



# WTO RULING CHALLENGES THE EU "INDIVIDUAL TREATMENT" PRACTICE

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On 3 December 2010, the WTO published the panel report in case DS397, *EC - Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China* (EC - Fastener). China has achieved a landmark victory in its first WTO trade dispute against the EU.

In the report, the WTO Panel dealing with this case (the "Panel") disapproves of the EU's practice of Individual Treatment ("IT"). This practice allows exporters from non-market economy countries such as China to obtain an individual dumping margin calculation by reference to their export prices to the EU, only if they fulfil certain criteria.

The EU may challenge this ruling before the WTO Appellate Body ("AB"). In such a case, it may take another half year or so for the AB to reach its final decision. If the EU loses again at the appeal stage, it will have a reasonable period of time to conform with WTO practice.

## Individual Treatment in the EU's Anti-Dumping (AD) Basic Regulation

Pursuant to Article 9(5) of EU Council Regulation (EC) No 1225/2009 (the "Basic Regulation"), a Chinese exporter that fails to meet the EU's criteria for Market Economy Treatment ("MET") must fulfil the requirements listed in this Article to have its own export prices used in dumping margin calculations and hence, obtain an individual dumping margin. This is the so-called IT practice under EU law.

To qualify for IT, Chinese exporters must show, based on properly substantiated claims, that:

1. Where they are wholly or partly owned by foreign firms or joint ventures, they are free to repatriate capital and profits.
2. Their export prices and quantities, and conditions and terms of sale are freely determined.
3. Where the majority of their company shares



belong to private persons; State officials eventually appearing on the board of directors or holding management positions are in minority or the company is nonetheless sufficiently independent from State interference.

4. Exchange rate conversions are carried out at the market rate.
5. State interference is not such as to permit circumvention of measures if individual exporters are given different rates of duty.

Exporters failing to obtain IT receive a country-wide residual duty calculated by reference to the weighted average export price of all co-operating (sampled) producers. Where levels of co-operation are low and sampled producers do not represent a large portion of the country-wide exports, the European Commission (the “Commission”), which is the EU investigating authority, reverts to “facts available”, a methodology that frequently allows the Commission to resort to data from EU customs statistics.

### IT and the WTO

Article 9(5) of the Basic Regulation has no legal basis in the WTO Anti-Dumping Agreement (ADA). Indeed, the ADA always requires an individual dumping margin to be calculated for each co-operating exporter, irrespective of whether such exporter obtains MET or not. China has never agreed on such special treatment in its WTO Accession Protocol. Indeed, the Protocol only allows the EU to use analogue country data to establish the “normal value” of Chinese producers (instead of their own domestic prices).

The Panel supports China’s claim that the IT methodology introduces discriminatory treatment against non-market economy WTO Members. The Panel concludes that Article 9.5 of the EU Basic Regulation is inconsistent with Articles 6.10, 9.2 and 18.4 of the ADA, Article I:1 of GATT 1994 and Article XVI:4 of the WTO Agreement.

### EU’s compliance with WTO rulings

Council Regulation (EC) No 1515/2001<sup>1</sup> enables the EU institutions to take action in order to comply with WTO rulings in trade defence matters. This Regulation calls for a “WTO compliance” review, a kind of special review, of the EU provisions found to be WTO-inconsistent. The special review is initiated by the Commission, after consultation with the EU Anti-Dumping Advisory Committee. The WTO inconsistent measures may be suspended by the EU Council pending the special review<sup>2</sup>.

### Individual dumping margins

In the course of this special review, the Commission may request interested parties to provide additional data enabling it to (1) complete the information obtained during the original investigations in a WTO-compliant manner; and (2) recalculate individual dumping margins for each exporter concerned. In other words, the special review must be based on data prevailing during the period of investigation that led to the imposition of the measures in question.

Thus, the special review provides an opportunity for the Chinese exporters presently subject to EU anti-dumping

duties, to seek to reduce the level of such duties. All Chinese companies that cooperated in original investigations but did not obtain IT may participate in the special reviews, and request the Commission to recalculate their margins on an individual basis. According to Article 9(6) and Article 17 (3) of the Basic Regulation, even non-sampled co-operating companies can request an individual dumping margin calculation<sup>3</sup>.

