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More Efficient Policies to Combat Trade Distortions: How Quality Management Programmes Can Help Rationalize the Use of Trade Defence Instruments

An Illustration in the European Union

Stefaan Depypere & Mélanie Delots*

The existence and the use of Trade Defence Instruments (TDIs) are controversial. In the present article, we will argue that the present set of rules has advantages and deficiencies. We will argue that a better set of rules can be worked out for an ideal world but that we are not ready for an ideal world. In the meantime, we need to work with the rules as they exist.

Even for the implementation of the existing rules, we can think of a radically different manner to proceed, for instance, by organizing the policy implementation at central level, in the WTO. Here again, we may be in dreamland for the years to come.

When we then move to the real world, we will argue that the way forward lies in increasing the quality of the work by all the authorities that implement TDI and by increasing the communication and cooperation between those authorities. This may lead to reducing trade friction caused by cases.

We will describe a major effort undertaken by the European Union to implement a quality management programme and we will discuss the possibilities for the authorities of EU's trading partners to cooperate in this effort and to benefit from it.

1 INTRODUCTION

Trade Defence Instruments (TDIs) are based on solid legal ground resulting from multilateral negotiations at WTO level. The current instruments, comprised of anti-dumping (AD), countervailing (CVD), and safeguard (SFG) measures, are

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governed by rules defined consensually by all WTO members and formalized in the latest international trade round in 1994, that is, the Uruguay Round.[1]

The perception of TDI varies. On the one hand, they are the only effective protection against injurious unfair trade or an injurious sharp increase in imports and supported as such by domestic industries of WTO members. On the other hand, some economists and practitioners perceive them as a trade barrier prone to abuse in times of protectionism and inefficient to combat the root causes of unfair competition in world trade. There is merit in looking at these instruments in different terms: how do we think these instruments should evolve or how can they be applied in order to address concerns of both camps, and what can be done to facilitate this evolution?

This article intends first to examine the most criticized pitfalls of TDI and discuss possible short- or long-term solutions. Assuming, in a realistic approach, that the multilateral rules defining TDI will not be fundamentally modified in the foreseeable future, the attempts to improvement should focus on the terms of implementation of the current rules. This is where quality management programmes can provide valuable help, as will be explained in section 3. Section 4 will illustrate this idea by the recent move towards quality initiated in the European Union (EU), within the existing legal framework. This exercise is still ongoing, but the first results already achieved may convince other countries that quality improvement in TDI is both possible and worthy, for the benefit of both national economies and third-country stakeholders.

2 TDIS ARE CONTROVERSIAL BUT THEY ARE NEEDED

The existence and use of TDI are controversial. This should not come as a surprise. Markets are powerful instruments to deliver economic results, but markets can be manipulated by companies and governments. Yet, markets lose much of their efficiency and even of their legitimacy, when people become aware of the manipulation. In an efficient internal (or national) market, such distortion is avoided by policies of market regulation, including an extensive competition policy. In the international sphere, there exists relatively little market regulation and implementation of competition rules. TDIs institute a consistent set of properly codified rules. However, two main reproaches are commonly made to these tools: first, they only focus on price discrepancies and cannot replace a

[1] Agreement concluded in Marrakech in 1994 but transformed in definitive legal text in the framework of the WTO in 1995. The AD instrument is defined in the 'Agreement on implementation of Article VI of the General Agreement on Tariffs and Trade'. The anti-subsidy instrument is defined in the 'Agreement on Subsidies and Countervailing Measures'. The safeguard instrument is defined in the 'Agreement on Safeguard Measures'. These documents can be consulted at <www.wto.org/english/docs_e/legal_e/legal_e.htm>.

full-fledged regulation able to address the root cause of trade distortions; second, they can be abused by governments with protectionist aims independently of any real trade distortions.

2.1 A REMEDY UNABLE TO TACKLE THE ROOT CAUSES OF TRADE DISTORTIONS

Market regulation is only slowly advancing in the international negotiation agenda (TRIPS, Agreement on Government Procurement (GPA), …) and remains very controversial (think of the respect for Geographical Indications[2]).

As for competition rules, there is some scope for an extraterritorial application of the rules, even if this option is available only to very big players. There exist quite some conceptual links – for that matter – between applying competition rules extraterritorially and implementing TDI.[3] Furthermore, important efforts are made by competition authorities to discuss the structure of the rules and their implementation and to cooperate in certain cases at an international level. Here, we see much analogy with the way forward in applying the TDI policy.

Obviously, when the trade liberalization was first pursued on a more basic level of quota elimination and tariff reduction, international market regulation was out of the question and the economic agents had to find a more direct and practical manner to handle the problem of distorted trade. There was a perception that certain goods were 'dumped' on the market, thereby endangering the existence of national producers. Just like dominant players could squeeze a local producer out of the market. AD regulation was formally introduced progressively from the end of the nineteenth century onward, in parallel with antitrust rules (it was part, for example, of the Sherman Act) and as the international version of the competition rules. TDI became the 'safety valve' in international trade. It has remained and was progressively refined in the various trade negotiation rounds and through case-related evolution.

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[2] Geographical indications (GIs) refer to the region where a product is made. The EU proposes that they should be respected, i.e., products cannot claim a reference to an established GI if they are not actually produced in that region. Although this seems pretty obvious, the respect of GI leads to much controversy.

