CTEI Working paper

The Anti-Circumvention Instrument: Another Roadblock on the Investment Development Path?

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Abstract

Companies from emerging economies, and China in particular, have started internationalizing their production operations. In doing so, they are following the same path as that taken by American, European and East Asian corporations before them, by setting up factories in third countries to serve their export markets from closer locations and produce more efficiently. Thus, it is no longer only developed countries' multinationals which are moving their operations to developing countries, but emerging market companies that are increasingly engaging in production abroad. This phenomenon is having beneficial effects in countries where these companies invest and might help them start their own industrialization process. Yet, it has attracted the ire of developed countries, in particular the European Union. They are now targeting these downstream production plants abroad by using the so-called anti-circumvention instrument, resulting in trade defence duties imposed on the parent companies being extended to their foreign subsidiaries. This application of the anti-circumvention instrument departs from its historic rationale and might hinder the development of countries in need of foreign investment. Therefore, affected governments should consider taking international legal action to bring developed countries to the negotiating table to put a halt to this abuse of the anti-circumvention instrument.

1. Introduction

Trade defence instruments have been described as 'dull', of little academic interest, and a mere bread and butter for international trade lawyers.[1] Yet, these instruments affect a large share of international trade and have been the target in most of the disputes brought to the World Trade Organization ('WTO') and under free trade agreements ('FTAs').

There are two main trade defence instruments aimed at protecting WTO Members from unfair trade practices: anti-dumping and anti-subsidy (technically known as 'countervailing') measures. These allow WTO Members to impose customs duties on imports from specific companies in targeted countries in excess of their agreed WTO bound tariff rates.[2] While the imposition of trade defence measures has been contentious,[3] there are relatively clear rules, which WTO Members agreed to, on how they might be imposed. Should any WTO Member consider these rules to be violated, they can have recourse to the WTO dispute settlement system to set things straight.

As China rapidly industrialized, thanks in part to high amounts of investment by Western corporations in China's manufacturing sectors, its exports became the main targets of trade defence measures. However, as wages rise, production regulations tighten and freight costs increase, many Chinese companies have started shifting parts of their production abroad.[4] In undergoing this process, Chinese companies have been walking in the footsteps of American, European and East Asian corporations

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1 P. De Baere *et al*., *The WTO Anti-Dumping Agreement*, *A Detailed Commentary* (2021).

2 Bound tariff rates are the maximum import tariff that a particular WTO Member agreed that it would not exceed when it joined the organization. See Article II.1(a), General Agreement on Tariffs and Trade 1947, 55 UNTS 194 (hereafter 'GATT').

3 For a recent discussion of the treatment of China as a non-market economy in anti-dumping actions and China's response, see generally W. Zhou and X. Qu, 'Confronting the 'Non-Market Economy' Treatment: The Evolving World Trade Organization Jurisprudence on Anti-Dumping and China's Recent Practices', 13 *Journal of International Dispute Settlement* (2022) 510.

4 H. Y. Wang and L. Miao, 'China's Outward Investment: Trends and Challenges in the Globalization of Chinese Enterprises', in J. Chaisse (ed.), *China's International Investment Strategy: Bilateral, Regional, and Global Law and Policy* (2019); Y. Huang *et al*., 'How Did Rising Labor Costs Erode China's Global Advantage?', 183 *Journal of Economic Behavior and Organization* (2021) 632.

before them. Such internationalization of production operations has also been increasingly undertaken by companies from other rapidly emerging markets. Yet, developed countries, and the European Union ('EU') in particular, now opine that these operations might not be a legitimate business process but, instead, a cover to avoid trade defence duties on their exports.

These countries have found the anti-circumvention instrument to be a potent tool to target this phenomenon. The anti-circumvention instrument is a little-known mechanism which was devised by the European Communities ('EC') (the precursor to the EU) and the United States of America ('US') in the 1980s to address the issue of Japanese companies trying to avoid trade defence measures by setting 'screwdriver' plants abroad to assemble parts and components of products targeted by trade defence measures at little cost.[5] It was used to extend trade defence duties imposed on imports from Japan to products assembled abroad by using parts originating from Japan. The anti-circumvention instrument was one of the thorniest issues in the negotiations leading to the establishment of the WTO in 1995. It was so contentious that no agreement could be reached on the matter. The negotiators merely agreed to refer the issue for further discussions.

Developed countries, especially the EU, have recently started using this instrument to target emerging countries corporations' downstream factories abroad. They have stretched the original scope of the anti-circumvention instrument to cover not only 'screwdriver' plants but also fully scoped downstream factories abroad, resulting in the automatic extension of the trade defence duties imposed on the parent companies to such overseas investments. This is problematic under WTO rules which impose conditions that must be satisfied before trade defence measures can be imposed.

The anti-circumvention instrument is now more commonly used by the EU against third-countries other than China than anti-dumping and countervailing measures. This instrument, therefore, is being increasingly used against investment which benefits the development of host countries and can play a major role in facilitating these countries' industrialization process. By unjustly targeting foreign investment in production operations with the anti-circumvention instrument, developed countries thus risk hindering these countries' opportunities to integrate in the global economy.

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5 M. Spicer *et al*., 'Anti-Circumvention of Anti-Dumping Measures: Law and Practice of the United States', 11 *Global Trade and Customs Journal* (2016) 536; E. Vermulst, 'Circumvention of Anti-Dumping Measures: Law and Practice of the European Union', 11 *Global Trade and Customs Journal* (2016) 499.

These countries are not left without means of redress, however. In the absence of WTO rules expressly allowing anti-circumvention measures, a legal challenge against the anti-circumvention instrument would have a high chance of success. This is because this instrument typically leads to the application of import tariffs beyond a WTO Member's bound rates without complying with the relevant conditions contemplated under WTO rules. WTO litigation, therefore, could be used as a steppingstone to bring developed countries to the negotiating table and, hopefully, have them agree to put the lid back on the anti-circumvention instrument.

We start this article by describing how companies from emerging markets, and China in particular, have been internationalizing production operations following the same approach that Western companies took before them (**Section 2**). This is followed by a discussion of the evolution of the anti-circumvention instrument since its introduction in the EC and the US in the 1980s and the negotiations of multilateral rules on this instrument in the WTO (**Section 3**). We then explain how the EU is increasingly broadening the scope of this instrument to target legitimate internationalization of production activities and its potential impact on foreign companies seeking to further integrate into global supply chains as well as developing countries in need of foreign investment (**Section 4**). Finally, we put forward several options that affected countries could use to put a halt to this practice (**Section 5**) and provide some concluding remarks, placing this development in a broader context (**Section 6**).

