

# Entering the EU market in the face of anti-dumping duties: new exporter reviews

*Eric Pickett*

## Abstract

This paper identifies the conditions under which new exporters may initiate a new exporter review (NER) under the Basic Anti-Dumping Regulation and thereby avoid the otherwise applicable residual duty, thus making access to the European Union (EU) market more realistic. The paper serves as a guide to new exporters, briefly describing the NER mechanism and the conditions under which the application will be successful in light of the European Commission's practice, also describing the impact of recent developments. Strategies are described for effectively exercising the applicant's rights and the available judicial remedies in the event of an unfavourable outcome.

## Introduction

Although the European Union (EU) is a comparatively moderate user of anti-dumping (AD) measures, once in place they seem to have a greater longevity than Methuselah. Given the typical level of residual AD duties, new exporters of the product concerned may find entering the EU market commercially prohibitive or even impossible. The new exporter review (NER) offers newcomers a mechanism by which they can avoid the residual AD duties and obtain an individual AD rate based on their individual dumping margin.

AD proceedings in the EU are governed by Regulation 1225/2009, as amended (the Regulation). Under the Regulation a product is considered to be dumped if its export price to the European Community<sup>1</sup> is less than a comparable price for the like product as established for the exporting country. If the European Commission (the Commission) determines that dumping has occurred and that the dumping has caused injury to the EU industry, it will propose the adoption of specific AD measures, unless the EU's institutions conclude that such measures would not be in the European Community's interest. Definitive AD measures automatically expire no later than five years from the date of their imposition. Each time the measures are due to lapse the Commission may conduct an expiry review and extend the period of application by up to five more years. The outcome of the expiry review, which is generally taken on the initiative of a substantiated request by the EU producers, is binary: either the measures are repealed or extended for up to five more years without amendment. AD measures can thus be maintained for an indefinite period of time.

Prior to the introduction of the rules governing NERs, exporting producers which did not export to the EU during the investigation period (IP) of the original investigation were normally subject to residual AD duties until they were able to request an interim review.<sup>2</sup> However, since interim reviews could not be requested until one year had elapsed since their imposition, their situation was difficult at best. The NER mechanism, now codified in Art. 11(4) of the Regulation, addresses this situation: such reviews can be initiated even during the first year of the imposition of the AD measure in question. At the other end of the spectrum, the new exporter can lodge its request even after several years have passed since the original AD measure was imposed. After the one-year time limit has expired newcomers may therefore lodge a request for either an NER review or an interim review.

The quasi-judicial NER is conducted by the Commission and can essentially be conceived as a sequential two-step analysis: the determination of whether the applicant qualifies for new exporter status and the determination of the AD duties, if any, to be levied.

It should be noted at the outset that the Regulation expressly prohibits the initiation of an NER where the initial investigation used sampling as the basis for the determination. Such exclusion could result in a detriment to the newcomer, since it could not obtain a better margin than the residual AD duties; this result could be considered discriminatory and thus in violation of primary EU law.<sup>3</sup> Therefore, the regulation imposing definitive AD measures will, typically, specifically provide that the weighted average duties incurred by the cooperating companies not included in the sample in the original investigation are also to be applied to unrelated new exporters.<sup>4</sup> This approach, called New Exporting Producer Treatment (NEPT), ensures equal treatment between new exporting producers and the cooperating, non-included companies.

Where price undertakings have been accepted but newcomers are expected, the regulation imposing definitive AD duties typically also foresees a provision authorising the Commission to accept such undertakings from newcomers.<sup>5</sup> Price undertakings are a voluntary agreement formulated by the exporter whereby it agrees to increase the export price of its product concerned to the EU to non-dumped or non-injurious levels.

### Initiating an NER

The newcomer is entitled to an NER if it substantiates in its application that it:

- has not exported the product concerned to the EU during the IP on which the measures are based
- is not related to any of the exporters or producers in the exporting country which are subject to the AD measures
- has actually exported to the EU following the IP, or has entered into an irrevocable contractual obligation to export a significant quantity to the EU.