[3] For example, both AD rules and competition rules can be applied against predatory conduct – note, however, that AD rules of a scope of application go beyond predatory pricing. Equally, the objective of CVDs is similar to state aid control. On the other hand, the institutional setting of TDI differs from competition policy. For instance, the investigative powers of competition authorities are typically more extensive than those available to TDI investigators. In both cases, companies in an exporting country are subject to respecting a certain market discipline (such as modifying their product offer or respecting a price discipline), must pay a fine, or see their sales affected by an extra duty. In both cases, foreign economic interests collide with the interests of national producers. Depending on the case in question, interests of consumers can be aligned with those of the exporters (at least in the short run).

In recent years, the use of TDI has been very criticized by various stakeholders. Economists argue that TDI does not address the root causes of the distortions and that it is open for abuse.[4] Both arguments are correct up to a point, but we disagree with the explicit or implied conclusion that TDI should be abandoned. At least in the short run, this is not realistic.

A number of practitioners – mostly lawyers – have criticized the way TDI are being implemented.[5] We think that the authorities are well advised to study these comments and to adapt their policy accordingly.

Some stakeholders – especially those thinking about the very short-term results of their companies – argue for TDI to be abandoned. They portray TDI as an undue interference with free trade. This is short-sighted because it is undeniable that there exists an objective economic problem of possible trade distortion and that there must be a solution to remedy this problem.

For exporting companies, dumping is an economically rational behaviour, as long as the home market and the foreign market are separated (e.g., by tariffs protecting the home market), enabling firms to charge different prices in each market. Firms operating out of a protected home market may recover the full cost of their production on the protected market and sell their goods on third markets at less than full cost but more than variable cost. They can, thus, maximize profitability and can even compete against otherwise more efficient rivals, leading to an inefficient allocation of resources.

For producers in the importing country, dumping can be a mere nuisance or can be injurious, when the dumped goods come in at a price that is lower than needed to recover full cost plus a reasonable profit margin (in EU terminology: when there exists 'underselling').

For governments of exporting countries, it can be rational behaviour to subsidize their companies when conquering new foreign markets with higher value products or for selling the goods on third markets to solve a problem of overinvestment or to maintain employment targets. If the industry in the third market disappears in the process, this is an extra bonus for the longer term.

What is rational for exporting companies or for their governments is not necessarily economically efficient or socially acceptable in the importing country nor acceptable for the world trade system. Otherwise efficient companies can be ruined by distorted trade or will underinvest in new production capacity if they are uncertain about the rate of return of their projects. The trade distortion

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4 See B. Hoekman & M. Kostecki, *The Political Economy of the World Trading System*, 3rd edn (Oxford: Oxford University Press, 2009).

5 For instance, in the project 'Ten', practitioners identify ten problems with the policy implementation in various jurisdictions. See E. Vermulst & G. Horlick, 'Problems with Dumping and Injury Margin Calculations in Ten User Countries', *Global Trade and Customs Journal* 2, no. 1 (2007).

artificially modifies the perceived comparative advantages of both trading nations and sends out the wrong market signals.

Hence, the need for an instrument like trade defence.

The mere existence of TDI and insurance that they will be correctly applied when needed allow economic agents to maintain their confidence in the open trade system and its further liberalization. We frequently compare TDI with the travel insurance on the liberalization journey. One hopes that it will not be needed, but one is pleased to have it when problems arise and one may refrain from starting a new journey without proper insurance. In this sense, TDI contributes positively to a liberalization agenda.

As we have briefly indicated above when discussing market regulation, we could agree with the economists and imagine a more efficient solution, but it is unlikely that the international negotiations will sufficiently move forward to consider replacing TDI in the foreseeable future.

It is worth reminding nevertheless that trading nations can live without TDI. Inside the EU, when the Union was still basically a customs union and not an economic union, TDI – to be applied on intra-community trade – was foreseen in the rules at the start (Article 91 of the EEC Treaty). It was barely used in practice by the end of a transitional period in 1969, when the internal market regulation and the competition policy were considered to be sufficiently established. Intra-community TDI was formally abolished on 1 January 1993 when internal customer borders were suppressed and repealed by the Treaty of Amsterdam on 2 October 1997.[6]

So, trade distortions could be avoided by a coordination of policies concerning competition rules and market disciplines at international level.[7] The EU integration policy could be considered as a laboratory for the world economic governance in this respect. It may be worth thinking about a programme that would move in this direction for future negotiation rounds. This would result in

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[6] Historical references are provided by W. Müller, N. Khan & T. Schafin, *EC and WTO Anti-dumping Law – A Handbook*, 2nd edn (Oxford: Oxford University Press, 2009).

[7] Several proposals in this direction were formulated in R. Hoekman & P. Holmes, 'Competition Policy, Developing Countries and the WTO', *The World Economy* 22, no. 6 (August 1999). The authors explain how international competition could benefit from an agreement in six fields: minimum substantive standards of antitrust law, the prohibition of export cartels, the introduction of antitrust criteria in AD, the expansion of the scope of non-violation complaints to competition issues, a greater transparency and 'discovery' role of the WTO, and the adoption of procedural and due process norms. However, they consider that diverging interests between WTO members will render a multilateral agreement on international competition policy beyond the last two proposals unlikely. The proposed actions would be more easily accepted in the framework of plurilateral agreements. All countries would also benefit from the creation of national competition law, for those which do not yet have one: This would provide them with tools to fight anticompetitive behaviour of both national firms, such as pre-existing monopoles, and of foreign companies importing on their domestic markets as a consequence of trade liberalization. Free trade and competition law are thus complementary according to the authors.

reinserting the so-called Singapore issues into the negotiation. However, such a coordination will need a long period of time to develop and even longer to bear its fruits. Even in the EU, it took several decades of consistent attempts to introduce and enforce efficient internal market disciplines and a respected competition policy.

