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The Vulnerability of EU Anti-Dumping Measures
against China after December 11, 2016

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EUI Working Paper **RSCAS** 2016/37

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ISSN 1028-3625

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Printed in Italy, July 2016

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I – 50014 San Domenico di Fiesole (FI)

Italy

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Abstract

On December 11, 2016, Article 15 (a)(ii) of China's Accession Protocol to the WTO will expire. The expiration of this provision terminates the right of WTO members' to calculate anti-dumping duties against China on the basis of methodologies that "are not based on a strict comparison with domestic prices or costs in China". In this context, this paper shall serve, first, as a reminder that the European Union will violate its WTO obligations under the WTO Anti-Dumping Agreement (ADA) if the Union's institutions continue - after December 11, 2016 - to adopt anti-dumping measures against China that are based on 'non-market economy' (NME) treatment of Chinese exports in anti-dumping investigations. Moreover, the 2009 EU Anti-Dumping Regulation will be vulnerable to legal challenge in the WTO dispute settlement mechanism "as such" if it is not brought into compliance with the WTO Anti-Dumping Agreement by that date. These observations, however, do not prejudice the legality of EU anti-dumping measures – "as applied" - that the EU has (or will have) adopted against Chinese producers prior to the December deadline. The post-2016 legality of already existing EU anti-dumping measures that are "not based on a strict comparison with domestic prices or costs in China" is particularly relevant in context of the rising amount of new EU AD measures and investigations against Chinese producers of steel and solar panels that the EU has imposed and initiated in the last 2 years. It is this very question that is subject to analysis and discussion in the second part of this paper. The third part provides for a brief normative assessment of the systemic implications of EU non-compliance with the WTO Anti-Dumping Agreement after December 2016 and hints at legally viable alternatives.

Keywords

China Market Economy Status, Anti-Dumping, Trade Defence Instruments (TDI), European Union, WTO, Anti-Dumping Regulation, Anti-Dumping Agreement, Protectionism.

JEL Codes: F10, F13, F15

1. Introduction*

On May 9 of this year, the German and French ministries responsible for trade and economic affairs posted a joint letter to EU Trade Commissioner Cecilia Malmström.¹ The document outlines “Common Core Demands from Germany and France on modernizing Trade Defence Instruments (TDI) of the European Union”. Among others, it requests that “the EU must further explore and use the possibilities of China’s WTO Accession Protocol *not* to use the standard calculation methodology to the extent *the producers under investigation can not 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* [emphasis added].”

Three days later, the European Parliament (EP) passed a resolution on “China Market Economy Status” with broad inter-party support amidst manifestations of steel workers and trade union leaders outside the plenary in Strasbourg.² “[A]s long as China does not meet all five EU criteria required to qualify as a market economy”, the resolution states, “the EU should use a non-standard methodology in antidumping and anti-subsidy investigations on Chinese imports (...), in accordance with and giving full effect to those parts of Article 15 of China’s Accession Protocol which provides room for the application of the non-standard methodology”. In consequence, the EP “calls on the Commission to make a proposal in line with this principle”.

The phrase highlighted in the quote from the Franco-German letter is identical to language contained in Article 15 (a)(ii) of China’s Accession Protocol (CAP) to the WTO. It is this very provision that has served as a legal basis for a highly effective trade defence remedy that allows for the imposition of extraordinarily steep anti-dumping duties against Chinese exports, and Chinese exports of steel products and solar panels in particular. The provision is set to expire on December 11, 2016. This very fact has generated fierce debates in Europe, Canada, and United States, which increasingly conflate the legal with the political dimension of the underlying issues. In the run-up to the December deadline, special interest representatives of industry groups have heavily lobbied EU member states’ (MS) governments and European Union institutions to ignore the expiry of WTO members’ special trade defence rights under the CAP in order to continue unabated tariff protection.³ These efforts have crystallized in both the EP and French-German initiatives. In the meanwhile, the official press agency of the People’s Republic of China – Xinhua - opined that “European countries have put on a bizarre show of deciding whether to deliver on their promises to grant China market economy status.”