Where the applicant is located in a non-market economy (NME) it must additionally demonstrate either that it operates under market economy conditions (MET) or that it qualifies for individual treatment (IT).<sup>6</sup> If the Commission is satisfied that the applicant has substantiated its claim to newcomer status then it will initiate an NER to verify the claim and determine the applicant's dumping margin.

In respect of the first criterion, even established companies that had exported the product concerned to the EU satisfy the criterion, providing that no exports of the product concerned were made to the EU in the original IP.<sup>7</sup> If an exporting producer does not export any relevant products to the EU in the original IP and makes itself known during the investigation, the Commission may decide to already include the new exporter within the scope of the definitive measure rather than wait and possibly have to conduct a separate NER, provided the applicant meets all the conditions for newcomer status.<sup>8</sup> In *Sacks and bags* (India, Indonesia and Thailand) the definitive measure foresaw the application of the weighted average dumping margin of cooperating exporters to the newcomers who had made themselves known.<sup>9</sup> Since such a 'pre-emptive inclusion' in the definitive measure is clearly advantageous to both the exporters concerned and the Commission it is recommended that companies satisfying these criteria make themselves known at the appropriate time.

In respect of the second criterion, the applicant must substantiate its claim that it does not have any links, direct or indirect, with any of the exporting producers subject to the AD measures with regard to the product concerned. If the applicant is related to a company subject to the AD duties but that company has ceased to exist, the Commission will nonetheless consider the second criterion to have been respected.<sup>10</sup> Consistent with the Commission's practice of considering all related companies as a single entity subject to the same duty, where the applicant is related to a company subject to the weighted average duty rate,

it will be also be subject to that rate if the two producers, taken together, would not have been included in the sample.<sup>11</sup>

To satisfy the third condition the applicant must demonstrate that it is a genuine exporter or producer of the product concerned.<sup>12</sup> Even a single consignment over a two-year period will entitle the applicant to an NER.<sup>13</sup> The goods must be exported directly to the EU as the final destination<sup>14</sup> for release into free circulation.<sup>15</sup> While small quantities of exports will not affect the determination of the applicant's newcomer status, it may impact the determination of its dumping margin.

The newcomer's exports to the EU must fall within the review investigation period (RIP) or the NER will be terminated. In *Stainless Steel Wire* (India) the applicant had made one sale to the EU prior to the RIP and the single contract it had entered into during the RIP had not materialised, whereupon the Commission terminated the NER.<sup>16</sup>

The product the applicant has exported must be the product concerned. In *Certain electronic weighing scales* (China) the applicant had exported products to the EU during the RIP. However, these exports were unfinished products, had different physical characteristics than the product concerned, and were not in a condition to be sold to end-users.<sup>17</sup> The Commission found that the imported products could not be classified as the product concerned<sup>18</sup> and terminated the investigation.<sup>19</sup>

The consistency of the third criterion with Art. 9.5 of the World Trade Organization (WTO) Anti-Dumping Agreement (ADA) is questionable. In its *Mexico – Beef and Rice* ruling the WTO Appellate Body held that Art. 9.5 of the ADA *requires* that an investigating authority carry out an NER for an exporter that (i) did not export the product concerned during the IP, and (ii) demonstrated that it was not related to a foreign producer or exporter already subject to the AD measure.<sup>20</sup> Additional conditions for the initiation of NERs not provided for in the ADA may not be imposed.<sup>21</sup> However, even if the third criterion is inconsistent with Art. 9.5 of the ADA, this would not necessarily render the provision invalid under EU law. The applicant should therefore submit evidence that it has respected the third criterion with its application.

Although the determination of newcomer status should not be affected where the applicant's exports cannot be considered to be representative within the meaning of Art. 6(1) of the Regulation, in *Leather handbags* (China) the Council rejected the application as inadmissible, based *inter alia* on the fact that the applicant's exports were sporadic.<sup>22</sup> This justification is inconsistent with the Appellate Body's ruling in *Mexico – Beef and Rice* and should be considered obsolete.