In the meantime, the available tools aiming at combating structural trade distortions will continue to consist in negotiations, dispute settlement, and unilateral action as a last resort. All of them can bring solutions in the long term but not fast enough to counteract the immediate economic effects of dumping or subsidization.

TDIs, therefore, remain an imperfect but straightforward tool to counteract specifically dumping and subsidization or to offer a temporary protection in case of unexpected import surges. Nevertheless, the important second criticism on TDI, namely that it is subject to abusive use, remains.

2.2 A TOOL SUBJECT TO ABUSE, ESPECIALLY IN TIMES OF CRISIS

TDIs are, in an increasingly open and global world, the only legal tool allowing governments to reintroduce temporary tariffs in excess of agreed tariff reductions agreed in successive GATT rounds or – in the case of safeguards – to impose import quotas. There can be a temptation to use this tool for a different purpose than the intended legitimate defence against injurious and unfair trade practices.

The multilateral rules defining TDI are not always drafted with the desirable degree of precision and are not centrally implemented. This results in different interpretations and shortcomings in their administration by WTO members.

The multilateral agreements on AD, CVD, and SFG measures contain a number of minimum standards that have to be respected when applying them (e.g., concerning procedural requirements and on the general way to perform the various calculations). However, in the absence of any neutral international body that would be in charge of conducting the corresponding investigations following a complaint by any WTO member,[8] the implementation of these tools relies on each individual WTO Member State.

WTO members, therefore, have to transpose the minimum agreed standards in their national law. They also need to develop their own national policy on topics not explicitly specified by WTO law. The areas where such decentralized policy building can take place are quite numerous in view of the technical nature of AD

[8] The creation of such an international investigation body is suggested by J. Stiglitz, *Making Globalization Work* (New York: W.W. Norton, September 2006).

and CVD calculations, covering, for instance, the determination of normal value in case of insufficient domestic sales or imports from non-market economy countries or the comparability between product types intended for domestic use or for export sales to quote only a few.[9]

It has to be noted that in some cases the decentralized implementation of WTO rules has led to beneficial innovations. Some WTO members like the EU have created additional obligations that make it more onerous for domestic industry to get trade defence measures adopted, such as the introduction of a mandatory lesser duty rule that brings down considerably AD and CVD duties or an economic interest test that ensures that AD or CVD measures do not have disproportionate effects on downstream users of the product subject to investigation.[10]

It remains that varying interpretations of apparently minor aspects of TDI rules can have a high impact on the number of investigations initiated (depending on the initiation standards), on the results of the investigations, and on the average level of AD duties imposed: As often, the devil is in the detail.

TDI can, thus, be misused to close economies to foreign competition in reply to concerns about the negative adjustment effects of trade liberalization. Such a temptation increases in times of economic downturn, irrespective of whether or not the downturn is caused by dumped or subsidized imports. This is a serious point, as such behaviour, if generalized, would lead to a global decrease of trade exchanges likely to worsen the economic situation of all players. Such abuse would also lend credibility to claims of TDI opponents and may eventually put into question the legitimacy of the only existing 'safety valve' in the WTO system.[11] There is also a danger that TDI are applied in a retaliatory manner when authorities look less at the merits of cases that are brought but rather at measures introduced by trading partners.

The recent economic crisis provides an interesting opportunity to observe whether this behaviour has materialized. On the one hand, more trade distortions could have been expected both from private and public actors: the fall in demand

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9 For more examples of diverging interpretations, the reader can refer to Vermulst & Horlick.

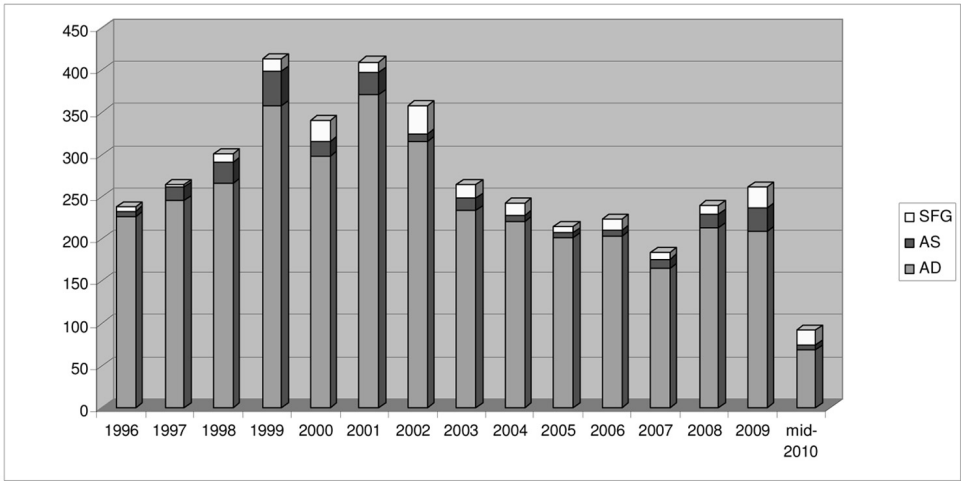
10 A detailed list of WTO-pluses implemented in the EU can be found in Stefaan Depypere & S. Nardelli, 'Comments on the Use of Trade Defence Instruments against the EU in the Current Economic Downturn', *Global Trade and Customs Journal* 4, no. 9 (2009).