This paper aims at achieving three things. The first part shall serve as a reminder that Article 15 CAP does not, after December 11, 2016, allow for the use of non-standard methodologies for price comparisons in anti-dumping investigations that are inconsistent with the provisions of the WTO Anti-Dumping Agreement (ADA). Should the Union follow the path to protectionism recommended by Berlin, Paris, and the EP, the EU will violate its obligations under the ADA. In order to comply with its WTO obligations after December 11, 2016, in contrast, EU institutions need to bring EU secondary legislation – “as such” - and future anti-dumping measures against Chinese producers – “as applied” -

* This paper was first presented on July 8, 2016, at the 5th Biennial Global Conference of the Society of International Economic Law (SIEL), at the Mandela Institute of the University of Witwatersrand in Johannesburg, South Africa. I am grateful for helpful feedback and comments I received on a previous draft, particularly from Lothar Ehring, Bernard Hoekman, Philippe De Baere, Petros Mavroidis, Christoph Herrmann, Bin Ye, Jochem de Kok, and Edwin Vermulst. All remaining errors are my own.

¹ Matthias Machnig & Matthias Fekl: Letter to Cecilia Malstrom - Common core demands from Germany and France on modernizing the Trade Defence Instruments (TDI) of the European Union, Berlin / Paris, May 9, 2016.

² European Parliament resolution of 12 May 2016 on China’s market economy status (2016/2667(RSP)).

³ AegisEurope, a European association of 25 industries, has advanced a particularly targeted public relations campaign titled “Stop China MES”.

into conformity with the ADA. It is highly likely otherwise that the EU will be subject to a larger number of unfavorable legal decisions, adopted by the WTO Dispute Settlement Body (DSB). In the aftermath of these decisions, in case of non-compliance, the EU will be confronted with hefty retaliatory measures authored by China and authorized by the WTO DSB.

This conclusion, however, does not prejudge the legality of AD measures that the EU has (or will have) adopted against Chinese producers *prior* to the December deadline. The question about the post-2016 legality of *already existing* EU AD measures that are “not based on a strict comparison with domestic prices or costs in China” (Article 15 (a)(ii) CAP), is particularly relevant in context of the rising amount of new EU AD measures and investigations against Chinese producers of steel and solar panels that the EU has imposed and initiated in the last 18 months. It is this very question that is subject to analysis in the second part of this paper.

In July of this year, the European Commission will submit a legislative proposal to the Council and the EP that would amend the 2009 EU Anti-Dumping Regulation (ADR).⁴ This proposal is then subject to potential amendments by the EP and EU Member States in the Council. These amendments ought to be adopted before the December deadline in order to protect the Anti-Dumping Regulation – “as such” – and existing as well as future EU anti-dumping measures against China – “as applied” - from legal challenges in the WTO context. In concluding this paper, the third and final part will give a hint at alternative and WTO-compatible trade defence instruments and provide a brief normative take on the systemic consequences of a non-compliance scenario.

2. A Reminder: The Legal Effect of the Expiration of Article 15 (a)(ii) of China’s Accession Protocol to the WTO

Article 15 of China’s WTO Protocol of Accession lays down special rules that apply to price comparisons in determining the existence of ‘dumping’ in context of third countries’ trade defence proceedings against imports from Chinese producers. Article 15(a) provides for an explicit derogation from ADA Article 2.1. and Article 2.2. Under the ADA, a product is considered to be dumped onto the importing countries’ market if the export price is lower than the price of the like product in the exporting countries’ domestic market. Article 15(a) codifies an exception to this standard price comparison methodology in acknowledgement of non-competitive market conditions in the Chinese economy that prevailed at the time of accession:

“(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.” [emphasis added]

⁴ Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community.

Article 15(a)(i) and (ii) reflect the presumption that Chinese domestic prices are generated under conditions of government-induced market distortions. Domestic prices generated under non-market-economy (NME) conditions make for a deceptive comparator of export prices in the determination of whether, and to what extent, a product has been dumped onto third country markets. The rationale for this presumption is straightforward: If Chinese domestic prices are artificially low due to non-competitive market conditions, a comparison with export prices in anti-dumping procedures would not allow for a determination of dumping at all, or result in the calculation of dumping margins and anti-dumping duties that are lower than under competitive market economy (ME) conditions.

