Welcome to the ABA International Trade Committee quarterly newsletter. The newsletter is intended to assist Committee members in staying up-to-date on current international trade issues and Committee activities. The newsletter also provides a forum to discuss international trade ideas and opinions. This edition contains three original articles on the topic of recent trade remedies development around the world. The first discusses a recent Canadian International Trade Tribunal ruling, the second highlights Brazil’s progress in trade remedies development, and the third discusses the effect that recent anti-dumping investigations have had on the Chinese economy.

The Committee’s website contains additional information about and resources from the activities of the Committee, including notices of upcoming events, past publications, and materials from previous programs. These materials are updated regularly. To visit the Trade Committee’s website, click here. Members of the Committee are encouraged to become involved, and we look forward to hearing from you.

* Please note that the views and opinions expressed in the newsletter are those of the authors and may not represent the views and opinions of the ABA or the Trade Committee.

ARTICLES IN THIS ISSUE:

CASE COMMENT: THE CANADIAN INTERNATIONAL TRADE TRIBUNAL MAKES FIRST FINDING CONCERNING CAPITAL GOODS IN 20 YEARS  
By: Andrew Lanouette ................................. [3]

TRADE REMEDIES – BRAZIL IN A TRANSITIONAL STAGE  
By: Leonor Cordovil and Ricardo Motta................. [6]

RECENT TREATMENT TO CHINESE ECONOMY IN ANTI-DUMPING INVESTIGATIONS  
By: José Francisco Mafla................................. [8]
International Trade Committee Events in Section of International Law Fall 2013 Meeting
October 15 – 19, 2013:

Transatlantic Defense Cooperation: Challenges and Opportunities in a New Regulatory and Enforcement Era
Wed, 10/16: 2:30 PM - 4:00 PM Session
Room: Crystal Palace
The opportunities and challenges facing companies engaged in Transatlantic defense trade have never been greater. On the one hand, agreements such as the US-UK Defense Trade Cooperation Treaty are facilitating enhanced defense trade. On the other hand, unprecedented coordination among the US, the UK, and other countries has resulted in staggering fines against companies for violations of export control and anti-bribery laws, such as the multi-million penalties imposed on BAE Systems plc and United Technologies Corporation. During this interactive program, a panel of experienced US and non-US government attorneys and in-house and outside counsel will discuss hypothetical fact patterns in which critical export control and anti-bribery issues are involved in Transatlantic defense operations. The panel also will share insights on best practices for complying with export control and anti-bribery laws.

Program Chair
Geoffrey Goodale, Cooley LLP

Moderator
Geoffrey Goodale, Cooley

Speaker(s)
Carol Fuchs, General Electric Corporation; David Green QC, Director, Serious Fraud Office; James Hursch, U.S. Department of Defense; Joyce Remington, BAE Systems PLC

Developments in Free Trade Agreements Between North America and Europe: Is a New Trans-Atlantic Trade and Investment Agreement Within Reach and What Impact Would it Have on NAFTA?
Fri, 10/18: 4:30 PM - 6:00 PM
Room: Coronation Suite

While the North American Free Trade Agreement (NAFTA) has functioned for many years as the exclusive free trade agreement (FTA) involving Mexico, Canada and the U.S. Mexico has already negotiated its own FTA with the EU, Canada is at an advanced stage of negotiations with the EU, and the U.S. has also now launched talks with the EU. How will these agreements affect NAFTA and the future of trade between North America and Europe? What is the likelihood of these agreements being signed and approved by the governments involved in light of deep divisions on intellectual property, agriculture, and the environment?

Program Chair(s)
Les Glick, Porter Wright
Geoffrey Kubrick, McMillan LLP
Bernd Janzen, Akin Gump Strauss Hauer & Feld LLP

Moderator(s)
Geoffrey Kubrick, McMillan LLP
Bernd Janzen, Akin Gump Strauss Hauer & Feld LLP

Speaker(s)
Ana Renart, Government of Canada - Foreign Affairs
Philipp Dupuis, European Commission
Les Glick, Porter Wright

The Wave of New Criminal and Regulatory Customs Enforcement Investigations: Current Enforcement Agenda and Outlook for Importers Globally
Fri, 10/18: 2:30 PM - 4:00 PM
Room: Harvest Suite