11 This image was also proposed by G. Depayre, 'Anti-dumping Rules: For a Predictable, Transparent and Coherent Application – A European View', *Global Trade and Customs Journal* 3, no. 4 (2008). The existence of TDI can help convince domestic industries and public opinion to accept further trade liberalization since it goes along with a sort of insurance against anticompetitive behaviour from foreign competitors. This is confirmed by the usual pattern following the liberalization of a new user's market: increased use of TDI right after the liberalization, followed by a gradual tapering off. In this respect, TDI is a safety net against injurious trade practices and also against national demand for protectionism.

caused manufacturing overcapacity worldwide and created an incentive for companies to dump product in order to fight for sales and market shares; meanwhile, governments felt urged to support their national industries via emergency subsidies schemes. On the other hand, more abuse of TDI could also be expected as governments could yield to the protectionist temptation and try to shield domestic producers from foreign competition, whether it be fair competition or not.

The two phenomena could have led to a massive increase of new TDI investigations and TDI measures worldwide. The WTO made efforts to monitor possible trade protection trends carefully and it found that that the big rise did not take place (see Table 1 below).

Figure 1. Initiation of New Anti-Dumping, Anti-Subsidy and Safeguard Cases by Main Reporting WTO Members (Initiations for the Period of 1 January 1996 to 30 June 2010 – Data Source: WTO)



It is also worthwhile to examine per country the intensity of the use of TDI. This can be done by comparing for each country the number of TDI actions with the volume of imports in this country. The result of this comparison shows that big importing countries have been very moderate since the beginning of the crisis (see Table 1 below). It should be highlighted that certainly India and Argentina stand somewhat out with the number of initiations as compared to their imports. Finally, it is interesting to note that China maintains in terms of numbers of initiations a TDI activity that is structurally not different to that of other big WTO members.

Table 1 Ratio of 'Initiation of Cases to Import Value' per Country in 2009 and 2010 (Data Source: WTO) – *Only First Semester 2010. No Data Available for the Second Semester

Main Reporting WTO Members	*Year of Initiation*					*World Import Trade (*Billion, 2010)*	*Number of Cases Initiated in 2010 per Billion Dollars of Trade Imports (and Figure for 2009)*
	2006	*2007*	*2008*	*2009*	*2010*		
India	34	49	55	42	40	323	0.124 (0.172)
USA	7	36	22	34	6	1968	0.003 (0.021)
Turkey	14	10	27	7	2	185	0.011 (0.050)
Brazil	13	14	24	9	37	191	0.194 (0.067)
P.R. China	10	4	15	20	9	1395	0.006 (0.020)
Argentina	11	7	20	27	14*	56	0.250* (0.543)
South Africa	3	6	5	4	0	94	0 (0.56)
Australia	9	3	8	10	8	202	0.040 (0.061)
Korea (Republic of)	3	15	6	0	3	425	0.007 (0)
Canada	9	2	6	7	3	402	0.007 (0.021)
EU	36	9	20	21	18	1977	0.009 (0.013)

It is, of course, still too early to assess the full effects of the crisis, as the impact in terms of TDI may take several years to develop. However, it is not an outlandish hypothesis to accept that the very existence of TDI may have deterred economic operators from solving their problems through dumping on third-country markets or to claim aggressive subsidization.

Acknowledging that TDI will continue to be necessary but that a risk of abuse exists, actions aiming at mitigating this risk are necessary. This could be achieved by the clarification of the rules, increasing the procedural rights of parties, increased attention for a proper implementation of the rules, increased cooperation between TDI authorities, and the tightening of criteria defined at WTO level.

At WTO level, guidance can come from the dispute settlement system (either from panels or from Appellate Body decisions) or from the multilateral negotiations. At local level, important improvements in this direction can be achieved if TDI authorities focus on quality management.

3 HOW QUALITY MANAGEMENT CAN HELP

Even if TDIs feature certain design flaws[12] when benchmarked against an ideal, we argue that the set of TDI rules can be applied correctly. We also argue that a correct application is imperative; otherwise, the cure is worse than the disease and the authorities would be well advised to heed the recommendation by Hippocrates ('First: do no harm').

3.1 Four conditions for applying TDI correctly

First, a TDI authority must be capable of applying the rules. It must have *adequate resources*, with sufficient staff and material resources to do a proper job. The staff must be trained to understand this complex set of rules and the financial techniques that are needed to implement them. Even if TDI are based on a very simple idea (e.g., for AD: Exporters should not sell below the normal value of goods if this injures the industry of the importing country), the rules have progressively become very complex. Without proper theoretical and practical training, it is not possible to apply the rules correctly.

The secretariat of the WTO plays a crucial role in offering technical assistance and training. We would argue that more can be done in this respect and that experienced users of TDI should be available to help increase the professional standards of their colleagues in other jurisdictions. TDI should not be applied, unless it is done properly.

Second, even if technically competent, the staff of the authority should be subject to very *high ethical and professional standards*. They should make major efforts to establish the facts and to undertake an unbiased, objective analysis of these facts. They should avoid introducing any type of consideration that is not foreseen by the agreed rules or applying these rules in a discretionary or selective manner. The policy should be predictable and consistent.

Third, it is desirable that the application of TDI is subject to *intensive scrutiny by the interested parties*. TDI decisions have major consequences for the economic operators with opposing interests. All operators must be convinced that the decisions are correct (even if they do not like the decision as such, they must be convinced that the decision was taken according to the rules). Obviously, there exists the possibility of recourse to a national Court (or to the European Court of Justice in the case of the EU) and the WTO dispute settlement mechanism. Yet, this ex post review is not sufficient. Already during an investigation, there should be a high degree of transparency and the possibility for parties to study the facts

[12] No implied criticism at all vis-à-vis the negotiators who agreed on these rules.

and the provisional conclusions and to present arguments before any final decision is taken.