2. Legitimate Internationalization of Production Activities

Companies from emerging markets have started internationalizing their production operations, becoming multinationals on par with Western corporations.[6] This is particularly the case of Chinese enterprises. While the first foreign ventures of Chinese companies took place in the late 1970s, Chinese outward investment used to be heavily restricted and, therefore, remained limited. The enactment of China's 'Going Out' policy in 1999, which was aimed at enhancing the global presence

6 J. Hennart, 'Emerging market multinationals and the theory of the multinational enterprise', 2, *Global Strategy Journal* (2012), 168.

of Chinese firms,[7] stimulated rapid growth of outward foreign investment by Chinese companies. The launch of China's Belt and Road Initiative ('BRI') in 2013 further accelerated Chinese investment overseas.[8] While their initial outward foreign direct investment focused primarily on natural resources, Chinese companies have increasingly invested in manufacturing abroad. They have established production subsidiaries in third countries, acquired foreign plants and merged with foreign competitors with production operations overseas.[9] These activities are motivated by a range of factors, including rapidly increasing labour costs[10] and stricter production regulations in China,[11] rising trade barriers on Chinese exports in foreign markets and China's lack of free and preferential trade deals,[12] lowered freight costs[13] and enhanced access to resources and potential markets, as well as support provided by the Chinese government to alleviate excess industrial capacity at home.[14] While Chinese companies have been at the forefront of the internationalization process of emerging market corporations, they are not the only ones doing so. Amongst others, Russian, Saudi and Indian companies are walking in their footsteps.[15]

In this internationalization process, emerging market corporations are following a similar path to that taken by American, European and East Asian companies before them.[16] American companies were the first to internationalize their production operations in order to remain competitive in markets they originally exported to. As early as the end of the nineteenth century, they started investing and opening

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7 C. Liou, *The Politics of China's "Going Out" Strategy: Overseas Expansion of Central State-Owned Enterprises* (2010), available at https://repositories.lib.utexas.edu/bitstream/handle/2152/ETD-UT-2010-05-826/LIOU-DISSERTATION.pdf?sequence=1&isAllowed=y.

8 R. Stone *et al*., 'Chinese Power and the State-Owned Enterprise', 76 *International Organization* (2021) 229.

9 H. Y. Wang and L. Miao, *supra* note 4.

10 Y. Huang *et al*., *supra* note 4.

11 D. van der Kley, *China Shifts Polluting Cement to Tajikistan* (2016), available at https://www.chinadialogue.net/article/show/single/en/9174-China-shifts-polluting-cement-to-Tajikistan.

12 See discussions on this in Section 4.A below.

13 X. Tang, 'Chinese Investment in Ghana's Manufacturing Sector', Working Paper 8, *China Africa Research Initiative* (2016) 1.

14 V. Crochet and V. Hegde, 'China's 'Going Global' Policy: Transnational Production Subsidies Under the WTO SCM Agreement', 23 *Journal of International Economic Law* (2020) 841; M. Du, 'When China's National Champions Go Global: Nothing to Fear but Fear Itself?', 48 *Journal of World Trade* (2014) 1127; K. Sauvant and V. Chen, 'China's regulatory framework for outward foreign direct investment', 7 *China Economic Journal* (2014) 141.

15 P. Gammeltoft and A. Cuervo-Cazurra, 'Enriching internationalization process theory: insights from the study of emerging market multinationals', 27, *Journal of International Management* (2021).

16 X. Deng, 'Patterns of Internationalization of Chinese Firms - Empirical Study Based on Strategic Approach', 9 *Journal of Public Affairs* (2009) 301.

factories in Europe and Latin America.[17] They were joined by European companies investing in production operations in other European countries and North America shortly thereafter.[18] Their main reasons for doing so was to maintain markets they had conquered through exports in the face of growing competition from domestic companies and rising tariffs on imports.[19] Following the end of World War II, as European industries had been decimated by the war, American companies accelerated the process of internationalizing their manufacturing operations to meet growing demand for industrial and commercial goods as well as to respond to the world's shortage of US dollars, which limited exports from the US.[20] In subsequent years, European businesses recovered. They then, together with American companies, established manufacturing plants in Japan and South Korea to serve their nascent consumer markets.[21] At the same time, in response to import-substitution policies implemented by governments in most of the developing world, and particularly in South America, American and European companies started investing in production factories to serve developing countries' markets from within.[22]

Towards the 1970s an increasing amount of investment by American and European companies became targeted at improving efficiency.[23] Underdeveloped countries were used as a cheap labour pool to produce goods for exports to rich countries, while rich countries focused on more comfortable or profitable activities.[24] Indeed, through investment, in particular in Asia, subsidiaries were set up for producing labour intensive goods to be exported to developed countries' markets.[25] This process accelerated from 1970 to 2000 as American and European companies increasingly sought to localize stages of their production process where the conditions for that stage of the process would be the most

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17 M. Wilkins, *The Emergence of Multinational Enterprise: American Business Abroad from the Colonial Era to 1914* (1970), at Chapters 4, 5 and 7.

18 M. Wilkins, *The Maturing of Multinational Enterprise, American Business Abroad from 1914 to 1970* (1974), at Chapter 4; J. Dunning and S. Lundan, *Multinational Enterprises and the Global Economy* (2nd ed., 2008), at Chapter 6.

19 M. Wilkins, *supra* note 17, at Chapter 5; H. Chang, *Kicking Away the Ladder: Development Strategy in Historical Perspective* (2003), at 16-7; J. Dunning and S. Lundan, *supra* note 18, at 159.

20 M. Wilkins, *supra* note 18, at Chapter 17; J. Dunning and S. Lundan, *supra* note 18, at Chapter 6.

21 M. Wilkins, *supra* note 18, at Chapter 19; J. Dunning and S. Lundan, *supra* note 18, at Chapter 6.

22 M. Wilkins, *supra* note 18, at Chapter 19.

23 F. Fröbel et al., 'The New International Division of Labour', 17 *Social Science Information* (1978) 123.

24 *Ibid*.; G. Starosta, 'Revisiting the New International Division of Labour Thesis', in G. Charnock and G. Starosta (eds), *The New International Division of Labour, Global Transformation and Uneven Development* (2016).

25 M. Wilkins, *supra* note 18, at Chapter 19.

efficiently conducted in terms of cost.[26] This led American and European companies to establish plants for the most labour intensive parts of the production process in developing countries with low labour costs and loose labour rights or energy intense operations in places with cheap energy sources. These companies also took advantage of less stringent environmental and other production regulations in developing countries to outsource downstream production operations therein. However, they maintained research and development operations as well as more technologically advanced production processes primarily in the US and Europe.[27]

East Asian companies soon followed suit in internationalizing their production activities. When Japan rapidly (re)industrialized in the second half of the twentieth century, Japanese goods were hit by trade defence measures in their export markets.[28] Japanese companies were also facing labour shortages, a lack of industrial land and increasing regulations on production at home. Consequently, they started exporting labour-intensive and low-productivity industries, mostly in downstream production of semi-finished products of Japanese origin,[29] to neighbouring developing countries in Asia. This allowed Japan to keep these industries internationally competitive and to redeploy domestic resources to more advanced sectors.[30] The internationalization of more advanced technology industries, such as automotive, followed in order to increase their competitiveness in developed markets, promote demand for Japanese inputs abroad and maintain research and development operations in Japan.[31] Korean companies followed a rather similar pattern of internationalization of production some years later.[32] Korea's rapid industrial development in the last years of the twentieth century was quickly followed by the export of downstream production plants abroad in order to avoid raising trade barriers

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26 J. Dunning and S. Lundan, *supra* note 18, at Chapter 6.

27 M. Wilkins, *supra* note 18, at Chapter 20; J. Dunning and S. Lundan, *supra* note 18, at Chapter 6.

28 J. Morris, 'Globalization and Global Localization, Explaining Trends in Japanese Foreign Manufacturing Investment', in J. Morris (ed.), *Japan and the Global Economy, Issues and Trends in the 1990s* (1991) 2.

29 *Ibid.*

30 J. Dunning and S. Lundan, *supra* note 18, at 692; L. Franko, *The Threat of Japanese Multinationals – How the West Can Respond* (1983), at 65-66.