## Dumping determination

If the investigation concludes that each of the criteria for granting newcomer status is satisfied then the individual dumping margin must be calculated where sampling was not used in the original investigation. Ideally, the new exporter will be found not to be dumping and will therefore be exempted from the AD duties. Similarly, if the newcomer's dumping margin is determined to be below the *de minimis* threshold of 2%, no duty will be imposed and the regulation will be amended accordingly.<sup>23</sup> Under the Commission's proposed draft revision of the Regulation, exporters will no longer be subject to subsequent review investigations where their dumping margins have been found to be less than the *de minimis* thresholds.<sup>24</sup>

Where the exports to the EU are infrequent and the export price is significantly higher than exports to non-EU countries, newcomer status may be granted, but the dumping margin will be detrimentally affected.<sup>25</sup> In *Polyethylene terephthalate* (Thailand), the Council imposed the residual AD duty established in the original investigation.<sup>26</sup> Consequently, where the applicant believes that its dumping margin is lower than would be determined in accordance with the above described practice, it should ensure that it is able to establish a representative basis for the dumping determination.

In the case of an application on the basis of an irrevocable contractual obligation, the arrangement must be for the release of a significant quantity of the goods concerned into free circulation in the EU.

If the investigation reveals that the applicant's individual dumping margin is greater than the applicable residual AD duty, the higher rate will be imposed, subject to the lesser duty rule.<sup>27</sup> The new exporter should therefore carefully consider its individual dumping margin before lodging the application. If, in the course of the investigation, it becomes apparent that the applicant's individual rate will exceed the residual AD rate in force, it may withdraw its application and cease cooperating, which will generally result in the proceedings being terminated.

### Procedure

Pursuant to Art. 11(5) of the Regulation the relevant provisions of that Regulation with regard to procedures and the conduct of investigations, excluding those relating to time limits, also apply to NERs. There are, however, certain differences.

After consultation with the Advisory Committee and after the EU producers concerned have been given the opportunity to comment, the Commission will initiate the NER by publication of the relevant regulation, rather than by notice as in other reviews.

The regulation initiating an NER repeals the duty in force with regard to the applicant by amending the regulation imposing the AD duty. Pursuant to Art. 11(4) of the Regulation the Commission also directs the Member States' customs authorities to register the applicant's imports in accordance with Art. 14(5) of the Regulation.<sup>28</sup> Registration ensures that AD duties can be levied retroactively to the date of the initiation of the NER should it result in a determination of dumping. In 'normal' investigations, the Commission generally only directs the registration of imports upon a request by the EU industry.

NERs are carried out on an accelerated basis and must be concluded within nine months of the date of the initiation. This is a significantly less amount of time than that set for interim reviews, which should normally be concluded within twelve months of the date of the initiation but may be extended by three months, meaning that it may not be concluded until 15 months after the date of initiation.

After publication of the initiation of the NER the Commission will send the applicant a questionnaire and verify the information at the applicant's premises. The investigation is limited to the applicant's status as a new exporter, dumping margin during the RIP and any claims for MET or IT. Information which has not been verified during the visit will generally not be considered.<sup>29</sup> The applicant should therefore ensure that it has appropriately prepared for the on-site inspection and bring any issues which may require examination to the Commission's attention prior to the verification visit.<sup>30</sup> This includes ensuring that the relevant staff are available to answer any questions, preparing all documents and computer records, which served as the basis for the questionnaire response and providing the inspectors with a photocopier.

The NER concludes with the notification of the maintenance or amendment of the measures by publication of a regulation in the Official Journal (OJ). With the regulation's entry into force the duties, if any, will be collected retroactively and the Member States' customs authorities will be directed to cease registration of the applicant's imports. It should be noted that the period of validity of the measures reviewed is not affected by the NER.

Finally, if the investigation is not completed within the nine-month timeframe the measures will be maintained.