With increasing questions regarding product safety, intellectual property violations and trans-shipment of goods, the European Union (EU), the United States (US), and Canadian Customs authorities have stepped up enforcement at the borders and have become much less forgiving of violations. In prior cases where a potential violation may have led to an inquiry or possible audit, today a number of companies are being served in the first instance with notices of both administrative investigations and criminal fraud investigations. In addition, the governments have made customs enforcement a top priority, issuing new directives and enforcement action plans, and staffing the agencies for increased enforcement. This program will offer attendees a unique opportunity to hear from an EU Customs official, who will provide an overview of the EU’s key enforcement agenda and objectives for the coming year. In addition, business and legal experts from the EU, the US, and Canada will discuss examples
of recent investigations such as those involving intellectual property violations, consumer product safety, and criminal fraud for transshipment of goods. The panel will provide an informative review of the of the various investigative processes across each government, including regulatory and criminal enforcement steps, and what to do when facing an investigation.

Program Chair(s)
Melanie Frank
Charles Joern Jr., Joern Law Firm
Daniel Kiselbach, Miller Thomson

Moderator
Melanie Frank

Speaker(s)
Charles Joern Jr., Joern Law Firm
Daniel Kiselbach, Miller Thomson
T. James Min, DHL Americas
Mark Young, Google Inc.
Stacey Toder Feldman, Deloitte UK

CASE COMMENT: THE CANADIAN INTERNATIONAL TRADE TRIBUNAL MAKES FIRST FINDING CONCERNING CAPITAL GOODS IN 20 YEARS

By: Andrew Lanouette

On November 20, 2012, the Canadian International Trade Tribunal (“CITT”) concluded its inquiry against liquid dielectric transformers having a top power handling capacity equal to or exceeding 60,000 kilovolt amperes (60 megavolt amperes) (“Power Transformers”) originating in or exported from the Republic of Korea (“Korea”) [Liquid Dielectric Transformers]. The CITT found that the Korean dumping of Power Transformers had caused injury to the domestic industry and consequently, gave the Canada Border Services Agency the legal authority to impose anti-dumping duties against the dumped Power Transformers. The case is the first trade remedies case in Canada dealing with capital goods since the early 1990s and the first original investigation concerning capital goods since 1985. The decision sets a number of important precedents for anti-dumping cases in Canada involving highly customized goods, capital goods, and goods purchased through a competitive bidding process. In particular, and as will be discussed in this comment, this case:

• creates an approach for like goods and classes of goods in the context of highly-customizable products;
• sets out a framework of injury analysis for future capital goods cases;
• clarifies the treatment of price in capital goods purchases; and
• condones pricing decisions in a limited-transparency market.

Andrew Lanouette is International Trade Counsel at the Ottawa offices of Cassidy Levy Kent LLP. Andrew would welcome questions or comments on his article and can be reached at alanouette@cassidylevy.com.

1 Liquid Dielectric Transformers, Injury Inquiry No. NQ-2012-001 at para. 51 (CITT).
2 Induction Motors, Review No. RR-93-004 (CITT); Polyphase Induction Motors, [1985] CIT No. 44 (QL).
3 Liquid Dielectric Transformers, Injury Inquiry No. NQ-2012-001 (CITT).
The majority power transformers are unique because they are made to order in accordance with customer needs and specifications. This characteristic poses a problem in anti-dumping inquiries because the CITT must determine if all the goods under investigation are like products and whether they belong to a single class of goods or if their characteristics are such that there are multiple classes of goods. The CITT in its preliminary determination treated power transformers as one class of goods despite that power transformers are customized and can vary to a significant degree from one to the other because any division of the products on their customizations would be arbitrary and impractical for carrying out an anti-dumping inquiry.\(^4\) The CITT maintained this position in the final determination.\(^4\) This case demonstrates the CITT’s reluctance to individually identify each highly customized and varied product and create several classes of like products. It aims to simplify cases dealing with highly customized products and ease the concern of complainants that the proceeding will become mired in debate over which arbitrary selection of criteria will divide the products into separate classes.