31 J. Dunning and S. Lundan, *supra* note 18, at 692; J. Morris, *supra* note 28**Erreur ! Signet non défini.**, at 3 and 10; T. Ozawa, 'Japan: the Macro-IDP,meso-IDPS and the Technology Development Path', in J. Dunning and R. Narula (eds), *Foreign Direct Investment and Governments*, *Catalysts for Economic Restructuring* (1996); P. Dicken, 'The Changing Geography of Japanese Foreign Direct Investment in Manufacturing Industry, A Global Perspective', in J. Morris (ed.), *Japan and the Global Economy, Issues and Trends in the 1990s* (1991) 34.

32 F. Sachwald, 'Globalization and Korea's Development Trajectory: The Roles of Domestic and Foreign Multinationals', in F. Sachwald (ed.), *Going Multinational: The Korean Experience of Direct Investments* (2001) 361; K. Kumar and K. Y. Kim, 'The Korean Manufacturing Multinationals', 15 *Journal of International Business Studies* (1984) 45.

and to increase exports of semi-finished products from Korea while maintaining higher value-added industries at home.[33]

The internationalization of production activities is thus a legitimate business phenomenon once companies reach a certain size domestically.[34] Firms internationalize their production activities to remain competitive in foreign markets which they originally supply through exports from their homebase (market-seeking internationalization) or to improve efficiency by taking advantage of differences in the availability and relative cost of carrying out different activities in different countries (efficiency-seeking internationalization).[35] There is also a certain pattern to the internationalization of production operations by companies. To start, a sales and service facility is set up abroad to promote exports, which is then replaced by downstream production overseas using imported inputs made by the mother company, followed eventually by entire production chains abroad.[36]

The expansion of production activities has benefits for both home and host countries.[37] As acknowledged by the International Labour Organization, '[t]hrough international direct investment, … enterprises can bring substantial benefits to home and host countries by contributing to the more efficient utilization of capital, technology and labour'.[38] For the home country, this process allows industrial upgrading by freeing up resources, such as land and labour, which can then be used for higher value-added activities, thereby enabling development and economic growth.[39] For the host country, attracting labour intensive downstream activities can help advance its industrialization and more profitable operations.[40] Indeed, cheap and flexible labour is often the main competitive advantage of low-income countries which they can use to attract foreign direct investment. This investment can generate tax revenues, create jobs and further investment in basic infrastructure, thereby contributing to the host country's industrial upgrading and economic development.[41] This is

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33 F. Sachwald, *supra* note 32; K. Kumar and K. Y. Kim, *supra* note 32.
34 J. Dunning and S. Lundan, *supra* note 18, at Chapter 3.
35 *Ibid*., at 70.
36 Ibid., at Chapter 6.
37 M. Sornarajah, *International Law on Foreign Investment* (5th ed., 2021), at 73-79.
38 International Labour Organization, Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy 1977, subsequently amended in 2000, 2006 and 2017.
39 J. Dunning and R. Narula, 'The Investment Development Path Revisited, Some Emerging Issues', in J. Dunning and R. Narula (eds), *Foreign Direct Investment and Governments*, *Catalysts for Economic Restructuring* (1996).
40 *Ibid*.
41 *Ibid*.

so because foreign production subsidiaries in third countries train local employees and invest in technologically advanced production facilities that could not have otherwise been achieved without foreign funds and know-how.[42] Furthermore, these production subsidiaries also bring indirect positive spill over effects as they stimulate the local economy, which may result in further investment.[43]

A clear example of the positive effects of this integration in global value chains is China. China became the workshop of the world thanks to its large and cheap workforce at the beginning of the twenty first century and after joining the WTO.[44] China received vast amounts of foreign direct investment in downstream manufacturing operations to produce goods, which were subsequently exported to advanced economies.[45] It managed to use this investment as a steppingstone to build and upgrade its own industrial capabilities, hence readjusting its place in the international division of labour in just a few decades.[46]

Companies from emerging markets, and China in particular, are thus now internationalizing just as other countries' industries did a couple of decades ago. They are investing significant amounts in setting up downstream production plants abroad and sending inputs thereto from their home base in order to produce finished products that are then sold in the host country and other markets. These investments are starting to yield beneficial development effects on host countries. For example, while sometimes criticized, foreign direct investment by Chinese companies has led to job creation, additional tax revenue, increased investment in infrastructure and technology transfers in host countries. It has set the path for these countries' own industrial development.[47] Yet, the legitimate internationalization of emerging market corporations has attracted the ire of developed countries, and

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42 J. Dunning and S. Lundan, *supra* note 18, at Chapter 10.

43 *Ibid.*, at Chapters 10 and 16.

44 J. Hardy, 'China's Place in the Global Divisions of Labour: An Uneven and Combined Development Perspective', 14 *Globalizations* (2017) 189.

45 F. Lemoine and D. Ünal-Kesenci, 'Assembly Trade and Technology Transfer: The Case of China', 32 *World Development* (2004) 829.

46 J. Hardy, *supra* note 44.

47 X. Tang, *supra* note 13; A. Dreher *et al.*, *Banking on Beijing*, *The Aims and Impacts of China's Overseas Development Program* (2022), at Chapter 7; L. Hanauer and L. J. Morris, *Chinese Engagement in Africa: Drivers, Reactions, and Implications for U.S. Policy* (2014), at Chapter 4; S. Chen *et al.*, 'Does China's Direct Investment in ASEAN Have Institutional Preference From the Perspective of Investment Motivation Heterogeneity?' *Journal of the Asia Pacific Economy* (2022) 1.

in particular that of the EU, which has recently broadened the scope of their anti-circumvention instruments to target especially Chinese factories in third countries.

3. The Genesis and History of the Anti-circumvention Instrument

A. *A Brief Introduction to Trade Defence Instruments*

The anti-circumvention instrument is a specific tool designed to target activities by companies seeking to avoid trade defence duties, namely anti-dumping and countervailing measures, on their exports. Trade defence duties are expressly allowed under WTO rules by Article VI of the General Agreement on Tariff and Trade ('GATT'), as further elaborated upon under the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994[48] ('Anti-Dumping Agreement') and the Agreement on Subsidies and Countervailing Measures ('SCM Agreement').[49] These agreements are, however, silent when it comes to the anti-circumvention instrument, which has raised doubt about the legality of its use.[50]

Trade defence duties can be imposed on imports from a particular country when the relevant authorities (in the EU, this is the European Commission) establish that exporting producers in that country are dumping or are subsidized, and that the dumped/subsidized imports cause or threaten to cause injury to the domestic industry of the importing country.[51] Trade defence measures can be used indiscriminately. Nevertheless, they have often been used to target nations on path to industrialization. For instance, from the 1970s to 1980s, Japan was the main target of US and EU trade defence measures,[52] followed by Korea. Since the beginning of the new millennia, China has topped the chart[53]

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48 Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, 1868 UNTS 201 (hereafter 'Anti-Dumping Agreement').

49 Agreement on Subsidies and Countervailing Measures 1994, 1867 UNTS 14 (hereafter 'SCM Agreement').

50 See Section 5 below.

51 GATT, *supra* note 2, at Article VI; Anti-Dumping Agreement, *supra* note 47; SCM Agreement, *supra* note 48.

52 I. Van Bael, 'EEC Anti-Dumping Enforcement: An Overview of Current Problems', 1 *European Journal of International Law* (1990) 118.