### The applicant's rights in the proceedings

The Regulation bestows important rights on the parties in AD proceedings. These rights include rights of disclosure, the right to make submissions and be heard, confidentiality and intervention by the hearing

officer. The ECJ considers the parties' procedural rights to be crucial in anti-dumping proceedings<sup>31</sup> and a violation of these rights of defence may lead to the annulment of the contested regulation. According to settled case law, parties must be placed in a position during the administrative procedure in which they can effectively make known their views on the correctness and relevance of the facts and circumstances alleged and on the evidence presented by the Commission.<sup>32</sup>

Throughout the investigation the applicant may lodge any submission or supplementary comments with the Commission, which the Commission is obligated to take into account when establishing its findings. This obligation is to be evaluated in light of the duty to state reasons. The statement of reasons for a regulation imposing AD duties must be assessed by taking account, *inter alia*, of the information which has been communicated by the institutions to the interested parties and the submissions made by those parties during the investigation procedure.<sup>33</sup> The institutions are not, however, required to give specific reasons for a decision not to take account of the various arguments raised by the interested parties.<sup>34</sup>

The Regulation also grants the applicant rights of disclosure of the details underlying the essential facts and considerations which form the basis for the proposed duties as well as the dumping margin calculation. Pursuant to written requests and their acceptance, the applicant is entitled to inspect the non-confidential files. At both stages the applicant has the right to comment on the documents, facts and considerations and have these comments considered by the Commission. The applicant's confidential information must be treated as such where that information has been properly identified or is obviously confidential. The right to confidentiality extends to the verification phase.

If, in the course of the review, the applicant has any grievances relating to procedural issues or the exercise of its rights of defence it may request a hearing. Hearings may be oral – where the applicant meets with the Commission's staff – or adversarial – where the interested parties directly concerned exchange views on specific contentious issues.<sup>35</sup> The Commission cannot, however, compel a party to attend an adversarial meeting.

These rights place the applicant in a position where it can effectively affect the outcome of the review. The Commission has, in fact, changed its position in light of the parties' submission on several occasions.

The applicant may also request the intervention of a hearing officer. The hearing officer, whose role includes ensuring the full exercise of the parties' rights of defence, acts as a facilitator and mediator between the interested parties and the Commission, in an advisory role and formulates non-binding recommendations.<sup>36</sup> The intervention of the hearing officer may be requested as soon as the investigation has been initiated or at any time thereafter, but it is advisable to involve him/her at an early stage and to contact him/her formally. The hearing officer's involvement has proven effective, leading to the recent codification of the terms of reference.<sup>37</sup>

## Non-cooperation and withdrawal of request

Where the Commission is unable to verify that the applicant qualifies for new exporter status it will reject the application as inadmissible, resulting in the applicant incurring the residual AD duties,<sup>38</sup> which will then be levied retroactively to the date of the initiation of the NER. Applicants located in an NME must additionally meet the criteria for MET or IT. In *Castings* (China), however, three Chinese exporters who had been denied both MET and IT were nonetheless granted the weighted average duty rate for sampled companies granted IT.<sup>39</sup>

In cases of non-cooperation the Commission will reject the request and inform the applicant that its request will not be considered.<sup>40</sup> Non-cooperation occurs where the applicant fails to complete and return the questionnaire within the time limits set, does not provide or refuses access to necessary information, for example, by failing to permit on-the-spot verification, or otherwise significantly impedes the investigation. Where the applicant is unable to meet the deadlines it is therefore advisable that they immediately notify the Commission and request an extension.

The Commission's consistent practice of determining MET and IT for a group of related companies as a whole<sup>41</sup> creates special problems for affiliated applicants located in NMEs. Where their related producer and/or exporter fails to cooperate in the investigation, the application will be rejected because the applicant's status as a new exporter status will not be able to be verified,<sup>42</sup> resulting in the imposition of the residual AD duty.<sup>43</sup>

If the applicant has supplied false or misleading information, the information shall be disregarded and use may be made of the facts available. In *Chamois leather* (China) the applicant provided false and misleading information and ceased cooperation altogether during the verification visit, thereby preventing completion of the verification. The applicant proceeded to formally withdraw its application.<sup>44</sup> Despite the withdrawal of the application<sup>45</sup> and non-cooperation, the Commission considered it appropriate to continue the investigation *ex officio* and base its findings on the facts available, ultimately imposing the residual AD duties.<sup>46</sup>

Non-cooperation must be distinguished from other instances where the Commission uses the facts available to determine the dumping margin. Where the applicant cooperates but the Commission is unable to establish the applicant's individual dumping margin, for example, because of lack of representativity or because it was unable to verify the information during the on-site visit, it may resort to the facts available. As seen above, the outcome will depend on the specifics of the case.