Finally, the authority that is entrusted with the implementation of TDI should refrain from being guided – both during the investigation and when decisions are taken – by considerations that are outside the legal framework.

All this can usefully be looked at from a quality management perspective. Quality management techniques have been very instrumental to bring industry to the high levels of efficiency and reliability that are achieved nowadays. We think that public authorities are well advised to apply similar techniques where they implement policy.[13] In particular, quality could foster progress in areas for improvement common to most TDI administrations, thereby addressing concerns of both supporters and opponents to TDI.

3.2 Quality management: a strategic tool also relevant to the public sector

Quality can be defined as the compliance with customer needs, whether these needs are expressed explicitly or not. Quality management consists in a set of tools used to direct and control an organization with regard to quality.[14] These tools have been refined over time, from mere quality inspection at the end of the production chain to quality insurance methods aiming at analysing the causes of defects during the production process and solving them and up to the current approach of Total Quality Management (TQM) that strives to embed customer orientation in the very design of an organization, in its culture and its processes. In a nutshell, TQM recommends aligning strategic choices of an organization with its customer needs ('Do the right things'). It encourages all staff from all departments involved in a specific process (from a need to a product, from order to delivery, from sales to cash …) to cooperate in order to continuously improve this process and increase the satisfaction of the final beneficiary/customer ('Do things right'). It strives towards 'built-in' quality for every task in a process, by raising awareness of staff and engaging them in the continuous improvement cycle ('Plan-Do-Check-Act', also called Deming's cycle).

Modern quality management clearly belongs to the set of strategic tools used by top management to steer an organization towards success. For a private company, understanding customer needs and satisfying them is a vital necessity to

[13] Arguably also when they produce policy, but this is another argument.

[14] As defined in the *International Standard ISO 9000*, 3rd edn, 2005-09-15. The eight principles of quality management are also explained in this standard: customer focus, leadership, involvement of people, process approach, system approach to management, continuous improvement, factual approach to decision-making, mutually beneficial supplier relationships.

avoid losing market share and revenues. Quality management is, therefore, an essential condition of competitiveness for both industrial and service operations, the best illustration of this being the impressive recovery of Japanese industry competitiveness after WWII, induced by large-scale quality improvement programmes designed with the help of W. E. Deming.[15] For public administrations that are not driven by market forces and without any competitors, the need to focus on customer needs and to resort to quality management programmes does not seem so pressing at first sight. However, delivering useless or bad services will, in the long term, lead to criticism from taxpayers and to questioning the existence of the organization at the next administrative reform. Delivering bad quality services would more immediately expose the administration to disputes and reversals in Court,[16] thereby damaging its credibility with national citizens and foreign counterparts. Moreover, a TDI authority whose actions affect foreign stakeholders, by delivering a bad quality service, could expose some domestic stakeholders to similar treatment by other countries' administrations. By striving towards quality service for all stakeholders, public organizations are, therefore, applying the public interest principle while still returning value to their domestic taxpayers and legitimating their very existence.

Public administrations, therefore, have an interest in focusing on their customer needs, and some quality management tools have been specifically designed to help them identify and comply with customers' expectations. As regards more specifically TDI authorities, the same quality challenges are likely to be detected whatever the quality management system applied, as a result of some structural flaws enshrined in the design of these instruments. Similar improvement actions could, therefore, be valid for all countries and define a common path towards quality in TDI practices.

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[15] W. Edwards Deming (1900–1993), initially an American statistician, became an international consultant in quality and productivity management and considered as the father to TQM. He became famous in Japan where he taught top management to improve quality from 1950 onward. His teaching reached the US audience much later, in the 1980s. He described his theory of management in fourteen principles to the attention of American companies and government in *Out of the Crisis* (The MIT Press, 2000), 1st edn, 1986, completed later by *The New Economics for Industry, Government Education*, 2nd edn (2000), 1st edn, 1993.

[16] A lawsuit could be seen here as a kind of quality inspection. This is why a strong and independent legal system, whether at national or WTO level, can bring some discipline in TDI practices. This is, however, the basic stage of quality management (quality inspection done a posteriori and conducted by an external body) and relying on this simple system would not prevent possible damage to the image of the organization.

3.3 Practical application of quality management to TDI practice

3.3[a] *Reduce Unpredictability Linked to Diverging Interpretations of Rules or Mistakes*

The complexity of WTO rules defining TDI and the decentralized implementation of these rules can result in diverging interpretations and possible mistakes. As a consequence, it may be difficult for parties cooperating in an investigation to anticipate which policy will be followed by each country and to predict the result of an investigation ceteris paribus, let alone detect suspicious infringements to the established policy. The same phenomenon of diverging practices can even appear within big organizations comprised of several departments in charge of investigations when these departments work in silos.

This unpredictability issue can be addressed by developing actions to reinforce the transparency and consistency of analyses in TDI proceeding. Identifying the internal need for policy guidance, defining implementing guidelines at national level, and making such guidelines public would increase the TDI 'literacy' of stakeholders. Developing standardization tools (standard questionnaires, standard calculations rules, disclosure templates, calendars of procedures), enhancing the training of staff, and establishing intermediary checkpoints and process audits would ensure that these guidelines are indeed enforced systematically and in a consistent manner.

