SOP of the Potato Starch China CVD Expiry review (1st dec 2016)

Background

- **Economic Value**: 28 Mio EUR in 2006 (original case); and 14 Mio EUR of EU exports to China in 2015.

- In 2006, this was the **first AD proceeding by China concerning an agricultural product**.

- **Main EU countries concerned**: DE, FR, NL, AUS.

- **Main legal concern**: China is challenging a key outcome of the latest CAP reform, a subsidy scheme that has not been notified to the WTO yet, namely the basic payment scheme (BPS) (see below).

- **CVD duties** range between 7.5% and 12.4%.
- **AD duties** (AD review concluded in Feb 2013 for 5 years) range between 12.6% and 56.7% (France, company Roquette).

Procedure

- **Expiry of the original China CVD measures**: 17 sept 2016 (after 5 years).

- On 7 sept 2016, TRADE+AGRI+NL+AUS held pre-initiation consultations by means of a teleconference with MOFCOM TRIB. TRADE and AGRI summarised the content of the submission (6 pages) which tackles extensively each alleged subsidy. China merely listened without engaging on substance.

- **Summary of the submission**: Allegations contained in the complaint concern either subsidy programmes that have been terminated several years ago, or subsidy programmes that are not product specific and therefore do not target the product concerned, or that are not otherwise countervailable under the WTO ASCM. The petitioner identified the following subsidies:
  1. An upstream subsidy allegedly received by starch potato growers;
  2. a direct subsidy allegedly received by potato starch producers;

  ----→EU reply: the first 2 support schemes mentioned (the upstream subsidy and the direct subsidy) have fully disappeared during 2012.
  3. the EU single/basic payment scheme (SPS/BPS);

  ----→EU reply: the SPS scheme is not applicable anymore as it has been replaced by a new scheme: the BPS. BPS is a new subsidy scheme and as such will be notified to the WTO in the course of 2016. EU considers that BPS is not trade-distorting according to WTO provisions, is not linked to production, is not linked to price intervention or price support and under the WTO context is considered to respect the provisions contained in Annex 2 of the WTO agreement on Agriculture (i.e.: green box subsidies). The Basic Payment Scheme is in fact a payment granted with no requirement to produce. It is an income support decoupled from production.
  4. national subsidies allegedly granted by the Netherlands and Austria.

---->EU reply: With regard to the national schemes the situation is even worse since the complainant has provided absolutely no evidence and no specific schemes have even been identified. The evidence merely consists in extracts from annual accounts of NL and AUS companies.
French Caisse central de re-assurance was also targeted in the questionnaire.

- **On 14 sept 2016, MOFCOM dispatched the NOI, disregarding completely our arguments.** MOFCOM probably did not even read our submission.

- Expiry review investigation starts officially on 16 sept 2016, and **shall normally be concluded on 15 sept 2017**.

- Measures remain in place pending conclusion of the investigation.

- FM+CB meet the industry Federation (Starch Europe) on 21 sept 2016.

- **1st dec 2016 : EU files submission+government intended questionnaire reply in EN (100 pages) and in CN with MOFCOM, containing contributions from DG AGRI, TRADE, FR, NL, AT.**

- **Dutch company AVEBE also submitted a questionnaire reply**.

- **Starch Europe submitted a submission**.

Legal ground for the expiry review

- Article 21.3 of the WTO Agreement on Subsidies and Countervailing Measures: ***"duty shall be terminated 5 years from imposition of measures, unless the authorities determine that the expiry of the duty would be likely to lead to continuation or recurrence of subsidisation and injury"*.**

- Concept of Likelihood of Continuation or recurrence is very broad.

- Subsidisation: even a residual countervailable subsidy can be regarded as evidence of continuation of subsidisation.

- Article 3 of the WTO Agreement on Subsidies and Countervailing Measures: Prohibited subsidies are subsidies contingent upon export performance, or upon the use of domestic over imported goods.

- Article 2 of the WTO Agreement on Subsidies and Countervailing Measures: a countervailable subsidy is a subsidy that is specific to an industry or to a geographical region.

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- Injury: also relatively easy to show that domestic industry is still fragile (injury indicators such as sales, production, profitability, capacity utilisation, employment), or risks suffering injury in case subsidisation reoccurs (MOFCOM will look at production, capacity, prices, exports to third markets of EU industry in order to assess risk of diversion to Chinese market if measures are lifted)

- In our submission/questionnaire reply: we argue that EU subsidisation has disappeared under the CAP reform, and that continuing injury is due to other factors (overcapacity, inefficiency, absence of restructuring) since Chinese industry is shielded from EU competition for 10 years.

Future?

- MOFCOM will have to address seriously each of the arguments submitted by cooperating parties.

- Challenge MOFCOM decision with local Courts

- Challenge MOFCOM decision in the WTO.

- EU starch industry could buy out the Chinese complainants, or conclude a gentleman agreement with the Chinese complainants (like in the wine sector)

- MOFCOM's informal practice is to have 10 years of measures (i.e. just one expiry review) and then stop measures.

- Feb 2018: second expiry of AD measures: we will see if MOFCOM applies its informal policy.