53 European Parliament, *EU-China Trade and Investment Relations in Challenging Times* (2020), available at https://www.europarl.europa.eu/RegData/etudes/STUD/2020/603492/EXPO_STU(2020)603492_EN.pdf.

and is now the most common target of trade defence measures,[54] with up to 10 percent of Chinese exports to the US being covered by trade defence duties.[55]

Dumping occurs where an exporting producer sells the goods concerned at a lower price in its export market (the export price) than the price of the goods in its domestic market (known as the normal value).[56] The extent of this price discrimination is called the dumping margin. In certain cases, when investigating authorities consider that the exporting country is not functioning in accordance with market economy principles (which is commonly the case in investigations targeting China), WTO rules allow the authorities to depart from basing the normal value on a producer's actual prices and to use alternative methodologies instead.[57] Typically, these alternative methodologies use surrogate data from a third country as domestic prices.[58] This usually results in a much higher normal value and, hence, a much higher dumping margin.

A producer is considered as being subsidized if it has received a financial contribution by a government which confers a benefit on its recipient.[59] The sum of the benefits received by an exporting producer (that is, the difference between the financial contributions that the exporting producers could have received on the market and those it actually received) divided by that entity's turnover is called the subsidy margin. Chinese companies are often found to be copiously subsidized as developed WTO Members tend to consider that the provision of raw materials, land and financing, even by private entities in China, constitutes subsidies and then calculate the amount of benefit by comparing prices in China with prices abroad.[60]

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54 For example, in the EU, more than two thirds of trade defence measures target China. See Commission Staff Working Document SWD(2022) 294 final.

55 C. Bown and J. Hillman, 'WTO'ing a Resolution to the China Subsidy Problem', 22 *Journal of International Economic Law* (2019) 557.

56 Anti-Dumping Agreement, *supra* note 47, at Article 2.

57 *Ibid*., at Article 2.7; WTO, *China WTO Protocol of Accession*, 23 November 2001, WT/L/432, Article 15.

58 European Parliament and Council Regulation 2016/1036, OJ 2016 L 176/21 (hereinafter the 'Basic Anti-Dumping Regulation'), at Article 2(6a); P. Reinhold and P. Van Vaerenbergh, 'Significant Distortions Under Article 2(6a) BADR: Three Years of Commission Practice', 16 *Global Trade and Customs Journal* (2021) 193; D. Ikenson, *Tariffs by Fiat: The Widening Chasm between U.S. Antidumping Policy and the Rule of Law* (2020), available at www.cato.org/sites/cato.org/files/2020-07/pa-896-updated.pdf.

59 SCM Agreement, *supra* note 48, at Articles 1 and 2.

60 D. Ahn and J. Lee, 'Countervailing Duty Against China: Opening a Pandora's Box in the WTO System?', 14 *Journal of International Economic Law* (2011) 329; Van Bael & Bellis, *EU Anti-Dumping and Other Trade Defence Instruments* (6th ed., 2019), at Chapter 11.

To determine whether dumped/subsidized imports have caused a material injury to the relevant domestic industry, authorities must assess the volume of these imports and their effects on price, as well as other factors reflecting the situation of the domestic industry such as market share or profitability. Authorities must then show that the injury was caused by the dumped/subsidized imports.[61] Finally, although this is not mandatory under WTO rules, some WTO Members require their authorities to assess whether the imposition of trade defence measures is in the overall interest of their economies by balancing the interests of producers, importers and users of the product concerned.[62]

Once these substantive conditions are met, the WTO Member conducting the investigation can impose an individual duty per exporting producer at an amount that cannot be higher than each exporting producer's dumping/subsidy margin.[63] Investigating authorities thus establish individual duties per exporting producer which cooperated in the investigation as well as a rate for "all other companies" which did not manifest themselves during the investigation. This rate is usually equal to, or higher than, the highest duty established for cooperating exporting producers.[64]

In addition to these substantive conditions, the Anti-Dumping Agreement and the SCM Agreement set forth a range of procedural rules. For instance, authorities may normally only initiate trade defence investigations based on a complaint from their domestic industries which provide sufficient *prima facie* evidence that the conditions for the imposition of trade defence measures are present.[65] This complaint must also be supported by a certain share of the domestic industry. [66] Investigations, once

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61 Anti-Dumping Agreement, *supra* note 47, at Article 3; SCM Agreement, *supra* note 48, at Article 15.

62 For example, in the EU, see Basic Anti-Dumping Regulation, *supra* note 57, at Article 21; European Parliament and Council Regulation 2016/1037, OJ 2016 L 176/55 (hereinafter 'Basic Anti-Subsidy Regulation'), at Article 31.

63 However, it can be lower if a lower duty is sufficient to remove the injury, see Anti-Dumping Agreement, *supra* note 47, at Article 9.1; SCM Agreement, *supra* note 48, at Article 19.2.

64 Van Bael & Bellis, *supra* note 60, at Chapter 7.

65 While it is technically possible for investigating authorities to initiate trade defence investigations on their own motion, this rarely happens in practice due to the high evidentiary standard set forth by the Anti-Dumping Agreement and SCM Agreement. See Anti-Dumping Agreement, *supra* note 47, at Article 5.6; SCM Agreement, *supra* note 48, at Article 11.6. See also Van Bael & Bellis, *supra* note 60, at 355.

66 Anti-Dumping Agreement, *supra* note 47, at Article 5; SCM Agreement, *supra* note 48, at Article 11.

initiated, should be concluded within eighteen months.[67] If certain conditions are met,[68] it is possible for the authorities to register imports and to retroactively levy the duties on products which were imported within ninety days from the date of application of provisional measures.[69]

B. *Illegitimate Third Country Production Operations: The Development of EU Law and WTO Negotiations*

In the 1980s, the EC and the US were faced with Japanese companies internationalizing their production activities in order to avoid trade defence duties imposed on their exports. These companies did not follow the legitimate market and efficiency-seeking internationalization path described in Section 2, but instead, set up 'screwdriver' plants abroad to circumvent the imposition of trade defence duties. A growing number of Japanese firms established factories in the EC with the sole aim of assembling parts of electronic goods, such as photocopiers or typewriters, which when imported into the EC from Japan were subject to trade defence measures. These companies continued to manufacture all the necessary parts in Japan and exported these parts to the EC for assembly into finished goods by their 'screwdriver' plants. As these parts were not covered by the trade defence measures, this practice allowed them to avoid paying any duty at minimal costs and due to the lack of investment, yielded little benefits to the EC's economy.[70] Around the same time, the US faced similar circumventing practices by Korean and Japanese producers establishing assembly operations in the US or a third country to produce goods subject to US trade defence measures.[71]

These practices triggered the EC and the US to introduce anti-circumvention provisions in their trade defence regulations in the late 1980s to target such illegitimate internationalization of production. The EC's anti-circumvention provision was aimed at assembly operations taking place in the EC provided

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67 Anti-Dumping Agreement, *supra* note 47, at Article 5.11; SCM Agreement, *supra* note 48, at Article 11.11. Note that slightly shorter timelines apply in the EU. See Basic Anti-Dumping Regulation, *supra* note 57, at Article 6; Basic Anti-Subsidy Regulation, *supra* note 61, at Article 11.

68 Anti-Dumping Agreement, *supra* note 47, at Article 10.6; SCM Agreement, *supra* note 48, at Article 20.6.

69 Under WTO rules, provisional measures can be imposed after two months from initiation, but since their duration is limited to nine months for anti-dumping measures (four months for countervailing measures), they tend to be imposed within nine months (four months for countervailing measures) from the deadline to conclude the investigation.