It follows from Article 15(a)(ii) that WTO members' anti-dumping investigators may derogate from the price comparison requirements of ADA Article 2.2. if the Chinese producer under investigation cannot prove that ME conditions exist in the respective industry. The allocation of the burden of proof, however, makes for a formidable obstacle for the producer under investigation: neither WTO law nor the CAP define the concept of "market economy conditions". WTO members were thus free to determine criteria for the conferral of 'market economy status' (MES) to China under its national laws, either for the economy as a whole, or for specific industries. MES conferral to China, in other words, remained at full discretion of WTO members' policy-makers for the time being.

Throughout the past 15 years, Article 15(a)(ii) provided EU anti-dumping investigators in the European Commission with a wide margin of discretion in determining the existence and extent of Chinese dumping and created the legal basis for a highly effective trade remedy against Chinese exports: no less than 56 of the current 73 EU antidumping measures apply to imports from China.

Article 15(d), however, provides contingencies that trigger the termination of Article 15 (a), in general, and the expiry of Article 15(a)(ii), in particular:

"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."

Interpreting the provisions of Article 15(d) in conjunction with Article 15(a), the WTO Appellate Body (AB), in *EC-Fasteners*, opined that Article 15(a) is a time-bound derogation from the ADA.⁵ Until December 11, 2016, China had the opportunity to establish MES for the purposes of price comparisons under the ADA for the entire Chinese economy (Article 15(d), 1st sentence) or individual sectors (Article 15(d), 3rd sentence). The two provisions, however, only applied vis-a-vis countries that had enacted laws and regulations providing for criteria of MES conferral prior to 2001. It is noteworthy that the EU did not maintain legal criteria for MES conferral at that time.

Notwithstanding China's right to early termination of the ADA derogations laid down in Article 15(a), the AB interpreted the expiry of Article 15(a)(ii) – codified in Article 15(d), 2nd sentence – as WTO members' *erga omnes* obligation to apply the disciplines of the ADA on an unconditional basis, starting on December 11, 2016:

"Paragraph 15(d) of China's Accession Protocol establishes that the provisions of paragraph 15(a) expire 15 years after the date of China's accession (that is, 11 December 2016). It also provides that other WTO Members shall grant before that date the early termination of paragraph 15(a) with respect to China's entire economy or specific sectors or industries if China demonstrates under the law of the importing member 'that it is a market economy'."

⁵ Appellate Body Report: *EC-Fasteners*, para. 289

After this deadline, WTO members' use of methodologies other than those consistent with the ADA run foul of their obligations and expose respective practices to legal challenge at the WTO. With the December deadline looming, Western industries have become increasingly wary of the loss of a highly potent trade defence remedy in the post-2016 scenario. Such anxieties have resulted in spillover effects that inspired innovative legal thinking among some trade defence lawyers. Ever since, the prevailing legal opinion on the interpretation of Article 15 CAP, as expressed by the AB in *EC-Fasteners* as well as numerous reputable legal scholars and practitioners, has become the target of intense opposition advanced by EU industry associations, politicians, and some legal practitioners.⁶

One opposing view contends that the remaining provisions of Article 15(a) and Article 15(d) make for an indefinite presumption of NME conditions in China even after the expiry of Article 15(a)(ii). The ADA derogations of Article 15(a), the story goes, are permanent and render China a NME forever and ever after, unless otherwise established under the national laws of WTO members in accordance with Article 15(d), 1st and 3rd sentence.⁷

This alternative and – among industry interest group representatives - increasingly popular reading of Article 15 is based on the assumption that Article 15(a) has a broader scope than Article 15(a)(ii), which expires in December 2016. After that date, the introductory sentence of Article 15(a) allowed WTO members' to choose between ADA and NME price comparison methodologies, if China cannot establish MES under Article 15(d). Article 15(a)(i), likewise, affirmed the continued presumption of China's NMES.

