Being successful in EU trade defense investigations

Seminar organized by the China Chamber of Commerce for Import & Export of Machinery & Electronic Products (CCCME)

Beijing, 24 June 2016

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China's MES: what to expect in December 2016

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China's Protocol of WTO Accession, Section 15:

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.

China's Protocol of WTO Accession, Section 15:

(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.

- In a nutshell, after 11 December 2016, **Section 15 (a)(ii) will disappear, but Section 15 (a)(i) will remain**

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Forecast:

- China's position: As of 11 December 2016, Chinese domestic sales and costs must always be used, like for any other country

- The position of domestic industries in the EU (and the US): with or without section 15(a)(ii), the provision says the same thing. NME methodology can remain unchanged.

- The position of the European Commission (investigating authority): rather in favor of abandoning NME methodology

- But the decision belongs to the EU's co-legislators: the Council (28 Member States) and the European Parliament (over 700 elected members).

Forecast (continued):

- Position of the Parliament: unofficial vote in favor of not granting MES
- Position of the Council: Member States divided, many Member States are against granting MES

→ the EU's legislators don't agree to change the current NME system

- The Dispute Settlement Body (DSB) of the WTO has the final say

- Forecast: what will happen after 11 December 2016?
  - EU law will not change its laws
  - China will bring the EU before the WTO DSB
  - Current system won't change for several more years

Challenging anti-dumping and countervailing duties before the EU Courts

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Challenging anti-dumping and countervailing duties before the EU Courts

- Duties are imposed by the European Commission (Commission Regulations)

- The validity of Commission Regulations is reviewed by the European Courts. Marginal review: the court does not substitute its own assessment to the assessment of the Commission, but only review whether the Commission made a manifest error in the assessment of the facts, abused its powers, or breached the law.

- Two methods to challenge Commission Regulations :
  - Application for annulment (by exporting producers)
  - Invalidation via the Member States' courts and a preliminary reference before the Court of Justice of the EU (by importers)

Challenging anti-dumping and countervailing duties before the EU Courts

- **First method: Annulment**
  - Application by an exporting producer or another party directly and individually concerned by the Regulation. Not by importers
  - Deadline applies: within two months (+ extension) from publication
  - Appeal before the Court of Justice on points of law
  - Result: the Regulation is annulled only as far as the applicant is concerned. For all other producers, the duties remain.
  - What happens next:
    - Either duties are terminated retroactively; or
    - The investigation is reopened and the duties are recalculated by the Commission, retroactively

Challenging anti-dumping and countervailing duties before the EU Courts

- **Second method: before the courts of the EU Member States**
  - Anytime an import is made and payment of the duty is requested
  - The validity of the Regulation can be challenged up to three years from the time of import (when duty is payable)
  - Challenge by the importer (who paid the duties)
  - **Challenge of the customs act levying the duty before a national Court. The national Court suspends proceedings to ask the Court of Justice of the EU whether the Regulation is valid**
  - The Court of Justice answers the question, after submission of written comments and sometimes a hearing
  - Result if successful: the Regulation is declared 'invalid' and it is no longer enforceable anywhere
  - Commission may reopen and recalculate the duties if the flaw is 'fixable'

Challenging anti-dumping and countervailing duties before the EU Courts

- XinYi PV (Case T-586/14). Application lodged on 7 August 2014
- Grounds for annulment
  - First: Rejection of MET because the company received tax breaks: breach of Article 2(7)(c) of the basic Regulation
  - Second and Third: Use of a transfer price between Chinese manufacturing company and related Hong Kong company: breach of Article 2(8), (9) and (10) of the basic Regulation
  - Fourth: Refusal to give access to the confidential dumping margin: breach of rights of the defense
- Result: annulment of the Regulation on the first ground on 16 March 2016
- Commission appeal before the Court of Justice on 26 May 2016

A successful injury and Union interest defense: have users speak for you

A successful injury and Union interest defense: have users speak for you

- Duties imposed if there is injury caused by dumped or subsidized imports, provided the duties are in the interest of the EU
- Injury defense by Chinese companies is often ineffective
- Anytime an intermediary product is targeted (steel, yarn, chemicals), industrial users in the EU are adversely affected by the measure
- Users are often unaware of what an AD or CVD investigation means, and the impact users can have on the final measures
- Important to raise the awareness of users at the beginning of investigations, so the Commission is aware of their opinion when forming a view and deciding the measures to be imposed

A successful injury and Union interest defense: have your industrial customers speak for you

- Grain Oriented Electrical Steel
  - Instruction on injury: talk to users and convince them to cooperate
  - Provisional duties between 20% and 40%
  - Negative opinion adopted by the Member States afterwards
  - Intense cooperation by users: questionnaire response, hearings, multiple submissions, two on-the-spot verifications, lobbying
  - At definitive stage, the provisional duties were withdrawn and low minimum import price were imposed instead
- Article on the role of users in EU trade defence investigation:

  "Users in EU Trade Defence Investigations: How to Better Take their Interests into Account, and the New Role of Member States as User Champions after Comitology," Global Trade and Customs Journal, March 2016

THANK YOU!

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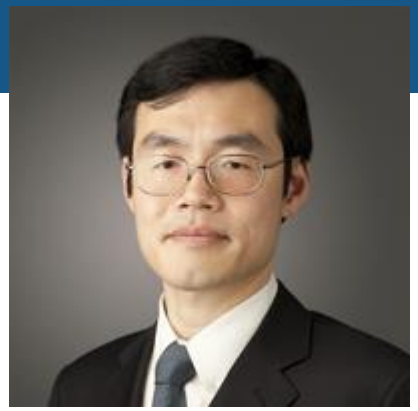

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