The applicant may withdraw its request without providing a justification therefor,<sup>47</sup> which will result in the termination of the review, providing termination would not affect the measures in force and is not against the Community's interest.<sup>48</sup> In the latter case the Commission will continue the review *ex officio* and use the facts available.

### Recent developments affecting applicants in NMEs

The conditions for obtaining IT status were recently litigated before the WTO and found to be inconsistent with Art. 6.10 and 9.2 of the ADA.<sup>49</sup> The Council has amended Art. 9(5)<sup>50</sup> in light of the ruling, clarifying the criteria under which enterprises that are legally distinct from the State may nonetheless be considered a single entity for the purpose of specifying the duty. The Appellate Body's ruling reverses the presumption of Art. 9(5) of the Regulation that exporting producers operating in an NME are related to the State and bear the burden of proof that they are entitled to IT. This is of significant practical importance since the EU must now demonstrate that the undertaking does not qualify for IT.<sup>51</sup>

The EU has already also modified its MET and IT questionnaires in light of the recent WTO rulings. However, it is questionable whether the new questionnaires have brought EU practice into line with the ADA.<sup>52</sup> The new 'IT-Annex' to the questionnaires, for example, not only contains many of the same questions as before but also continues to request information which is irrelevant to the assessment of whether the applicant is eligible for IT status under the criteria set forth by the Appellate Body.<sup>53</sup> The criteria are, however, relevant to the historical approach taken by the EU for the assessment of IT status eligibility. Under these circumstances, even if the EU does shift the burden of proof so that it is in line with the Appellate Body's ruling, the type of information taken into account by the EU authorities may be inconsistent with the ADA. Nonetheless, under the current practice, companies located in NMEs as such may have a better chance of obtaining MET or IT status. The Commission recently completed an investigation launched to bring the definitive AD measures into conformity with WTO law and found that one exporting producer was entitled to IT.<sup>54</sup>

In *Brosmann Footwear* (HK) the ECJ held that the Commission must determine whether an exporting producer qualifies for MET within three months of the initiation of the investigation where the applicant has submitted substantiated evidence to that effect, irrespective of whether the applicant was included in the sample of exporting producers.<sup>55</sup> In response to this judgment the EU institutions amended the

Regulation.<sup>56</sup> Disappointingly, the amendment brings the Regulation into line with the Commission's practice rather than *vice versa*.<sup>57</sup>

## Judicial remedies

The applicant can bring three types of direct action before the General Court (GC): an action for annulment, an action for failure to act, and an action for non-contractual damages.

The action for annulment is governed by Art. 263(4) of the Treaty on the Functioning of the European Union (TFEU). There are four grounds for challenging an AD measure under this provision: lack of competence; infringement of an essential procedural right; infringement of the Treaty or any rule of law relating to its application, and misuse of power. Actions based on allegations of the infringement of essential procedural rights, such as rights of defence, tend to be more successful than actions based on a manifest error of the assessment of facts.

The action must be instituted within two months of the publication of the measure, or of its notification to the applicant. It should be noted that actions brought before the GC do not have suspensory effect by operation of law. If the action is successful the GC will declare the contested regulation void insofar as it affects the applicant.

The applicant can also bring an action for compensatory damages against the EU institutions under Art. 268 of the TFEU as an indirect way to challenge the measure. However, such actions are very seldom successful.

If the EU institutions fail to act, for example, the Commission simply does not react to the application, the new exporter may bring an action under Art. 265 of the TFEU.