3.3[b] *Improve Rights of Defence of All Parties without Prejudice to Business Secrets*

TDI services have legitimate reasons to restrict access to investigation data and information on proceedings. Dumping and injury calculations are based on sensitive business data provided by companies cooperating in the investigation, such as costs of production, domestic and export sales, or profitability. This cooperation is crucial for the credibility of the investigation but is obviously consented under strict confidentiality constraints, which limit the ability of other parties to check the data and methodology used for the calculations and detect possible mistakes.[17] As regards procedural aspects, the high financial stakes of a TDI investigation make any early information on the opening or on the conclusion of a proceeding valuable and special care has to be taken to avoid unintended and asymmetrical disclosure of such information. Transparency on procedural steps can also increase the pressure exerted by interested parties on decision-makers at

[17] The USA is a noteworthy exception, as lawyers can access the full confidential file of an investigation, with prohibition to share the business secrets with their customers and with heavy penalties in case this rule is breached. Most other countries do not enjoy a similar legal framework though and protect business data by simply restricting access to it.

critical stages and increase the risk that the final decision is not made on the basis of technical and neutral criteria. However, restricting information on procedural steps can deprive interested parties from an opportunity to exert their rights of defence.

Transparency should, therefore, be improved within the limits imposed by the need for business data protection and with equality of treatment between all parties in mind. Transparency of procedures and fact-based decision-making are precisely two other key principles of modern quality management. This can be achieved, for instance, by publishing deadlines of an investigation from the start, by facilitating access to data and analyses performed, by enriching the content of any disclosure, by improving the meaningfulness of the non-confidential summary of the file, by allowing inspection of the case file in a simple manner (i.e., electronically and remotely), and by providing an official, transparent, and accessible channel to challenge conclusions of a TDI administration (such as confrontational hearings or reasonable time to comment after disclosure).

3.3[c] *Simplify the Requirements to Parties without Sacrificing the Accuracy of Analyses*

Several factors contribute to the complexity of TDI investigations. First, WTO agreements foresee that the findings of TDI investigations have to be based on accurate data ideally verified on the spot at the cooperating parties' premises.[18] The more accurate the data required from companies, the more burdensome the investigation process becomes for parties. Second, efforts towards more transparency typically translate into additional tasks for companies such as participation to multiparty hearings or provision of meaningful non-confidential summaries of sensitive information. To manage such a complexity, companies may choose to hire TDI experts, whether internal or outsourced in law firms, this resulting in additional costs. In addition, complex and lengthy procedures result in longer uncertainty for parties and markets until the final measures are known. The mere existence of an investigation can, therefore, penalize companies investigated whatever the final outcome of the case. Low initiation standards can exacerbate this phenomenon and could constitute another form of abuse of the instruments. Reducing the burden for parties and speeding up the investigations could, therefore, counteract the negative consequences of initiating new cases.

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[18] Article 6.7 of the WTO Anti-dumping Agreement starts as follows: 'In order to verify information provided or to obtain further details, the authorities may carry out investigations in the territory of other Members as required, provided they obtain the agreement of the firms concerned and notify the representatives of the government of the Member in question, and unless that Member objects to the investigation. […]'.

This would also benefit the TDI administrations themselves as complex requirements also entail additional processing tasks such as handling huge databases of transactions, conducting longer verification visits, applying complex adjustments, and so on. At a time when public budgets have been put under pressure as a consequence of the economic crisis, the possibility to spare resources by avoiding over-processing and unnecessary procedural steps whenever possible should be considered. This is all the more crucial for developing countries that already allocate scarce resources to TDI but nevertheless have to respect minimum standards imposed by the WTO rules.

This objective of simplification is at the heart of another series of quality management tools grouped under the 'lean' label and that were successfully developed and implemented in the industry. By identifying which tasks really create value to the customer's eyes, by eliminating as much as possible the other tasks (including rework caused by errors) and by making the product flow without stopping between tasks, lean techniques allow to deliver services or products faster, with less efforts and with a better quality.[19] When applied to TDI, such tools could lead to a simplification of questionnaires and calculation rules, to automated calculations, to swifter internal consultations, and to a better quantification and management of internal capacity.

3.3[d] *Develop Communication with Stakeholders to Defuse the Debate and Improve Continuously*

TDI investigations are designed as quasi-judicial proceedings, and for obvious ethical reasons, exchanges with interested parties on a specific case have to be limited to the official frame provided by questionnaire replies, verification visits, disclosures, and hearings. However, developing regular contacts with the various stakeholders to discuss possible improvement is a keystone of any quality management system as it is essential to ensure both customer focus and continuous improvement.

By listening to stakeholders, TDI administrations can detect possible dissatisfaction and decide to launch corrective actions or explain possible limitations before discontent is expressed publicly. By communicating the feedback from stakeholders to staff, and completing it with objective measurements, it is possible to raise awareness and see spontaneous inflection in behaviour at individual level, which is the ultimate achievement of quality management.

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[19] Concrete examples of results achieved in the industry can be found in J. Womack & D. Jones, *Lean Thinking*, 2nd edn (Simon & Schuster, 2003). Further examples in the service sector and public administrations such as municipalities or hospitals are provided in M. George, *Lean Six Sigma for Service* (Mc GrawHill, 2003).

The examples provided above show that operational management in implementing WTO rules is essential to ensure a correct use of the instruments. They also provide concrete ideas to improve quality in terms of consistency of analyses, transparency of proceedings, efficiency of the investigations, and communication with stakeholders All TDI authorities would gain credibility by implementing quality management methods. The EU TDI services have started such a programme in 2009 and achieved some significant results already after one year.