This view, however, is not convincing. The introductory sentence of Article 15(a) offers a choice between an ADA consistent and an alternative price comparison methodology “based on the following rules”. These rules are codified in subparagraph (i) and (ii) of Article 15(a). In other words, paragraph (a) cannot operate in autonomy from subparagraphs (i) and (ii). The material content of subparagraphs (i) and (ii) is identical, albeit phrased in reverse logic: only subparagraph (ii) expressly permits that “[t]he importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs”. Subparagraph (i), in contrast, requires that Chinese domestic prices or costs are used “[i]f the producers under investigation can clearly show that market economy conditions prevail in the industry.”

A narrow textual interpretation of Article 15(a) following the expiration of subparagraph (ii) could mislead to the inferential conclusion that the use of alternative price comparison methodologies remains permissible under Article 15(a)(i) if producers *cannot* clearly show that ME conditions prevail in the industry under investigation. An isolated reading of subparagraph (i), however, would preclude an effective interpretation of paragraph (d), 2nd sentence, which triggers the expiration of Article 15(a)(ii). Inferring the permission to use alternative methodologies from (i) would leave the expiration of subparagraph (ii) via paragraph (d), 2nd sentence, without any legal effect on WTO members' rights to use alternative price comparison methodologies. Such a reading of Article 15(a) would not only ignore the immediate legal context but also violate the principle of effective treaty interpretation in regard of paragraph (d), 2nd sentence, which the AB articulated in *US-Gasoline*.⁸

⁶ For interpretations that are consistent with the AB's *orbiter dictum* in the *EC-Fasteners* case, see, for instance: Tietje, Christian & Karsten Nowrot: *Myth of Reality? China's Market Economy Status under WTO Anti-Dumping Law after 2016*, Policy Papers on Transnational Economic Law, No. 34, Transnational Economic Law Research Center, 1-12 (2011); Graafsma, Folkert & Elena Kumashova: *In re China's Protocol of Accession and the Anti-Dumping Agreement: Temporary Derogation or Permanent Modification?*, (9(4) Global Trade & Customs Journal, 154-159 (2014).

⁷ O'Connor, Bernard: *Market Economy Status for China is not automatic*, VOXeu website, CEPR (2011); O'Connor, Bernard: *Much ado about nothing: 2016. China and Market Economy Status*, 10(05) Global Trade & Customs Journal, 176-180 (2015).

⁸ Appellate Body Report: *US-Gasoline*, para. 23

A less radical line of thought proposes that the expiration of Article 15(a)(ii) merely shifts the burden of proof in regard of MES conditions (and NMES conditions respectively) from China to the investigating WTO member.⁹ Article 15, however, does not give any textual indications to this end, neither prior to nor after December 11, 2016.

It is, moreover, questionable whether the purpose of the CAP, in general, and Article 15(a) and (d) in particular, is to permit a permanent discriminatory legal treatment of Chinese producers in derogation from the WTO's ADA. To the contrary, as Graafsma & Kumashova point out, both then USTR Charlene Barshefsky (in a hearing before the US House of Representatives) as well as the European Commission (in its submission to the WTO panel in *EC-Fasteners*) have publically voiced their understanding that China will automatically receive ME status for the purposes of the ADA in December 2016.¹⁰ It appears to be clear that evidence of official positions expressed by the drafters of the CAP will be taken into account by WTO panels and the AB in future proceedings.

2.1 Preliminary Conclusion: The WTO-compatibility of EU “as such” and “as applied” Anti-Dumping Measures against China after December 11, 2016

In conclusion, the adoption of EU AD measures against China that are based on the use NME methodologies will be vulnerable to legal challenge in WTO Dispute Settlement (DS) proceedings after December 11, 2016.

In order to bring EU secondary legislation – “as such” - and future EU antidumping measures – “as applied” in conformity with the ADA by December 11, 2016, the European Commission ought to table a legislative proposal as part of the envisaged EU TDI reform - or separately - in the coming weeks. The Commission will have to, at a minimum, propose China's removal from the list of NMEs in Article 2.7. of the EU's 2009 ADR to ensure compliance with ADA Articles 2.1. and 2.2. The ADR, “as such”, will otherwise be vulnerable to legal challenge in the WTO's dispute settlement mechanism immediately after the December deadline has passed.