## Conclusions

New exporters of products subject to AD duties will find it difficult if not commercially impossible to enter and develop the European market. To avoid these duties the newcomer may request the initiation of an interim review or an NER. The NER mechanism offers an expedited procedure for newcomers to avoid having their products subject to the residual AD duties and is therefore advantageous in comparison to the interim review. Although the newcomer must present a *prima facie* case that it is, indeed, a new exporter, this is the only significant extra hurdle the NER establishes. The investigation is limited to the applicant's dumping margin, meaning that no new injury review is conducted. It also means that the applicant will be fully investigated in respect thereof, for example, it will need to complete the questionnaire, be prepared for the on-site verification visit, etc. Companies located in non-market economies will also be subject to investigations to evaluate their MET/IT claims. The recent WTO rulings on these issues have led to an amendment of the Regulation and to a change in the Commission's practices. The ECJ's *Brosmann Footwear (HK)* judgment also led to the Regulation being amended but, disappointingly, only to bring it into conformity with the Commission's practice.

The NER allows newcomers to have an individual dumping margin determined for them, which is generally lower than the residual AD duty in force. In cases where the original investigation used sampling, the applicant cannot be granted an individual AD duty but it may be entitled to NEPT, which is generally a significant improvement over the residual AD duty. In some cases the applicant may also be entitled to offer an undertaking.

The applicant enjoys important rights under the NER procedure, including rights of defence, rights of disclosure and access, confidentiality, and the right to intervention by the hearing officer. These rights not only offer a relatively high level of protection but also enable the applicant to materially influence the outcome of the investigation. Finally, the applicant can apply for judicial relief, directly challenging the final measure.

## References

### Books and commentaries

- McGovern, E 2010, *EU Anti-dumping and trade defence law and practice*, Globefield Press, Exeter.
- Van Bael & Bellis 2011, *EU Anti-dumping and other trade defence instruments*, 5th edn, Kluwer Law International, The Netherlands.

### Journal articles

- Adamantopoulos, K & Graafsma, F 2011, 'EU practice after DS397: old wine in an old bottle?', *Who's Who Legal*, November, viewed 28 April 2013, [www.whoswholegal.com/news/features/article/29373/eu-practice-ds397-old-wine-old-bottle](http://www.whoswholegal.com/news/features/article/29373/eu-practice-ds397-old-wine-old-bottle).
- De Baere, P 2012, 'The impact of EU and WTO dispute settlement on EU trade defence actions: towards a more level playing field?', *Who's Who Legal*, November, viewed 30 April 2013, [www.whoswholegal.com/news/features/article/30091/](http://www.whoswholegal.com/news/features/article/30091/).