Moreover, this decision establishes a framework for analyzing future capital goods cases. There is often a long time lag between the placement of an order and the delivery of the goods.\(^6\) In the case of power transformers, the order for the product usually happens 12 to 18 months before delivery. The result is that while performance indicators such as price effects may be felt immediately at the time of a lost order, the financial effects of that lost order will not take place until 12 to 18 months later. This presented the CITT with a need to separate indicators into categories of those that occur immediately after a lost order and those delayed by the lag. In particular, the CITT found that the price effects of dumping, such as price undercutting and price depression, materialize immediately at the time of an order, which may occur one or two years before the actual importation or delivery of the power transformer.\(^7\) On the other hand, production and financial data relates to pricing practices that are 12 to 18 months before revenue recognition in the producer’s accounts. Thus, it is necessary to distinguish the time frame when examining the volume of the imports and the financial impact on the domestic industry.\(^8\) In this case, the CITT followed the reasoning from capital goods dumping cases from the 1980s concerning the lag between order and delivery and the separation of injury factors in a temporal sense.\(^9\) The CITT’s recognition of the time-lag issue in capital goods cases is significant for future capital goods dumping claims and clarifies the evidence needed to substantiate injury allegations.

Furthermore, the CITT examined the importance of price in the context of complex bidding processes with numerous evaluative criteria and found that price could be a determinative factor in selecting winning bids. In the bidding process for capital goods, customers often set detailed evaluation criteria such as product quality, industry standards, and historical performance in addition to price. The issue here is that when price is not a major consideration in the purchase of a product, it is less likely that the dumped price of a good is the reason behind a lost sale. Nevertheless, the CITT found other factors, such as quality and historical performance, equalize amongst technically pre-bidders, and price becomes the determinative factor.\(^10\) Therefore, the CITT could establish that all producers at a certain “tier” are identical, leaving price the only differentiating criterion between them. This reasoning simplifies the causation aspect of a dumping case.

Lastly, the CITT provided guidance on how it will examine the issue of pricing decisions in an industry where pricing feedbacks may be limited due to the confidential nature of offers, particularly in a competitive bidding process. The CITT acknowledged that while full pricing and competitor feedback was not always available, competitors did receive some indirect feedback from secondary sources. The CITT found that there was sufficient information for producers to know whether a lost bid was due to the pricing of another competitor and, to some degree, allow producers to match the pricing of their competitors.\(^11\) The CITT also accepted that in such a marketplace it is reasonable for

---

4 Liquid Dielectric Transformers, Preliminary Injury Inquiry No. PI-2012-001 at para. 26 (CITT).
5 Liquid Dielectric Transformers, Injury Inquiry No. NQ-2012-001 at para. 51 (CITT).
6 Liquid Dielectric Transformers, Injury Inquiry No. NQ-2012-001 at para. 60 (CITT).
7 Liquid Dielectric Transformers, Injury Inquiry No. NQ-2012-001 at para. 60 (CITT).
8 Liquid Dielectric Transformers, Injury Inquiry No. NQ-2012-001 at para. 61 (CITT).
10 Liquid Dielectric Transformers, Injury Inquiry No. NQ-2012-001 at para. 80 (CITT).
11 Liquid Dielectric Transformers, Injury Inquiry No. NQ-2012-001 at paras. 87-88 (CITT).
producers to revise pricing based on the imperfect market feedback in order to try to meet the dumped competitor pricing. Such conduct is not reckless or self-injurious. The CITT, therefore, took into context the marketplace in analyzing pricing and injury caused by dumped competitor pricing. This contextual analysis should ease the evidentiary burden on complainants in future cases when pricing is generally confidential.

The CITT’s finding in *Liquid Dielectric Transformers* stands as an important recent precedent for capital goods cases going forward. The decision clarifies a number of unique aspects for cases dealing with capital goods and competitive bidding processes and provides guidance for claimants to determine what evidence is needed to prove injury to their company.

---

12 *Liquid Dielectric Transformers*, Injury Inquiry No. NQ-2012-001 at paras. 179, 181 (CITT).
TRADE REMEDIES – BRAZIL IN A TRANSITIONAL STAGE

By: Leonor Cordovil and Ricardo Motta

There is no question that Brazil is going through a transitional stage. Since the announcement of the Plano Brasil Maior [Plan for a Greater Brazil] by the president Dilma Rousseff on August 2nd, 2011, the government started to take a series of measures and instruments for the purpose of making easy and speeding up the procedures for trade protection. As a reaction to the turmoil in the international economic crises scenario and to the increase in the volume of imports in the months following the international financial crisis, the Brazilian government declared that its intention was to protect domestic industries, by using the available instruments without breaching the free trade rules.