3. Are existing “as applied” Anti-Dumping Measures against China WTO-compatible after December 2016?

The conclusions drawn from the previous section, however, do not prejudge the legality of AD measures that the EU has (or will have) adopted against Chinese producers prior to the December deadline. The question about the post-2016 legality of *already existing* EU AD measures that are “not based on a strict comparison with domestic prices or costs in China”, is particularly relevant in context of the rising amount of new EU AD measures and investigations against Chinese producers of steel and solar panels that the EU has imposed and initiated in the last 18 months. It is this very question that is subject to analysis in this section.

China's Accession Protocol, to begin with, does not give any textual or contextual indication for a third country obligation to terminate existing AD measures against Chinese producers on or before December 12, 2016. Thus, in regard of the CAP, we are left with the conclusion those AD measures that were adopted before the deadline and are based on non-standard methodologies will remain valid after December 2016. WTO members' trade defense investigators may not, however, use non-standard price and cost comparison methodologies in proceedings under the ADA *after* December 11, 2016.

⁹ Miranda, Jorge: Interpreting Paragraph 15 of China's Protocol of Accession, 9(3) Global Trade & Customs Journal, 94-103 (2014).

¹⁰ Graafsma / Kumashova (2011): op. cit.

3.1 *After Sunset: The End of the WTO Anti-Dumping Regime under China's Accession Protocol*

“As applied” anti-dumping measures are subject to a ‘sunset clause’, which is codified in Article 11.3 of the WTO’s Anti-Dumping Agreement. The purpose of the provision is to preclude the indefinite application of AD measures after their adoption. The rule requires that

“(…) any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (…).”

The lifespan of EU AD measures that have been imposed prior to the December deadline is thus limited to five years. The only way to extend the duration of such a measure is the request of an *expiry review* on behalf of the domestic industry or on the initiative of domestic government authorities. An expiry review entails a full anti-dumping investigation and is subject to the material and procedural requirements of the ADA. These requirements are frequently transposed into WTO members’ domestic laws and regulations, such as the EU’s Anti-Dumping Regulation of 2009.

Expiry reviews that are initiated after the December deadline must entail ADA consistent price and cost comparison methodologies under the post-CAP AD regime and would hence result in the calculation of much lower - if any - AD margins compared to the results attained under non-standard methodologies applied under Article 15 CAP. Both domestic industries and WTO members’ government authorities will thus lack incentives to initiate such reviews in regard of AD measures that were adopted prior to the December deadline. As a preliminary conclusion, AD measures will henceforth have to be phased out over the course of five years, counting from the date of the adoption of each and every individual measure.

3.2 *‘Immediate Termination’ before Sunset? Interim Reviews under the WTO Anti-Dumping Agreement*

“As applied” anti-dumping measures adopted under the CAP regime, however, may nevertheless have to be terminated before the end of the 5-year period. Article 11.1 ADA codifies the general principle that

“an anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury”.

Article 11.2 ADA, in conjunction with Article 11.4 ADA, elaborates and specifies the contingency-based and time-bound approach of the ADA with regard to trade defence remedies, which is generally framed by Article 11.1 ADA.

“11.2 The authorities shall review the need for the continued imposition of the duty where warranted, on their own initiative or, provided that *a reasonable period of time* has elapsed since the imposition of the definitive anti-dumping duty, upon request by any interested party which *submits positive information substantiating the need for a review*. Interested parties shall have the right to request the authorities to examine *whether the continued imposition of the duty is necessary to offset dumping* (…). If, as a result of the review under this paragraph, the authorities determine that the anti-dumping duty is no longer warranted, *it shall be terminated immediately*.”

11.4 (…) Any such review shall (…) normally be concluded within 12 months of the date of initiation of the review.”