70 I. Van Bael and J. Bellis, *Anti-Dumping and other Trade Protection Laws of the EC* (1996), at Chapter 8.

71 W. Clinton and D. Porter, 'The United States' New Anti-Circumvention Provision and Its Application by the Commerce Department', 24 *Journal of World Trade* (1990) 101, at 102 and 106.

that the firms in the EC were related to foreign producers being subject to trade defence duties. If certain conditions relating to the value of the imported parts were met, the authorities could decide to extend the trade defence duties imposed on imports by the related foreign producer to the products manufactured in the EC.[72] The US anti-circumvention provision went further as it also targeted assembly operations taking place in third countries.[73]

The EC applied this provision in a series of investigations.[74] It considered that, to be targeted by the instrument, an assembled product had to be made of parts which could be broken down and put back together without damaging the parts, thereby limiting the scope of the instrument to illegitimate 'screwdriver' operations.[75] As Japanese producers subject to trade defence duties imported parts and components of electronic goods to be assembled in the EC, the EC extended the trade defence duties imposed on the finished imported goods from Japan to the goods assembled in the EC.[76]

This led Japan to bring a GATT dispute (the predecessor to the WTO) against the EC. In *EEC – Parts and Components*, the GATT Panel found in favour of Japan that the EC's anti-circumvention provision violated the rules of Article III of the GATT as it discriminated between domestic and imported goods and could not be justified under the general exception provided for in this agreement.[77] Following this decision, while the EC refused to amend its legislation, it did not use the anti-circumvention instrument again until it introduced a revised provision in 1995 following the creation of the WTO.[78]

At the same time, during the Uruguay round of negotiations which led to the creation of the WTO, the EC and US lobbied intensively for the development of global rules on anti-circumvention of trade defence measures. Both put forward detailed proposed texts based on their own domestic

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72 Council Regulation 2423/88, OJ 1988 L 209/1.

73 *Omnibus Foreign Trade and Competitiveness Act of 1988* (US), at section 1321; W. Clinton and D. Porter, *supra* note 70, at 104-108. It is worth noting that the US law also covered two other types of circumventing activities including minor alterations and later-developed products and that before the law came into effect US authorities already started using existing trade defence measures to address circumvention. Most of the earlier cases in the US involved assembly operations.

74 S. Holmes, 'Anti-Circumvention under the European Union's Anti-Dumping Rules', 29 *Journal of World Trade* (1995) 161, 163-164.

75 See description of the "destruction test" in S. Holmes, *supra* note 74.

76 I. Van Bael and J. Bellis, *supra* note 70, at Chapter 8.

77 GATT Panel Report, *EEC – Regulation on Imports of Parts and Components*, 16 May 1990, L/6657 – 37S/132.

78 I. Van Bael and J. Bellis, *EU Anti-Dumping and Other Trade Defence Instruments* (5th ed., 2011), at Chapter 8.

experiences.[79] While their proposals received support from traditional users of trade defence measures, they faced strong resistance by export-oriented countries/territories such as Japan, Singapore, Korea, and Hong Kong.[80] The last draft on the issue, known as the Dunkel draft, sought to reach a compromise by allowing anti-circumvention measures but limiting their scope to allow only the extension of trade defence duties to assembly and completion of parts and components in the importing country by a company related to or acting on behalf of an exporting producer subject to anti-dumping duties.[81] With regard to assembly operations in third countries, the draft did not allow the imposition of anti-circumvention measures. It provided, instead, that, in case of an initial trade defence investigation targeting a producer conducting assembly operations in a third country which was related to an exporting producer already subject to trade defence measures in another country, trade defence measures could be levied retroactively up to a hundred and fifty days prior to the imposition of the provisional measures (instead of ninety days in other cases).[82] The Dunkel draft did not satisfactorily address the competing interests among governments. In particular, the US requested that anti-circumvention measures be allowed for assembly operations in third countries,[83] while the opponents of anti-circumvention rules remained highly sceptical about the need for any rule on the issue.[84] As a result, no rules on anti-circumvention were adopted when the WTO was created in 1995. Governments merely agreed to refer this matter to the WTO Committee on Anti-Dumping Practices for further negotiation.[85]

Regardless of this lack of agreement, the EU introduced a revised version of its anti-circumvention instrument in 1995 which targeted assembly operations in the EU by allowing the extension of trade

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79 Communication from the European Communities, GATT Doc. No. MTN.GNG/NG8/W/28, at 5; Communication from the United States: Proposal for Improvements to the Anti-Dumping Code, GATT Doc. No. MTN.GNG/NG8/W/59 (20 December 1989), at 4-14.

80 T. P. Stewart (ed.), *The GATT Uruguay Round: A Negotiating History (1986-1992)*, 2 Vols (1993), at 1620-1625.

81 Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, at F.1-F.31, at 21, within Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Negotiations, GATT Doc. No. MTN.GNG/NG8/W/FA (20 December 1991).

82 *Ibid.*

83 M. Matsushita, 'Some International and Domestic Antidumping Issues', 5 *Asian Journal of WTO and International Health Law and Policy* (2010) 249, at 253-254; *US Antidumping Proposals* (26 November 1993), reprinted in *Inside US Trade*, 3 December 1993, at 3.

84 T. P. Stewart, *supra* note 79, at 1639-1640.

85 WTO, *Decision on Anti-Circumvention*, The Results of the Uruguay Round of Multilateral Trade Negotiations, available at https://www.wto.org/english/docs_e/legal_e/39-dadp1_e.htm.

defence duties imposed on imported products to imported parts.[86] It also broadened the scope of the instrument to cover assembly operations in third countries.[87] Under Article 13(2) of the Basic Anti-Dumping Regulation (that is the provision under EU law which encapsulates the anti-circumvention instrument with regard to anti-dumping measures),[88] the European Commission thus became able to target assembly and completion operations in third countries if a number of conditions are met.[89] First, the assembly or completion operations must have started or substantially increased since, or just prior to, the initiation of the initial investigation. Second, the parts originating from the country subject to the measures must constitute at least 60 percent of the total value of the parts of the assembled product, except if the value added to the parts, during the assembly or completion operation, is greater than 25 percent of the manufacturing cost. Finally, the remedial effects of the duties must be undermined and there must be evidence of dumping/subsidization.[90] In addition, according to Article 13(1), the assembly operations must lead to a change in the pattern of trade between third countries and the EU and there must be insufficient economic justification other than the imposition of the trade defence duties for it.[91]

In the following years, the EU initiated a few anti-circumvention investigations targeting assembly operations, covering products, such as weighing scales, bikes and magnetic disks, made of parts from Japan, but assembled in the EU or third countries.[92] In these cases, the EU confirmed that only

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86 Instead of the finished assembled products as this had been considered illegal by the GATT Panel.

87 Council Regulation (EC) 384/96, OJ 1995 L 56/1. "Circumvention" was defined as a change in the pattern of trade between third countries and the Community, resulting from a practice, process or work for which there is insufficient due cause or justification other than the imposition of the duty.

88 The criterion that the assembler had to be related to a producer subject to trade defence measures was not included in the new version of the anti-circumvention instrument.

89 There is no similar provision in the Basic Anti-Subsidy Regulation so that this provision is applied by analogy by the European Commission in case of anti-circumvention of countervailing measures. See for example, Commission Implementing Regulation (EU) 2022/301, OJ 2022 L 46/31.

90 Basic Anti-Dumping Regulation, *supra* note 57, at Article 13(2).

91 *Ibid.*, at Article 13(1); Basic Anti-Subsidy Regulation, *supra* note 61, at Article 23(3).