The plan includes trade remedies, and its main focus has been on the imposition of antidumping duties. From mid-2011 to the end of 2012, the number of investigations launched by the Commerce Department (DECOM) has grown. DECOM is in charge of the conduction, review of, and recommendation for the imposition of antidumping duties. The Chamber of Commerce, formed by the Brazilian Ministries, is responsible for reviewing the final applications.

Currently, there are 34 anti-dumping investigations pending at DECOM. The products under investigation include stainless steel pipes, powder milk, stainless steel austenitic cold rolled flat products, flat-rolled silicon steel, heavy plates, nylon yarns, table fans, ethanolamine, steel pipes, motorcycle tires, car tires, yarn containing predominantly acrylic fibers, pre-sensitized aluminum plates, fresh or refrigerate garlic, padlocks, hair brushes, speakers, liquid epoxy resins, acrylic yarns, silicon dioxide, polycarbonate resin, and etc. The reasons for a significant increase in the number of investigations are mostly due to the present world economic framework and the international crisis. The depressed domestic market in these countries, including Brazil, leads to an ensuing increase in exports, which usually end up being sent to countries where the consumer market is expanding and the national costs of production are high.

Moreover, the number of investigations is expected to grow even more in the beginning of 2013 as a consequence of the forecast for China’s slower growth and economic activity in the coming months. Brazilian DECOM has already announced that many requests of antidumping investigation are still waiting for the opening of proceedings while the delay is because of the lack of governmental resources to process all the investigations. Of these pending requests, China leads the ranking of main investigated origins. In light of this development and the political atmosphere within the Brazilian government, DECOM announced its addition of 90 more agents to the present team of 30 agents. Some of them have already begun working in the ongoing investigations. In the near future, about a 100 agents will be available to conduct reviews and investigations of cases for imposition of trade remedies.

With more staff working, the time of the investigations is expected to be reduced and the proceedings should become more efficient. Until now, the average term of duration of an investigation has been 17 months whereas the term-limit established in the antidumping agreement and in Brazilian laws is 18 months. On October 13th, 2011, the government has announced some changes in the procedure: (i) increasing the efficacy of the
trade remedies; (ii) making feasible the imposition of temporary duty at a shorter term period; (iii) reducing the quantity of pieces of information requested from petitioners; and (iv) making the act of filling out less bureaucratic and speeding up the opening of investigations. Upon the implementation of the new procedures and the expansion of the investigation team, DECOM expects that the average analysis time should be reduced to 10 months.

In order to achieve this goal, DECOM has been much more selective in opening investigations. DECOM conducts a preliminary analysis concerning the existence of injury and causality before the investigation begins. By doing so, DECOM aims to promptly eliminate cases, in which injury and causality are not so clear, or the level of information of which is not sufficient enough to achieve a fruitful investigation.

The concentration in the supply of information before the investigation is launched will further help the procedure become more efficient. According to the former rules, 4 the supply of information on the domestic industry’s part was divided into two different stages. The domestic industry had to supply some pieces of information before the investigation was launched, and the remaining information was submitted when exporters and importers also presented their answers to the questionnaires sent by DECOM.

Several times, this procedure caused duplicate pieces of information to be supplied, as well as another review of data was required on DECOM agents’ part, which delayed the progress of the investigation. The procedure now in force has concentrated the stage for supplying information from the domestic industry before the investigation is launched. 5 According to DECOM, this change not only expedites the procedure but also make the imposition of temporary duties quicker and safer, since the authority now has all information by the date of its decision. Moreover, it will allow the on-site verification of the domestic industry at the outset of the investigation. 6

Some companies have criticized this issue, concerning the on-site verification of the domestic industry in a too early stage of the investigation. This is because, since this is a fundamental stage in the investigation as a whole, the conduction of the on-site verification well in advance could prevent exporters and importers from timely submitting the specific and special issues that DECOM agents should consider during the verification of the domestic industry.

Issues of the domestic product similarity in relation to the investigated product also could be impaired, and they would stir up more discussions in the progress of investigations. In this regard, DECOM will encourage interested parties to be more responsive concerning possible items and issues to be verified by DECOM. Said discussions, which until then were put off to a more advanced stage of the investigation, will now be up right at the start in order to allow DECOM’s agents to verify the items exporters and importers are interested in.