Article 11.2 ADA gives Chinese producers, exporters, and government authorities the right to request an interim review – i.e. a full AD investigation – before the end of the usual five-year lifespan of a measure. The purpose of the review a determination of whether an AD duty, at the time of the request and beyond that date, continues to respond to the existence of ‘dumping’ within the meaning Article 2.1 and 2.2 of the ADA.

The administration that has authored the measure has limited discretion to reject the request for interim reviews. Yet, two conditions must be fulfilled: First, a reasonable period of time must have

passed since the adoption of the measure. The EU, in the ADR of 2009, has interpreted this period to last one year following the imposition of the duty (ADR Article 11(3), first sentence).

Secondly, the applicant must submit “positive information” that “substantiates the need for a review” (Article 11.2 ADA). By inference drawn from ADA Article 11.2, second sentence, a “need for a review”, would be substantiated if the information submitted by the applicant provides “positive information” to the claim that the “continued imposition of the measure” will not “be necessary to offset dumping” after the review is concluded.

In *Mexico - Anti-Dumping Measures on Rice*, the AB clarified that

“where the conditions in Art. 11.2 have been met, the plain words of the provision make it clear that the agency has no discretion to refuse to complete a review.”¹¹

The review, to be sure, will then have to rely on an ADA consistent determination of ‘dumping’ and the determination of the potential extent thereof. It is noteworthy, in this context, that the ADA concept of “positive information” has been translated as “sufficient evidence” in the EU ADR.

EU Interim Reviews after December 2016: Practice and Litigation

The important question is therefore whether the European Commission will, in response to Chinese producers’ interim review requests, consider the submission of producer and industry specific price and cost data in conjunction with the expiration of the CAP exception as “positive information” (Article 11.2 ADA), i.e. “sufficient evidence” (ADR Article 11(3), third sentence). Moreover, in the course of an admitted interim review, how would such evidence effectuate the determination of ‘dumping’ and the prospect of the “continued imposition” of the original measure?

If the interested party can, in its request, provide evidence indicating that an ADA consistent EU anti-dumping investigation could result in a finding of ‘no dumping’ or ‘lower dumping margins’, the Commission will be obliged to engage in a full AD investigation subject to the post-2016 regime’s price and cost comparison methodologies. A subsequent finding of ‘no dumping’ or ‘less dumping’ requires that the original measure is “terminated immediately” (Article 11.2 ADA) or adjusted to the updated AD margin. The review, in any case, must be made within 12 (Article 11.4 ADA) to 15 months (Article 11.5 ADR). At the final stage, it is the Council that acts upon a proposal put forward by the Commission.

Given the incentives provided by the prevalent WTO and EU legal institutions, Chinese producers are likely to request interim reviews of existing EU AD measures in late 2016 and early 2017. If interim review requests are denied by the Commission the corresponding acts will be open to legal challenge before the EU Court under Article 263(4) TFEU. Moreover, Chinese government authorities are likely to challenge the denial of interim review requests within the context of WTO dispute settlement proceedings.

The first WTO panel dealing with this issue could be established as early as spring 2017. In the proceedings, the complainant will need to provide support to the claim that the party it represents had provided “positive information” – or “sufficient evidence” – to indicate that an interim review investigation could have resulted in a determination of ‘no dumping’ or ‘lower dumping margins’ under the ADR, and the ADA respectively. Conversely, the complainant can seek to demonstrate that it was but for the denial of the request that the Commission had not come to such a conclusion.

If the Commission admits Chinese producers’ AD interim review requests, however, the modalities of these reviews are then subject to EU obligations under the post-2016 ADA regime, if not an ADA consistent ADR. The continued imposition of EU AD measures that are based on determinations of

¹¹ Appellate Body Report: *Mexico – Anti-Dumping Measures on Rice*. para. 314

dumping that do not rely on Chinese domestic prices in accordance with ADA Article 2.1 or cost constructions in accordance with Article 2.2 ADA are hence vulnerable to challenge in WTO dispute settlement proceedings, if not before the EU Court in Luxembourg.¹²

It is further conceivable, in any case, that Chinese producers and government authorities feel inclined to contest the assumption that “a reasonable period of time” within the meaning of Article 11.2 ADA is adequately reflected by the phrase “the period of time of at least one year” in Article 11.3 of the EU’s ADR. In light of the expiry of the CAP’s ADA derogation on December 11, 2016, it may be convincingly argued that much less time ought to pass between the imposition of a measure and the request for an interim review, for that request to be admissible. It is at least conceivable that it is the date of that event rather than the prior duration of the measure in question, which determines the maximum duration of “a reasonable period of time”.