4 THE PRACTICAL EXPERIENCE OF TQM IN THE TDI SERVICES OF THE EU

4.1 How the EU applies TDI

The EU has traditionally been critical of the TDI. It has argued for a firm but moderate use, and it has even added unilaterally certain moderating features to the agreed rules. It has introduced, for instance, a 'lesser duty rule', which has a very moderating effect on the level of the duties. As a comparison, the duty levels for similar products subject to measures are generally much higher in the USA than in the EU:[20] for instance, at the end of 2005, measures imposed on hand pallet trucks imported from China varied from 7.6% to 46.7% for the EU duties and from 26.49% to 383.6% for the US duties. More recently, parallel AD and anti-subsidy investigations were conducted in 2010 on coated paper from China both by the EU and by the US TDI authorities and resulted in combined duties ranging from 20% to 30.9% in the EU, much lower than the duties imposed by the USA (from 7.6% to 135.8% for AD duties and from 17.6% to 178% for CVD duties).

The EU has also introduced a public interest test, which allows refraining from imposing duties if they would be clearly against the overall economic interest of the Union. It abandoned zeroing as soon as the Appellate Body indicated its disagreement with the practice.[21] This moderation also shows through the statistics already provided in section 2 and Table 1.

Yet, the EU has also taken TDI action wherever necessary. During the last five years, most of the technical conclusions by the TDI services and all proposals for

[20] An evaluation of EC Trade Defence Instruments was performed in 2005 at the request of the EU Commission by Mayer, Brown, Rowe & Maw LLP. Annex 6 of the study report focused on an analysis of differences between EC and US TDI. The authors compared the low and high ends of duty ranges imposed by the EU and the US authorities after parallel investigations on the same products against the same countries for the period of 2000–2006. The results were systematically higher for the US duties compared to the EU duties, and the trend since 1990 confirmed this. The report, nevertheless, highlighted the fact that administrative reviews conducted each year by the US authorities frequently led to lower levels in practice.

[21] A detailed list of WTO-pluses implemented in the EU can be found in Depypere & Nardelli.

decisions by the Commission have been endorsed by the Member States. Admittedly, this does not happen without critical discussion, but in the end, Member States accept to be convinced by technical arguments and by the common interest of the EU.

In December 2006, Trade Commissioner Peter Mandelson launched a public consultation to verify whether it was appropriate to modify certain rules. The proposal was introduced by a 'Green Paper' that raised a number of very precise questions, some of which suggested applying TDI more restrictively. It led to a lively and interesting if not controversial debate inside the Union. Before the debate came to precise conclusions, new information arrived from the DDA negotiators in Geneva. The Chair of the negotiating group had put forward *new* proposals that seemed to push the rules into the direction of using the TDI rules more extensively.[22]

In these circumstances, at the beginning of 2008, the reform debate was stopped until more clarity could be achieved regarding the direction of the WTO framework and the preferences of the Member States.

There were a few points, however, on which a large majority of Member States and an overwhelming majority of stakeholders agreed:

- It was useful to have TDI.
- The rules had to be applied correctly and more transparently.

The TDI services then initiated an evolutionary change process that started at the end of 2008.

4.2 An evolutionary process initiated in 2008

The TDI services listed all the objectives and the conditions for achieving the desired results and defined a TQM programme as the most appropriate operational tool for steering the organization towards the goal. A TQM approach was chosen to give structure to the effort, to make it understandable for stakeholders, and to rely on proven management techniques and technical tools.

As a first step, a comprehensive self-assessment of the Directorate in charge of TDI was conducted with the support of the European Institute of Public Administration (EIPA).[23] This assessment involved directly numerous staff

[22] Basically, a duty-enhancing technique called 'zeroing' was put into the rules, whereas duty-reducing techniques like the European 'Lesser Duty Rule' was taken out.

[23] The EIPA deployed a methodology called 'Common Assessment Framework', which looks at the organization from different angles at the same time (organizational performance, stakeholders, people, partnership, and the quality of the leadership driving strategy and planning). In a nutshell, it is a holistic approach of public organization performance analysis. More information can be found on EIPA and CAF at <www.eipa.eu> and <www.eipa.eu/en/topic/show/&tid=191>.

members and led to more than 300 ideas for improvement out of which ten structuring projects were identified as priorities. In parallel, a series of actions were identified jointly with Member States to achieve more transparency in the TDI investigations.

These projects shaped a Strategy 2009–2011 with four main objectives:

- Further improve the consistency and technical reliability of analysis.
- Simplify the cooperation of interested parties, especially for small- and medium-sized companies, to increase the rights of defence of these parties, to increase transparency in general.
- Increase the internal efficiency of the service via all possible organizational and technological tools available.
- Communicate more structurally with all stakeholders.

Project teams were set up in the second half of 2009 with volunteering staff members who were trained to use project management methods. It is worth mentioning that, with more than 70% of staff becoming involved in one or more projects, this exercise raised internal enthusiasm and revealed strong staff engagement to improve their own working tools. It also created strong expectations for improvements, both internally and externally, and tangible results are already visible since the beginning of this exercise.

4.3 Illustration of the progress achieved so far

About half of the projects planned for the period of 2009–2011 were completed in 2010.

One of the first achievements in 2010 was to clarify the mission, vision, and values of EU TDI services. These elements, now accessible on the Trade website,[24] provide a shared purpose for all staff in the Directorate and explain to all stakeholders the motives and priorities of EU action in trade defence. All stakeholders have very well received this clarification.

The work on transparency has progressed very well. The TDI web pages allow interested parties to better participate in an investigation by providing systematic and updated information on important steps of proceedings and on the history of previous investigations for the product concerned.[25] In order to improve the rights of defence, the content of the file for inspection by interested parties had also been enriched[26] and electronic access was successfully tried out on a few cases.[27] It

[24] <http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146391.pdf>.

[25] <http://trade.ec.europa.eu/tdi/completed.cfm>.