### Regulations and decisions

- Commission Decision of 11 October 2001, *Stainless Steel Wire with a diameter of 1 mm or more* (India), OJ 2001, L 271/42.
- Commission Regulation (EC) 693/2005, *Certain electronic weighing scales* (China), OJ 2005, L 112/1.
- Council Implementing Regulation (EU) 1252/2009, *Chamois leather* (China), OJ 2009, L 338/12.
- Council Implementing Regulation (EU) 806/2010, *Polyethylene terephthalate film* (India), OJ 2010, L 242/6.
- Council Implementing Regulation (EU) 924/2013, *Iron or steel fasteners* (China), OJ 2012, L 275/1.
- Council Implementing Regulation (EU) 295/2013, *Polyethylene terephthalate* (Taiwan), OJ 2013, L 90/1.
- Council Regulation (EC) 1950/97, *Sacks and bags made of polyethylene or polypropylene* (India, Indonesia and Thailand), OJ 1997, L 276/1.
- Council Regulation (EC) 175/2000, *Leather handbags* (China), OJ 2000, L 22/25.
- Council Regulation (EC) 2744/2000, *Sacks and bags made of polyethylene or polypropylene* (India), OJ 2000, L 316/67.
- Council Regulation (EC) 823/2004, *Polyethylene terephthalate* (Thailand), OJ 2004, L 127/7.
- Council Regulation (EC) 1294/2004, *Stainless steel wire with a diameter of 1mm or more* (India), OJ 2004, L 244/1.
- Council Regulation (EC) 1941/2004, *Certain electronic weighing scales* (China), OJ 2004, L 336/1.
- Council Regulation (EC) 2143/2004, *Cotton-type bedlinen* (India), OJ 2004, L 370/1.
- Council Regulation (EC) 1652/2006, *Synthetic staple fibres of polyesters* (China), OJ 2006, L 311/8.
- Council Regulation (EC) 426/2008, *Castings* (China), OJ 2008, L 129/1.
- Council Regulation (EC) 727/2008, *Tartaric Acid* (China), OJ 2008, L 200/1.
- Council Regulation (EC) 906/2008, *Magnesia bricks* (China), OJ 2008, L 251/1.
- Council Regulation (EC) 91/2009, *Certain iron or steel fasteners* (China), OJ 2009, L 29/1, at recital 236.
- Council Regulation (EC) 393/2009, *Candles, Tapers* (China), OJ 2009, L 119/1.
- Council Regulation (EC) 681/2009, *Polyethylene terephthalate* (Malaysia), OJ 2009, L 197/18.
- Council Regulation (EC) 258/2009, *Hand pallet trucks* (China), OJ 2009, L 258/1.
- Decision of the President of the Commission of 29 February 2012, 2012/199/EU, OJ 2012, L107/5.

European Parliament and Council Regulation (EU) 765/2012, OJ 2012, L 237/1.

European Parliament and Council Regulation (EU) 1168/2012, OJ 2012, L 344/1.

### **Court judgments and World Trade Organization rulings**

ECJ, judgment of 2 February 2012, Case C-249/10 P, *Brosmann Footwear (HK)*, not yet published.

ECJ, judgment of 16 February 2012, Joined Cases C-191/09 P and C-200/09 P, *Interpipe*, not yet published.

General Court, judgment of 10 March 2009, Case T-249/06, *Interpipe*, E.C.R. 2009 II-383.

General Court, judgment of 13 September 2010, Case T-314/06, *Whirlpool*, E.C.R. 2010 II-5005.

World Trade Organization (WTO) Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice*, WT/DS295/AB/R.

World Trade Organization (WTO) Appellate Body Report, *EC – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R.

World Trade Organization (WTO) Panel Report, *European Union – Anti-Dumping Measures on Certain Footwear from China*, WT/DS405/R.

### **European Commission publications**

European Commission 2011, *The Hearing Officer in Directorate-General for Trade: an independent mediator to guarantee good administration in trade proceedings*, European Commission/Trade, viewed 26 April 2013, [ec.europa.eu/trade/](http://ec.europa.eu/trade/).

European Commission 2013, Proposal for a Regulation of the European Parliament and of the Council, 10 April 2013, COM(2013) 192 final, viewed 1 May 2013, [http://trade.ec.europa.eu/doclib/docs/2013/april/tradoc\\_150838.pdf](http://trade.ec.europa.eu/doclib/docs/2013/april/tradoc_150838.pdf).

### **Notes**

- 1 The Regulation was adopted prior to the Treaty on the Functioning of the European Union and therefore still refers to 'European Community' rather than to the European Union. The difference in wording has no legal effect.
- 2 Van Bael & Bellis 2011, p. 572.
- 3 Council Regulation (EC) 393/2009, at recital 145 and Council Regulation (EC) 91/2009, at recital 236.
- 4 See the sources in note 2; Van Bael & Bellis 2011, p. 574; McGovern 2010, §5714.
- 5 See Van Bael & Bellis 2011, p. 575.
- 6 Council Regulation (EC) 727/2008, at recital 3.
- 7 Council Implementing Regulation (EU) 806/2010.
- 8 Council Regulation (EC) 1950/97, at recital 30.
- 9 Council Regulation (EC) 1950/97, at recital 30 and Art. 1(2)(a).
- 10 Council Regulation (EC) 2143/2004, at recital 13.
- 11 Council Regulation (EC) 2143/2004, at recital 13.
- 12 Commission Decision of 11 October 2001, at recital 13; Council Regulation (EC) 1941/2004, at recital 11; McGovern 2010, §5714.
- 13 Council Regulation (EC) 2744/2000, at recitals 12, 14.
- 14 Council Regulation (EC) 727/2008, at recitals 12, 15.
- 15 Council Regulation (EC) 727/2008, at recital 13.
- 16 Council Regulation (EC) 1294/2004, at recital 13.
- 17 Council Regulation (EC) 1941/2004, at recital 11.
- 18 Council Regulation (EC) 1941/2004, at recital 11.
- 19 Council Regulation (EC) 1941/2004, at recitals 12, 13.
- 20 WTO Appellate Body Report, WT/DS295/AB/R, at para. 321.