Apart from this, the Government is implementing additional measures as part its package of changes. DECOM, working jointly with other agencies, is also expected to issue a new anti-dumping decree, which will revoke the current measure (Decree 1602 of 1995). 7 This new antidumping decree is expected to be more comprehensive, with clearer and more transparent details on the procedures to be followed by DECOM’s agents, as well as to explain some questions which were not solved by the previous laws. For sure, Brazil is going through a transitional stage. Changes have already been implemented and other new rules still will be laid down. Based on the political atmosphere and the legal regime, we foresee that the volume of investigations should increase even more significantly.

---

4 The former procedural rules were provided by the Ordinance 21, 1996. The text in Portuguese is available at http://www.sice.oas.org/antidumping/legislation/brasil/CLSCX.asp.
5 The new proceeding was introduced by the Ordinance nr 46, as of December 29th, 2011, enacted by the Ministry of Development, Industry and Foreign Trade (MDIC) available at http://www.desenvolvimento.gov.br/arquivos/dwnl_1325169885.psf.
6 This new proceeding was already applied in the cases opened in 2012, as e.g. silica, acrylic yarns and others.
7 With the collaboration of Santiago Martínez.
I. Introduction

Although longstanding, the issue on market economy treatment for the Chinese economy is more important day by day. China is the world's greatest exporter and second-biggest importer, sending products worth more than US$900 billion worldwide each year and importing an average of products worth US$750 billion. While Chinese companies seem to improve their competitiveness, anti-dumping (“AD”) measures are key to avoid the losses that unfair trade practices may cause to industries around the world.

However, special rules for the imposition of AD measures have led to several unresolved issues regarding how Chinese producers and exporters, and China itself, should be treated in these investigations. Dumping regulation might be considered to be discriminatory against Non Market Economies (“NME”) such as China. For Instance, the concept of NME is not a definite matter.

According to Tu Xinquan, Associate Dean at University of International Business and Economics’ China Institute for WTO Studies, “discrimination towards Chinese firms is growing among the EU and US. The main reason is the increasing competitiveness of Chinese enterprises. I think it will take some time for western countries to accept the nature of China's market economy status. Meanwhile, international trading rules are mostly made by the developed western players, so better need to learn more and adapt itself more promptly into world trade.”

The purpose of this article is to present and discuss salient recent developments in connection with the treatment granted to the Chinese Economy in AD investigations. In first place, a brief review of China’s treatment in AD regulations will be made, followed by a summary of special AD provisions and their concerns, also an overview of recent relevant treatment in certain countries, finalizing with certain overall conclusions.

II. Treatment to Chinese Economy in Anti-dumping Investigations Before 2001

For many years, even before its accession to the WTO, the Chinese Economy has been treated differently in the framework of AD investigations performed by self-recognized states as market economies. Although the AD Agreement (“ADA”) provided WTO members with rules for AD investigations, differential treatment to NMEs continued as an issue of domestic law. Besides, there was not a harmonization standard regarding a consistent methodology for the calculation of the dumping margin of imports originating in China.

By the end of 2001, China's Protocol of Accession to the WTO provided a special section regarding AD investigations. However, such instrument did not radically change the implementation of NME methodologies in dumping investigations against Chinese imports. In fact, on the one hand, states still have sovereignty to decide on the recognition of China’s market economy status. On the other hand, even if a state grants such status to China, dumping investigations may still develop on the basis of NME methodologies. Moreover, companies may still apply for differential treatment in order for the dumping margin to be calculated with Chinese costs.

III. Special Anti-dumping Provisions

Although, GATT Article VI and the ADA provide the general commitments for WTO Members in connection with dumping law, other special provisions exist for the imposition of AD measures: namely, China’s Accession Protocol to the WTO and other municipal or regional provisions relevant to dumping investigations.

Section 15 of China’s Accession Protocol to the WTO provides that

“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.\textsuperscript{3}

According to the rules set forth in the Protocol, in order for producers to be investigated without the application of a NME methodology to determine the dumping margin there are two options. Either China establishes under the national law of the relevant investigating Member that it is a market economy or that market economy conditions prevail in the relevant industry, or the producers themselves establish that market economy conditions prevail in the relevant Chinese industry of the like product being investigated. In any event, such rules will be in force until 15 years as from the date of accession, when China will be considered as a market economy.

As it is not uncommon with WTO documents, these rules under the Protocol are drafted broadly and many issues are open to interpretation. Although the Protocol dates from November, 2001, the issue on NME Treatment against imports from China in the framework of anti-dumping investigations was adjudicated for the first time by the WTO’s Appellate Body in July, 2011.