92 Commission Regulation (EC) 984/97, OJ 1997 L 141/57; Commission Regulation (EC) 985/97, OJ 1997 L 141/61; Commission Regulation (EC) 799/2000, OJ 2000 L 96/30; Council Regulation (EU) 71/97, OJ 1997 L 16/55.

'screwdriver' operations, whereby the assembled parts can be unassembled without damage, could be targeted.[93] The US seemed to share the EU's understanding at the time.[94]

At the international level, the WTO Committee on Anti-Dumping Practices has facilitated further discussions on the topic since 1995.[95] The US and the EU, with the support of some other WTO Members,[96] have continued to push for the development of uniform anti-circumvention rules under the WTO to target assembly operations aimed at avoiding trade defence duties, amongst other circumventing practices.[97] In contrast, opponents, mainly including Japan, New Zealand, South Korea, Hong Kong and Egypt, maintained that third country factories are not necessarily illegitimate, and, even if they are, the existing rules on anti-dumping and rules of origin provide sufficient tools to address these practices.[98] In response to the concerns about assembly operations, the opposing Members believed that these can be rational activities in a globalized economy as 'a producer would shift production process to another country for a variety of commercial reasons unrelated to an anti-dumping proceeding' so as to 'make the most of the comparative advantages in different countries'.[99]

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93 Commission Regulation (EC) 985/97, OJ 1997 L 141/61, at recital 13.

94 After the Uruguay Round negotiations, the US also made changes to the conditions for the application of anti-circumvention measures particularly those relating to assembly operations in the US or a third country. To strengthen the anti-circumvention instrument, for example, the US law shifted its focus on the extent to which the *value* of the assembled goods exceeds that of the parts/components to the *process* of assembly or production operation and whether the parts originating from the country subject to trade defence measures constitute a significant portion of the total value of the finished goods. See Y. Yu, *Circumvention and Anti-Circumvention Measures: The Impact on Anti-Dumping Practice in International Trade* (2008), at 82-83; D. Palmeter, 'United States Implementation of the Uruguay Round Antidumping Code', 29 *Journal of World Trade* (1995) 39, at 79.

95 WTO, Committee on Anti-Dumping Practices, *Minutes of the Meeting Held on 30 October 1995*, 21 February 1996, G/ADP/M/4, at 7–10; WTO, Committee on Anti-Dumping Practices, *Communication from the Chairman*, 20 March 1997, G/ADP/W/404.

96 See eg. WTO, Committee on Anti-Dumping Practices, Informal Group on Anti-Circumvention, *Topic 1 – What Constitutes Circumvention?*, Paper by Turkey, 3 April 1998, G/ADP/IG/W/5; WTO, Committee on Anti-Dumping Practices, Informal Group on Anti-Circumvention, *Topic 1 – An Approach to the Definition of Circumvention*, Paper by Canada, 23 October 1997, G/ADP/IG/W/3; WTO, Committee on Anti-Dumping Practices, Informal Group on Anti-Circumvention, *Topic 3 – To What Extent Can Circumvention be Dealt with under the Relevant WTO Rules? To What Extent Can It Not? What Other Options May Be Deemed Necessary?*, Paper by Australia, 16 April 2003, G/ADP/IG/W/48.

97 WTO, Committee on Anti-Dumping Practices, Informal Group on Anti-Circumvention, *Topic 1 – What Constitutes Circumvention?*, Papers by the United States, 8 October 1997, G/ADP/IG/W/2, 22 April 1998, G/ADP/IG/W/7, at 1; Papers by the European Community, 22 April 1998, G/ADP/IG/W/6, 3 October 1997, G/ADP/IG/W/1.

98 WTO, Committee on Anti-Dumping Practices, Informal Group on Anti-Circumvention, *Topic 1 – What Constitutes Circumvention?*, Papers by Japan, 30 April 1998, G/ADP/IG/W/9, 30 October 1998, G/ADP/IG/W/15; Paper by Hong Kong, China, 28 April 1998, G/ADP/IG/W/8; Paper by New Zealand, 20 October 1998, G/ADP/IG/W/11; Paper by Korea, 28 May 1999, G/ADP/IG/W/17.

99 See eg. Paper by Hong Kong, China, *supra* note 97, at 2; Paper by Japan, *supra* note 97, at 3.

Accordingly, they criticized the use of anti-circumvention as a disguised way of 'expanding the scope of the Anti-Dumping Agreement to restrict normal commercial activities'.[100] Their general position, as stated succinctly by South Korea, is that 'circumvention of anti-dumping duties … should be treated as a separate dumping case for which a new investigation of dumping and injury determination should be conducted'.[101] These Members, therefore, questioned the use of the anti-circumvention instrument in the US and the EU, and aimed to ensure that anti-circumvention measures were taken in a way that complies with the substantive requirements of the Anti-Dumping Agreement.[102]

Since 2004, international discussions over the anti-circumvention instrument have become considerably less intense.[103] While a draft text on anti-circumvention was prepared, the disagreements among the major Members have remained unresolved.[104] The US has continued to communicate its concerns about circumvention activities.[105] However, these concerns have continued to face the usual opposition.[106] As a result, the absence of uniform rules on anti-circumvention has led some other major users of trade defence instruments to adopt their own anti-circumvention provisions. For

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100 *Ibid*.

101 See Paper by Korea, *supra* note 97.

102 See eg. WTO, Committee on Anti-Dumping Practices, Informal Group on Anti-Circumvention, *Topic 2 – What is Being Done by Members Confronted by What They Consider to be Circumvention?*, Paper by Japan, 9 May 2000, G/ADP/IG/W/23; WTO, Committee on Anti-Dumping Practices, Informal Group on Anti-Circumvention, *Topic 2 – What is Being Done by Members Confronted by What They Consider to be Circumvention?*, Paper by Egypt, 22 September 2000, G/ADP/IG/W/26; WTO, Committee on Anti-Dumping Practices, Informal Group on Anti-Circumvention, *Questions Posed by Hong Kong, China regarding the Paper by the European Communities*, Paper by Hong Kong, China, 13 June 2001, G/ADP/IG/W/38; WTO, Committee on Anti-Dumping Practices, Informal Group on Anti-Circumvention, *Topic 2 – What is Being Done by Members Confronted by What They Consider to be Circumvention?*, Paper by New Zealand, 22 September 2000, G/ADP/IG/W/25; 17 April 2001, G/ADP/IG/W/35; 19 September 2002, G/ADP/IG/W/47.

103 For a detailed review of the negotiations up to 2010, see generally J. Kazeki, 'Anti-dumping Negotiations under the WTO and FANs', 44 *Journal of World Trade* (2010) 931.

104 WTO, Negotiating Group on Rules, *Working Document from the Chairman*, 28 May 2008, TN/RL/W/232, at Annex A.

105 WTO, Negotiating Group on Rules, *Communications from the United States*, 8 February 2005, TN/RL/GEN/29; 14 October 2005, TN/RL/GEN/71; 6 March 2006, TN/RL/GEN/106; WTO, Committee on Anti-Dumping Practices, Informal Group on Anti-Circumvention, *Antidumping Duty "Evasion Services"*, Paper from the United States, 17 March 2015, G/ADP/IG/W/54; WTO, Committee on Anti-Dumping Practices, Informal Group on Anti-Circumvention, *Procedure for Investigating Allegations of Evasion*, Paper from the United States, 16 March 2016, G/ADP/IG/W/55.