An 'option map' prepared by the trade defence directorate of the European Commission's DG TRADE outlines an alternative scenario in which the Commission denies Chinese producers' interim review requests on the basis of the claim that a change in the applicable WTO legal regime does not constitute a change in factual circumstances.¹³ Interim and expiry reviews, in line with this approach, would be conducted in further application of the expired right the use of non-standard price and cost comparison methodologies. It is highly unlikely, however, that this approach would not be subject to litigation if it finds its way into the law and practice of EU Anti-Dumping following the adoption of the ADR amendments in the months to come.

4. Outlook: Systemic Implications and Alternatives to Non-Compliance

If the EU reform of the 2009 Basic Anti-Dumping Regulation follows the recommendations voiced in the Franco-German letter to the EU Trade Commissioner and the recent resolution of the European Parliament, the ADR, “as such”, as well as future EU AD measures, “as applied”, that will be highly vulnerable to legal challenge in WTO dispute settlement proceedings. The same is true, moreover, for EU AD measures that have been adopted against Chinese producers under the CAP regime prior to December 11, 2016, if EU law and practice, after that date, denies ADA conform interim reviews or base such reviews on ADA inconsistent price comparison methodologies.

In the past, Members of the European Parliament and Members States represented in the Council have frequently advanced unconditional and relentless efforts to promote the rule of law as a core European value at home and abroad likewise, quite in line with the EU’s external action objectives under Article 21 TEU. Concerning the questions raised in this paper, however, it may be the plain prospect of a flood of rather immediate legal challenges - both at the EU and WTO level - that could still make for a considerable factor in the course of the ongoing deliberations associated with the legislative process.

At the political level, the current global economic environment may yet inspire the negotiation of an EU-Sino compromise on the matter. Such a compromise, could conceivably allow for a 5-year phase-out period for all EU AD measures adopted under the CAP regime, starting on the date of the imposition of every individual measure, subject to a (no-litigation) ‘peace-clause’. The EU, in response, would guarantee the ADA conformity of its post-December AD regime.

Should the Union decide to ignore its WTO obligations on such a massive scale, it ought to hold itself accountable for the further erosion of the rules-based multilateral trading system that it once

¹² For a most recent discussion of permissible cost construction methodologies, see: Kok, Jochem de: *The Future of EU Trade Defence Investigations against Imports from China*, JIEL, 2016, 1-33.

¹³ European Commission, DG TRADE, Unit H1: Inception Impact Assessment – Possible change in the methodology to establish dumping in trade defence investigations concerning the People’s Republic of China, Brussels, January 2016.

helped to build in its very own interest. Furthermore, EU political leaders should be under no illusion that such a step back into the direction of the lawless jungle of international economic relations would alienate a vital partner in times of an increasing fragility of traditional alliances and dynamic global power shifts. Finally, it appears conceivable, to say the least, that the partner in question will deduct the costs incurred in this process in a currency other than trade revenues.

Rather than frustrating WTO members' credible expectations, which are anchored in negotiated legal disciplines, EU political institutions should fully exhaust the sufficient alternatives of WTO consistent trade remedy design and practice under the ADA as well as the SCM Agreement and promote social mitigation strategies for industrial sectors in decline.¹⁴

¹⁴ For a most recent discussion and analysis of alternate and WTO consistent trade defence instruments, see: Edwin Vermulst, Juhi Dion Sud, Simon J. Evenett, *Normal Value in Anti-Dumping Proceedings against China Post-2016: Are Some Animals Less Equal Than Others?*, 11 *Global Trade and Customs Journal*, Issue 5, 2016, pp. 212–228; Kok (2016): op. cit.

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