In fact, in \textit{EC – Fasteners}, China challenged the European Basic AD Regulation and the imposition of definitive AD measures against certain fasteners imported from China, considering the measures to be inconsistent with the ADA and the Protocol.\textsuperscript{4}

Among other issues, the Appellate Body (AB) ruled that Section 15 of the Protocol only deals with rules regarding the domestic aspect of price comparability but does not provide an exception for WTO Members to treat China differently for other purposes such as the determination of export prices or individual versus country-wide margins and duties.\textsuperscript{5} Moreover, the AB established that investigating authorities are obliged to determine individual margins of dumping for producers and exporters in the investigation, as well as to specify individual duties for each supplier except when impractical.\textsuperscript{6}

Additionally, the AB found it difficult to establish that “the economic structure in China justifies a general presumption that the State and all the exporters in all industries that might be subject to an anti-dumping investigation constitute a single legal entity.”\textsuperscript{7} According to the AB, the WTO covered agreements do not provide a legal basis for such a presumption.

Although the AB reached certain conclusions on the rules set forth in the Protocol and the ADA, there are still certain questions that remain unresolved in connection with both instruments, e.g. whether market economy treatment should be granted on an individual or on an industry-wide basis and what is exactly the methodology \textit{not based on a strict comparison with domestic prices or costs in China}.\textsuperscript{8}

Apart from the ADA and China’s Protocol, each WTO Member State has its own national rules on dumping. In general, two main models have been adopted by WTO member states in order to determine the normal value when investigating imports originating in a NME: i) the US System and ii) the EU Approach,\textsuperscript{9} as further explained below.

\textbf{IV. Recent Treatment In Certain Countries}

\textbf{A. United States}

In the US System, the NME methodology is based on a surrogate country selection. Selected surrogate countries must be at a comparable level of economic development. Chapter 10 of the US AD Manual provides indications for dumping investigations against imports from NME.\textsuperscript{10}

---


\textsuperscript{4} ABR. European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China, WT/DS397/AB/R. July 28, 2011.

\textsuperscript{5} Id., para. 290.

\textsuperscript{6} Id., para. 329, 336 & 354.

\textsuperscript{7} Id., para. 368.


\textsuperscript{10} Department of Commerce Antidumping Manual, \url{http://ia.ita.doc.gov/admanual/2009/Chapter%2010%20NME.pdf}. 
the US, China is still classified as a NME and is one of the first targets of anti-dumping measures.\textsuperscript{11}

Such status is determined by the US Department of Commerce (“DOC”) for purposes of AD law in the light of the US Tariff Act, which provides the factors that must be considered such as currency conversion, wages determination or foreign investment allowance. Moreover, DOC may assign separate rates for NME exporters when they are capable of demonstrating there is no \textit{de iure} or \textit{de facto} governmental control over their export activities.

In a recent Memorandum on the Final Determination following the WTO Appellate Body’s findings regarding the AD investigation of certain tires from China, the DOC recalled China’s economic status as follows:

“in China today, under the current legal and regulatory regime, there are procedures and regulations for the establishment and operations of firms that appear to be legally empowered to make independent decisions. However, the same legal and regulatory regime (in fact, in some cases, the same law, policy or regulation) also gives the State the legal authority and wide, unspecified latitude to control, influence or interfere in the operations or decisions of [State-Invested Enterprises].”\textsuperscript{12}

\textbf{B. European Union}

The EC approach calculates the normal value based on costs and prices of a reasonable analogue market economy country where the like product is made and sold. The Basic AD Regulation (Council Regulation (EC) 1225/2009) sets forth the rules that must be followed in order to use this NME methodology.

Under such regulation, Chinese producers and exporters may apply for either for market economy treatment (“MET”) or for individual treatment (“IT”). If granted the former, the dumping margin is calculated based on Chinese costs or prices. But, if such treatment is not granted, they can still apply for the latter in order to be granted an individual AD duty.

On July 19, 2012, the European Court of Justice (“ECJ”) rendered a fundamental judgment that will surely give raise to new developments in AD investigations. In its decision, the Court established that State-owned enterprises are able to apply for MET under European Law. The case concerned the denial, both by the European Commission and by the European Council of granting MET to Xinanchem due to a significant state control of the company. According to the ruling, State control cannot be equated to significant State interference as a ground to deny MET.\textsuperscript{13}

Additionally, it is important to take into account that the \textit{EC – Fasteners AB Report} commented above was to be implemented by the EU on October, 2012. Said implementation was done through the Council Implementing Regulation (EU) No. 924/2012 on October 4, 2012, where the imposition of AD duties in connection with IT granted to certain Chinese companies was reviewed.