106 WTO, Negotiating Group on Rules, *Proposed Provision on Anti-Circumvention, Statement of China; Hong Kong, China; Pakistan*, 12 February 2008, TN/RL/W/216.

example, Brazil, India, Australia and Canada introduced their own anti-circumvention instruments targeting third country assembly operations respectively in 2008, 2011, 2013 and 2018.[107]

In 2004, the EU further revised its anti-circumvention instrument to specifically include one other type of circumvention activity involving third countries, namely, transhipment of goods via third countries to make them appear as being exported by a country not subject to the duties.[108] For the next fifteen years, most investigations over third country circumventions opened by the EU targeted such cases of transhipments.[109] A few cases of circumvention through assembly operations in third countries, however, also led to the extension of anti-dumping duties to assembled imported goods. In seven cases between 2004 and 2020, the EU extended the anti-dumping duties imposed on imports from China to products assembled in third countries from parts made in China. In these cases, the EU confirmed that the anti-circumvention instrument was meant to target 'screwdriver' operations by targeting products such as lighters or bikes.[110] Indeed, in all these cases, the final products exported to the EU could be disassembled into parts without significantly damaging these parts.[111]

4. Targeting the Legitimate Internationalization of Production Operations

A. *Expanding the Scope of the Anti-Circumvention Instrument*

While the use of the anti-circumvention instrument to target assembly operations remained a contentious issue, no further legal action was taken at the WTO after the *EEC – Parts and Components* case. Indeed, WTO Members appeared to have stopped contesting that such illegitimate

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107 A. Caetano, 'Circumvention of Anti-Dumping Measures: Law and Practice of Brazil', 11 *Global Trade and Customs Journal* (2016) 487; J. Dion Sud, 'Circumvention of Anti-Dumping Measures: Law and Practice of India', 11 *Global Trade and Customs Journal* (2016) 508; D. Moulis, 'Anti-Circumvention of Anti-Dumping Measures: Law and Practice of Ten World Trade Organization Members – Australia', 11 *Global Trade and Customs Journal* (2016) 479; Canada Border Services Agency, *Anti-circumvention Investigations conducted pursuant to the Special Import Measures Act (SIMA)* (2018), available at https://www.cbsa-asfc.gc.ca/sima-lmsi/ac-eng.html.

108 Council Regulation (EC) 461/2004, OJ 2004 L 77/12.

109 Van Bael and Bellis, *supra* note 60, at Chapter 9.

110 Council Regulation (EC) 1208/2004, OJ 2004 L 232/1; Council Regulation (EC) 866/2005, OJ 2005 L 145/1; Council Regulation (EC) 338/2008, OJ 2008 L 117/1; Council Regulation (EC) 499/2009, OJ 2009 L 151/1; Council Implementing Regulation (EU) 260/2013, OJ 2013 L 82/10; Council Implementing Regulation (EU) 501/2013, OJ 2013 L 153/1; Commission Implementing Regulation (EU) 2015/776, O.J. 2015 L 122/4.

111 Council Regulation (EC) 866/2005, OJ 2005 L 145/1, at recital 5; Council Regulation (EC) 1208/2004, OJ 2004 L 232/1, at recital 28.

internationalization of production such as 'screwdriver' operations set up for the purpose of avoiding trade defence measures could be the object of anti-circumvention actions. Rather, most of the recent discussions have focused, not on whether such behaviour constituted circumvention, but instead on certain thresholds concerning the value of the imported parts from a country subject to trade defence measures or the value added that must be reached for anti-circumvention measures to be imposed.

Yet, over the last two years, the EU has turned the anti-circumvention instrument into a tool to target legitimate internationalization of production activities by emerging market corporations, and Chinese ones in particular. In a series of investigations, the European Commission has been stretching the scope of the anti-circumvention instrument to target increasingly complex downstream manufacturing processes using Chinese inputs when the downstream products exported from China are covered by trade defence measures. This departs from the past practice of targeting solely 'screwdriver' operations.

This shift took off[112] with two investigations against aluminium foil and aluminium foil in rolls against a Thai subsidiary of a Chinese company in 2021. This company's stated aim was to access new markets and diversify its raw material supply sources and production locations, thus clearly fitting in a model of market and efficiency-seeking internationalization. While the company had planned to produce aluminium foil from start to finish at its Thai plant in the long run, it still imported aluminium stocks which it turned into aluminium foil through processes of rolling, slitting and annealing. Such processes, although less costly and complex than the production of aluminium stocks, required significant amounts of technical machineries and the final product could obviously not be returned to the form of aluminium stocks. Regardless of this, the EU considered that these processes constituted assembly or completion operations so that anti-circumvention measures could be imposed. As a result, it extended the anti-dumping duties imposed on imports of aluminium foil and aluminium foil in rolls from China to imports of the same products from Thailand.[113]

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112 The first investigation targeting complex downstream production was against steel ropes and cables. However, the raw materials originating from China did not constitute 60% of the value of the raw materials needed to make the final product. See Implementing Regulation of the Council (EU) 400/2010, OJ 2010 L 117/11.

113 Commission Implementing Regulation (EU) 2021/1475, OJ 2021 L 325/24; Commission Implementing Regulation (EU) 2021/1474, OJ 2021 L 325/6.

The EU soon followed suit with no less than four investigations against two Chinese-owned companies producing glass fibre fabrics in Morocco and Turkey. Glass fibre fabrics are products used in many goods related to the green energy transitions, such as windmill blades or light vehicle bodies. They are produced by weaving and stitching together different types of glass fibre roving as well as other types of fabrics materials using specific machineries. Once turned into glass fibre fabrics, it is impossible to recover the original roving and fabrics.

In the investigations against Morocco, the EU found that a Chinese producer of both glass fibre roving and fabrics subject to anti-dumping and countervailing duties on its exports from China had set up a subsidiary in Morocco. While the subsidiary was set up shortly after the initiation of the anti-dumping and countervailing investigations on imports of glass fibre fabrics from China, the group had already started planning the internationalization of production and the process of setting up a subsidiary abroad long before the investigations. The subsidiary imported roving from China which it then processed into fabrics before exporting part of its production to the EU. The subsidiary argued that its goal was not primarily the avoidance of the trade defence duties imposed on imports from China but rather to take advantage of the lower customs tariffs under the EU-Morocco Association Agreement,[114] to better supply growing EU demand for its products as well as manufacturers of windmill blades established in Morocco. Its internationalization process thus was aimed at both market and efficiency. Regardless of this, the EU considered that turning roving into fabrics was equivalent to 'completion' of 'parts', thereby allowing it to impose anti-circumvention measures against imports of glass fibre fabrics from Morocco. As a result, the EU extended both the anti-dumping and countervailing duties imposed on imports of fabrics from China to imports of fabrics from Morocco.[115]

In the investigations against Turkey, the EU found that a different Chinese producer of both glass fibre roving and fabrics, with a subsidiary in Egypt, subject to anti-dumping and countervailing duties on its exports from China and Egypt had incorporated a subsidiary in Turkey. This subsidiary was set

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114 Council and Commission Decision 2000/204 of 24 January 2000, Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part, OJ 2000 L 70/1.