- 21 WTO Appellate Body Report, WT/DS295/AB/R, at para. 323.
- 22 Council Regulation (EC) 175/2000, at recitals 15, 16.
- 23 Council Implementing Regulation (EU) 295/2013, at recital 27.
- 24 European Commission 2013, at recital 13 and Art. 1(4)(a).
- 25 Council Regulation (EC) 823/2004, at recitals 13 and following.
- 26 Council Regulation (EC) 823/2004, at recital 22. See also Council Regulation (EC) 1950/97, at recital 14.
- 27 Commission Regulation (EC) 693/2005.
- 28 This is not affected by the Commission's proposed revision of the provision, see note 24.
- 29 See, for example, Council Implementing Regulation (EU) 295/2013, at recitals 15, 16.
- 30 General Court, judgment of 10 March 2009, para. 54.
- 31 ECJ, judgment of 16 February 2012, not yet published, para. 77.
- 32 ECJ, judgment of 16 February 2012, not yet published, para. 76.
- 33 General Court, judgment of 13 September 2010, para. 115.
- 34 General Court, judgment of 13 September 2010, para. 115.
- 35 Van Beal & Bellis 2011, p. 503.
- 36 European Commission 2011.
- 37 Decision of the President of the Commission of 29 February 2012.
- 38 Council Regulation (EC) 727/2008, at recital 17; Council Regulation (EC) 1941/2004, at recital 13.
- 39 Council Regulation (EC) 426/2008, at recital 20.
- 40 Council Regulation (EC) 426/2008, at recital 10.
- 41 Council Regulation (EC) 906/2008, at recitals 16 and 42.
- 42 Council Regulation (EC) 906/2008, at recital 52; Council Regulation (EC) 1652/2006, at recital 40.
- 43 Council Regulation (EC) 906/2008, at recital 52; Council Regulation (EC) 1652/2006, at recital 41.
- 44 Council Implementing Regulation 1252/2009, at recital 8.
- 45 Council Implementing Regulation 1252/2009, at recital 10.
- 46 Council Implementing Regulation 1252/2009, at recital 11.
- 47 Council Regulation (EC) 681/2009, at recital 9.
- 48 Council Regulation (EC) 258/2009, at recital 12.
- 49 WTO Appellate Body Report, WT/DS397/AB/R; WTO Panel Report, WT/DS405/R.
- 50 European Parliament and Council Regulation (EU) 765/2012.
- 51 Council Regulation (EC) 91/2009, paras 364, 365, 369.
- 52 Adamantopoulos & Graafsma 2011.
- 53 For a detailed examination of the questions, see Adamantopoulos & Graafsma 2011.
- 54 Council Implementing Regulation (EU) 924/2013, at recital 138.
- 55 ECJ, judgment of 2 February 2012, not yet published, at para. 30 and following.
- 56 European Parliament and Council Regulation (EU) 1168/2012.
- 57 See De Baere 2012.

### Eric Pickett



Eric Pickett, an American and licensed German lawyer with the Pickett Law Firm ([www.pickett-law.com](http://www.pickett-law.com)), located near Frankfurt, Germany, advises clients on European Union customs law and trade remedies, including anti-dumping and countervailing measures, and World Trade Organization law.