This is a particularly interesting development for two categories of Chinese exporters. Firstly, exporters with individual export prices that are higher than the export price determined in the original investigations will benefit from such a re-calculation, since it is likely to result in a lower dumping margin for them. Exporters operating at the higher end of the product segment could largely benefit from the recalculation because their export prices will usually be higher than the weighted average export price of all sampled companies.

Secondly, exporters could benefit from the recalculation where country-wide residual margins were based on facts available, because of low levels of co-operation or lack of export representativeness.

Dumping margin recalculation in these cases is also likely to result in lower levels of duties.

### Individual injury margins

The recognition of Chinese exporters’ individual export prices should also cause the Commission to abandon country-wide injury margins and

<sup>1</sup> OJ L 201, 26.7.2001, p. 10.

<sup>2</sup> OJ L 201, 26.7.2001, p. 10. Article 1(3,4) and Article 2(3,4)

<sup>3</sup> The Commission can reject such claim on the basis that compliance therewith would be unduly burdensome for the Commission. However, the Commission will need to ensure that the non-sampled companies receive the weighted average of the individual margins ascertained for the sampled companies. If no such companies exist in the sample, for example, because none of them requested individual margin, then the Commission will still have to grant non sampled companies their individual margin, following, for example, a “desk review” of their questionnaire responses and data.



replace them with individual, exporter-specific injury margins. Exporters subject to EU anti-dumping duties calculated by reference to a country-wide injury margin pursuant to the “lesser duty rule” will be able to benefit from individual injury margin recalculation. This will be the case, in particular, where their export prices during the period of investigation that led to the imposition of the AD duties were higher than the weighted average price level of all Chinese exporters.

Individual exporter injury margin calculation is not presently required by WTO law. The ongoing “Doha Round” Negotiations are also focusing on the amendment of the ADA in order for it to include, *inter alia*, the “lesser duty” rule. Regardless of the current position under WTO law and future developments, it will be difficult for the Commission to reject individual injury margin recalculation requests by exporters for reasons of coherent application of the Basic Regulation and policy consistency.

## Uncertainty and challenges

### Interim reviews

The Commission may also decide to initiate interim reviews pursuant to Article 11(3) of the Basic Regulation in order to ensure that the new WTO-compliant dumping margin calculations take into account up-to-date data. It may not be excluded that the EU industry may request the initiation of such interim reviews.

However, such requests may not be based on a finding that EU AD duties are lower as a result of the special reviews. The EU industry will need to provide the Commission with *prima*

*facie* evidence that dumping and/or injury margins have increased since the imposition of the original duties on a lasting basis, making a recalculation of the duties using up-to-date data necessary. In other words, the Commission may not initiate interim reviews by merely referring to the fact that, as a result of the special reviews, the duties against Chinese exporters have been reduced.

The problem that arises with such interim reviews is that the Commission will update the normal value data in the analogue country used in the original investigation, unless there are reasons to choose another analogue country. In both cases, the normal value will likely not be known by the Chinese exporters. Therefore, updating the analogue country normal value creates uncertainty in the calculation of the dumping margins.

The Chinese producers that are subject to currently applicable anti-dumping measures should therefore be prepared for this challenge. For example, it could be useful to consider proposing the use of an analogue country other than that used in the original investigation, if it might be reasonably expected that such a choice could result in lower dumping margins; and take the initiative to find producers in that country that are willing to cooperate.

### Timing

Finally, it is important to have an understanding of the time framework involved. The final report of the WTO AB, if the EU decides to appeal the Panel’s decision, might be adopted by the WTO DSB around mid-2011.

The Commission will thereafter proceed with the reassessment and recalculation of dumping and/or injury margins for individual exporters in the course of the special reviews in late 2011 or early 2012. Potential follow-up interim reviews may take place in 2012-2013. If the EU decides not to appeal the final WTO Panel report, all of these projected time limits will need to be brought forward by six months.

### EU Export Prices for 2011-2012 are important

If interim reviews are initiated, normal value and export price data will likely be established by reference to prices prevailing during 2011-2012. Chinese producers should therefore take this into account when they set their export prices to the EU during 2011-2012, if they wish to take advantage of the favourable changes in dumping and/or injury margin calculations.

Our EU Competition, Trade and Regulatory team can provide legal advice for companies interested in participating in the special reviews. We can assist, in particular, Chinese producers to perform a dumping and injury margin recalculation to assess the potential benefit of applying for/participating in such special reviews. Our goal is to help our clients establish and implement a commercial and legal strategy in order to capitalise on China’s victory in the WTO DSB.

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