[26] For more details on the improvements brought to the file for consultation by interested parties, consult Stefaan Depypere, 'The Better Is the Enemy of the Good', *Global Trade and Customs Journal* 4, no. 10 (2009).

should become a rule by the end of 2011. The Hearing Officer also helps to find solutions in cases where a party considers that its rights of defence are infringed. The content of the disclosures concerning dumping calculations should also become significantly more detailed after a new format was designed at the end of 2010.

New tools were also deployed to guarantee a consistent approach across cases. Since 2010, the case teams proceed with a systematic validation of all dumping calculations.[28] In a further development, an internal software was designed to perform dumping calculations automatically according to standard rules.

AD questionnaires sent to investigated companies were harmonized and made compatible with this software. It should become possible to produce an important part of disclosure documents automatically using the same tool. Further standardization work is planned in the course of 2011. This should make the findings easier to understand for parties.

A simplification of procedural steps during the initiation phase of a case has also been undertaken in 2010, with the help of an expert in 'lean' techniques. The deployment of this new process in 2011 will be followed shortly by the simplification work on the full investigating process. Such simplification will allow alleviating the burden for parties, speeding up the initiation process, and will allow case teams to concentrate on their analysis rather than administrative steps.

The quality exercise initiated by the EU in 2009 is, therefore, delivering concrete results that are already acknowledged by its stakeholders and Member States. This exercise is, nevertheless, not fully completed, as a few major projects were expected to deliver in the course of 2011 or early 2012. It should, in fact, never stop, as continuous improvement progressively becomes part of the culture of this organization. A few success factors can already be identified at this stage to explain the results obtained.

4.4 Key success factors

Obviously, various factors must have contributed to the successful outcome of this TQM exercise. We would first identify the *support of the top management* of the organization as a critical factor (i.e., this support was granted by the Director General for Trade). The support came both in terms of moral support and budgetary support. Even if – all in all – the amount of money that was needed remained very modest.

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[27] In particular, an experimental IT tool is currently tested in a practical case. Before this tool is fully deployed, several other case teams have already prepared manually a scanned version of the file for consultation by interested parties.

[28] For dumping calculations conducted in initial cases, not for reviews.

Internally, the classical recommendations of *change management* theory were followed. In particular, the Green Paper initiative created some sense of emergency that helped convince staff and stakeholders that improvements were unavoidable and should be considered as irreversible. A participatory approach also enabled more than half of the staff to actively participate in the definition and in the execution of the projects, thus creating an unstoppable critical mass and a collective ownership of the programme in the house. At individual level, this programme provided some staff with an opportunity to demonstrate new skills and reach a new visibility in the organization. As a more collective reward, all staff could seize the opportunity to change their working environment.

Of course, such a large effort needs to be properly *structured*. A well-defined temporary 'virtual' organization was set up. All project groups followed the same internal organization pattern and project methodology and they reported to a small steering committee that met every week to measure progress.

It was also very important to gain the support of the entire *middle management*, to ensure that the new tools and methods proposed by the project team would be effectively implemented. Progress was, therefore, regularly discussed with the full management of the TDI Directorate. More generally, *communication and training* were also identified as critical factors: Draft proposals from the project teams were regularly presented to all staff during general meetings in order to consult all staff, including those not actively participating in the programme. Training was systematically organized on the validated final products.

Obviously, during the most intense phase of the process, staff had to be pushed a little bit beyond the limits of long-term sustainable efforts. The most enthusiastic were regularly found to have studied or developed project material during evenings, weekends, or holidays. Yet, few staff complained about the 'forced march'. Some grumbling came rather from the groups that had to 'absorb' the changes, but the grumblings never transformed into strong change resistance.

As a conclusion on the success factors, we would argue that a TQM programme in a TDI service is perfectly doable as long as there is a shared vision on the purpose of changes and sufficient willingness to make the necessary effort.

5 THE WAY FORWARD: SPREAD THE PRACTICE

Open international trade has brought enormous benefit to the global economy. It could deliver even more if trading partners could agree on further liberalization. Yet, trading partners find it very difficult to bring this liberalization agenda forward. Most partners would want the others to liberalize while keeping some protection for themselves. So they move very cautiously towards opening their

own economy. Having a safety valve that allows to combat distorted trade helps to show more willingness towards opening the markets.
As the world market is still far from being fully integrated and as competition policy is only timidly enforced in the international context, this safety valve must be found in applying TDIs. TDIs can be considered as the travel insurance on the liberalization journey.

It is important that these instruments are correctly applied. The possibility to make an abusive use is considerable. The authors plead for a systematic effort, by all relevant authorities, to aim at a rigorous application of the agreed rules. Such an effort can be framed in terms of quality management.

The European Commission, which enforces trade defence rules in the EU, has undertaken such an effort and can report good results. It shows that it is possible to apply this private sector management technique convincingly also in the public sector. It is argued that a good way forward in managing trade relations could consist in inviting all authorities that apply TDI to work on their quality management and exchange good practices. EU TDI services already share experience with other WTO members on some of these developments,[29] and bilateral or multilateral cooperation on this topic would certainly be most useful to spread the practice.

[29] For more details on the cooperation between the EU and third countries regarding TDI, consult Depypere & Nardelli.

Submission Guidelines

The following is a brief guide concerning the provision of articles which may be of assistance to authors.

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3. Tables should be self-explanatory and their content should not be repeated in the text. Do not tabulate unnecessarily. Keep column headings as brief as possible and avoid descriptive matter in narrow columns.
4. A brief biographical note, including both the current affiliation as well as the email address of the author(s), should be provided in the first footnote of the manuscript.
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