Commission proposal of adjusting the current provisions so as to follow the current practice.

2.6.5. Clarify the definition of "a major proportion" of the Union industry

Article 5 deals with initiation, and paragraph 4 provides that an investigation shall not be initiated unless
complainants meet the 25% threshold. Article 4(1) of the basic AD regulation stipulates: *'For the purposes of this Regulation, the term 'Union industry' shall*

be interpreted as referring to the Union producers as a whole of the like product or to those of them whose collective output of the product constitutes a major proportion, as defined in Article 5(4), of the total Union production of those products (…)' (emphasis added). Article 5(4) defines a major proportion as being at least 25% of Union production. Articles 9(1) and 10(8) of the basic AS regulation contain similar provisions. However, the Appellate Body in DS397 of 15 July 2011 in *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China* held that the reference to a major proportion in article 4(1) of the basic AD regulation, in the context of the investigation, cannot automatically be equated with the minimum threshold of 25% set in article 5(4) of the basic AD regulation, which refers to initiation. Therefore, the reference to article 5(4) as contained in article 4(1) of the basic AD regulation should be deleted.
Similarly, the reference to article 10(8) as contained in article 9(1) of the basic AS regulation should be deleted, in order to comply with this ruling.

2.6.5.1. If you have any comments regarding this proposal, please provide them here:
(maximum 400 characters)

AmCham EU:
We agree with the Appellate Body.
"Major proportion" (definition/guidance required) is not represented by less than 50% of the EU production of the like product.
These 50% and the final sample should be representative for the entire market and not just one or two producer groups dominating the market.

2.6.6. Sampling provisions should refer to Union producers and not to complainants, except for the standing test

Article 17 of the basic AD regulation provides for the possibility to apply sampling in AD investigations. It stipulates: *'In cases where the number of complainants, exporters or importers, types of product or transactions is large (…)*' (emphasis added). Article 27 of the basic AS regulation contains similar provisions. However – except in cases of fragmented industries for the purpose of determining standing pursuant to article 5(4) of the basic AD regulation and article 10(6) of the basic AS regulation – it is the consistent practice of the Institutions to select the sample not only from among complainants but from all cooperating Union producers of the product subject to the investigation. Therefore, the reference to complainants in the aforementioned provisions should be replaced by a reference to Union producers in order to reflect this practice.

2.6.6.1. If you have any comments regarding this proposal, please provide them here:
(maximum 400 characters)

AmCham EU:
We agree to the Commission proposal.
Furthermore, sampling should always be representative regardless of what means this may require from the Commission to conclude the investigation.

2.6.7. Clarify that the investigation of Union interest covers all Union producers and not only complainants

Article 21(2) of the basic AD regulation stipulates: *'In order to provide a sound basis on which the authorities can take account of all views and information in the decision as to whether or not the imposition of measures is in the Community interest, the complainants, importers and their respective associations, representative users and representative consumer organisations may (…).make themselves known and provide information to the Commission. (…)*' (emphasis added).' Article 31(2) of the basic AS regulation contains a similar provision.
However, it is the consistent practice of DG TRADE to accept information not only from the complainants but from all Union producers of the product subject to investigation. Therefore, the reference to complainants in the aforementioned provisions should be replaced by a reference to Union producers in order to reflect this practice.

2.6.7.1. If you have any comments regarding this proposal, please provide them here: (maximum 400 characters)

AmCham EU:
Yes, all Union producers' interest should be taken into account. Furthermore it is also vital to take into account the interest of Union traders, users- and consumers. Taking only Union Producers into consideration may not reflect the real overall Union Interest.

2.7. Any other areas where the EU's rules or practice should be updated

2.7.1. Should you have any other ideas or concerns in relation to the above mentioned broad themes, that you would like to be addressed in the framework of this TDI modernisation process, please mention them here and explain briefly:
(maximum 500 characters)

AmCham EU:
Choice of measures:
A fixed duty is not an appropriate choice for materials subject to systematic price fluctuations. Application of a variable duty i.e. indexed minimum import price (MIP) provides a better way to take both producer and user interests into consideration by only regulating individual unfair trade transactions.

Recurrent cases:
The economic impact of recurrent measures should be evaluated by an independent group economist's possibly coordinated by the Chief Economist.

Useful links
Privacy Policy statement on the handling of your personal data: http://trade.ec.europa.eu/doclib/html/149323.htm

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