\textbf{C. Brazil}

Brazil is becoming a frequent user of trade remedies. The country’s AD regulation is set forth in Decree 1602 of 1995. Article 7 of said Decree provides that the normal value may be determined based on the price practiced or constructed value of the like product in a third market economy country, which is chosen based on reliable information presented at the time of selection.

On November 12, 2004 the Brazilian Government and the Chinese Government executed an Understanding on Cooperation in Trade and Investment whereby Brazil committed to grant China market economy status. However, during AD investigations China is still considered as a NME.

In fact, in a final determination of December 5, 2012 in an investigation against cutlery originating in China, the Brazilian Department of Trade Defense (“DECOM”) recalled that for the purpose of trade defense, China is not considered a country

\textsuperscript{11} Historics statistics of US Anti-Dumping investigations since 2000 are available at the International Trade Administration website at \url{http://ia.ita.doc.gov/stats/inv-initiations-2000-current.html}
\textsuperscript{12} USDOC, Memorandum on Section 129 Determination (WTO/DS/379), July 21, 2012. Available at \url{http://ia.ita.doc.gov/download/section129/pre-otr-tires-Final-129-Determination-20120830.pdf}
of predominantly market economy. The same argument was used on the investigation against imports of polymeric diphenylmethane diisocyanate from China.

Brazil also allows Chinese companies to apply for recognition of operations where market economy conditions prevail. Such recognition is granted upon proving market economy conditions in the company’s production. On a recent investigation against citric acid, Chinese companies applied for such treatment submitting evidence of supposedly normal business procedures, but DECOM denied granting such treatment due to the lack of information on the pricing of relevant inputs and wages, as provided by Regulation No. 59 of November 28, 2001.

D. Mexico

Mexico is also having a growing important role in International Trade Law mechanisms. The country’s AD regulation is set forth in the Mexican Foreign Trade Law. With regard to NME methodologies, Article 33 establishes that the normal value may be calculated based on prices and costs of a third market economy country that may be considered as a substitute of the NME country.

Additionally, MET may be granted to a sector or industry under investigation if it operates under market principles. Moreover Article 48 of the Mexican Foreign Trade Regulation sets forth the criteria to determine if an economy operates under market conditions.

In a recent investigation against graphite electrodes from China, certain companies tried to argue that petitioners have the burden of proof to demonstrate that China operates under NME conditions. However, the Mexican Economy Secretariat determined that producers are those who bear the burden of proof to demonstrate that market economy conditions prevail in the relevant industry. Otherwise, the authority is entitled to use third country as substitute for the dumping margin calculation.

E. Colombia

Colombia has also shown recent growth in the use of trade remedies against Chinese imports. Colombian producers and exporters each day are more concerned with the impact of Chinese imports over national industries. Therefore, more filings for the use of trade remedies are expected by the Colombian AD authority.

Colombian AD regulation is set forth in Decree 2550 of 2010. However, it does not include criteria to determine when market economy conditions prevail for individual exporters and producers, and such determination seems to be left to the political arena. In fact, in a recent investigation against radial and conventional tires from China, the authority recalled that China has not been granted market economy status by Colombia and has avoided so far a thorough study of the specific conditions in the case at hand. Moreover, in order for companies to apply for individual MET, the authority based such decision directly on the criteria set forth in the EU AD regulation.

V. Conclusions

- Although the use of AD measures against China is more frequent every year, there are still many issues to resolve related with NME methodologies.
- Such increase in use may grow even more between 2013 and 2016 given the upcoming expiration of the AD provisions of China’s accession protocol.
- Some countries have already granted market economy status to China but such decision may not deter the use of NME methodologies against China.
- It is not clear what will happen after 2016 when the AD provisions of China’s Protocol expire if market distortions continue in China.

CONTRIBUTE TO FUTURE EDITIONS OF THE NEWSLETTER …

We are currently planning upcoming editions of the newsletter. Articles should relate to international trade and contain between 1000 and 2500 words. If you are interested in contributing, please send your suggestions or ideas about topics and articles to Chris Drury (cdrury@goodwin.com) and Sylvia Chen (sylvia.y.chen@gmail.com). Thank you.