115 Commission Implementing Regulation (EU) 2022/302, OJ 2022 L 46/49; Commission Implementing Regulation (EU) 2022/301, OJ 2022 L 56/31.

up about a year before the initiation of the anti-dumping and countervailing investigations. As in the case of Morocco, the subsidiary imported roving from its related companies, this time from both China and Egypt. The subsidiary argued that its production operation in Turkey was established to meet significant demand in that market: a clear case of market-seeking internationalization. Indeed, before this Chinese subsidiary, several non-Chinese producers of glass fibre fabrics already set up production operations in Turkey to supply that market and take advantage of the customs union between the EU and Turkey. In rebutting the company's argument that its activities did not constitute assembly or completion of parts, the EU clarified that the anti-circumvention instrument aims 'to cover not only operations that consist of assembling parts of a composite article, but may also involve further processing, i.e., finishing of a product'. It thus concluded that processing roving into fabrics constituted assembly and completion operations of parts and extended both the anti-dumping and countervailing duties imposed on imports of fabrics from China and Egypt to imports of fabrics from Turkey.[116]

More recently, in an investigation against imports from Malaysia, which was initially aimed at transhipment operations, the EU extended the duties imposed on pipe fittings from China to imports from Malaysia.[117] The EU found that two Chinese-owned companies based in Malaysia imported steel pipes and plates from China (but not necessarily from their mother companies) which were cut into pieces and then further processed into fittings through various processes such as forming, heat treatment, coating, etc. These companies were set up respectively one and three years after the imposition of the anti-dumping measures allegedly to serve the Malaysian and South-East Asian markets.

In its latest attempts to stretch the scope of the anti-circumvention instrument, the European Commission targeted hot rolled stainless steel sheets and coils produced in Turkey by a subsidiary of a Chinese stainless-steel producer. This Chinese producer used to source the nickel ore necessary to produce stainless steel from Indonesia. However, in an effort to encourage domestic processing of its

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116 Commission Implementing Regulation (EU) 2022/1477, OJ 2022 L 233/1; Commission Implementing Regulation (EU) 2022/1478, OJ 2022 L 233/18.

117 [The final regulation has not yet been published but should be available during the first quarter of 2023]

nickel ore supplies, Indonesia adopted a series of measures to prevent the exportation of nickel ore.[118] This led the Chinese producer to set up a fully vertically integrated plant in Indonesia, which was soon hit with anti-dumping duties by the EU.[119] A Turkish company started importing slabs from Indonesia in order to turn them into sheets and coils. To do so, the slabs need to be run through a hot strip mill where they are heated to more than a thousand degrees and descaled before running through a series of roughing stands which make them thinner and longer. Once cooled, the steel is rolled into coils. Yet, regardless of this technical and expensive process, the EU opined that this constitutes assembly or completion of parts, justifying the extension of the anti-dumping duties on imports of stainless steel from Indonesia to imports from Turkey.[120]

B. *Circumventing the Rules of the Anti-Dumping and SCM Agreement?*

The EU's application of the anti-circumvention instrument in the cases discussed above has clearly stretched the scope of the instrument from 'screwdriver' operations to any sort of downstream processing, including legitimate market and efficiency-seeking internationalization of production operations which typically involve significant amount of investment.[121] This expansive use of anti-circumvention is likely to continue given the EU's commitment to 'address any circumvention activities' so as to 'preserve the effectiveness' of trade defence measures and to tackle the challenges associated with China's BRI.[122] The reason why the EU has increasingly resorted to the anti-circumvention instrument is largely because this instrument is substantially easier to apply and can result in higher duties than anti-dumping and countervailing measures.

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118 V. Crochet, 'Trade Defence Instruments: A New Tool for the European Union's Extractivism', 33 *European Journal of International Law* (2022) 381.

119 Commission Implementing Regulation (EU) 2020/1713, OJ 2020 L 384/6.

120 Commission Implementing Regulation (EU) 2022/1310, OJ 2022 L 198/8. [The final regulation has not yet been published but should be available during the first quarter of 2023]

121 The traditional understanding of what assembly of parts means was latest confirmed in 2017 in Commission Implementing Regulation (EU) 2017/2093, OJ 2017 L 299/1, at recitals 33, 6 and 71-72, where the Commission stated that the cold forming process to produce seamless pipes and tubes of stainless steel "substantially transforms the product and irreversibly alters its essential characteristics. During the process the product changes its dimensions and its physical, mechanical and metallurgical properties." It added that "the cold forming causes irreversible alterations of the product's essential characteristics".

122 European Commission, 40th Annual Report from the Commission to the European Parliament and the Council on the EU's Anti-Dumping, Anti-Subsidy and Safeguard activities and the Use of Trade Defence Instruments by Third Countries targeting the EU in 2021 (2022), COM(2022) 470 final, at 4-6.

Unlike anti-dumping or anti-subsidy investigations, an anti-circumvention investigation does not require the European Commission to assess dumping and subsidy margins, whether the Union industry is injured, whether this injury is caused by the targeted imports, or whether the use of the anti-circumvention instrument would be in the Union interest.[123] While the criteria of the Basic Anti-Dumping Regulation could be seen as limiting the use of the anti-circumvention instrument to illegitimate cases of internationalization of production operation, the European Commission applies them loosely. This is so because, as discussed further below in Section 5, the lack of international oversight over the implementation and interpretation of these criteria gives the European Commission a wide margin of discretion in utilizing the anti-circumvention instrument. As a result, it regularly makes numerous adjustments to the actual values reported by companies in order to ensure that the value thresholds are met; considers that any change in trade patterns meet the criterion; and concludes that, as soon as the imposition of the initial trade defence duties is one of the reasons for a company to start or increase production abroad, there is insufficient economic justification.[124] Furthermore, the thresholds concerning the value of the parts and value-added in the third country, which must be met for the application of the anti-circumvention instrument to assembly operations in third countries, do not mean much in today's economy. Indeed, most operations taking place in the context of global value chains do not result in more than 25 percent added value, thus rendering this condition somehow less meaningful.[125]

In terms of procedure, the anti-circumvention instrument provides for a much faster way to protect the EU industry. This is so because anti-circumvention investigations are conducted over a nine-month period and imports will be registered automatically from the start of the investigation so that any anti-circumvention measure can be applied retroactively as of that date, thereby providing immediate relief to domestic producers. Investigations can be initiated based on a request by any interested party, without demonstrating that any representativity threshold is met, or unilaterally by the European

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123 A. Willems and B. Natens, 'What's Wrong with EU Anti-Circumvention Rules and How to Fix it', 19 *Journal of International Economic Law* (2016) 497.

124 See for example, Commission Implementing Regulation (EU) 2021/1475, OJ 2021 L 325/24; Commission Implementing Regulation (EU) 2022/302, OJ 2022 L 46/49; Commission Implementing Regulation (EU) 2022/1477, OJ 2022 L 233/1. See further A. Willems and B. Natens, *supra* note 122.

125 UNCTAD, Tracing the Value Added in Global Value Chains: Product-Level Case Studies in China (2015), UNCTAD/DITC/TNCD/2015/1.

Commission.[126] Furthermore, the domestic industry does not have to respond to questionnaires to investigate its situation, since no injury must be demonstrated.

Finally, the EU uses the anti-circumvention instrument to extend the treatment of the parent company to its foreign subsidiaries. Indeed, the anti-circumvention instrument enables the EU to extend the 'all other companies' duties imposed on imports from China to imports from the country of downstream production without assessing the individual conditions of that particular downstream plant. As discussed in Section 3.A, WTO Members, including the EU, rely on specific non-market economy methodologies to calculate dumping and subsidy margins of Chinese producers. Such methodologies often inflate anti-dumping and countervailing duties to a significant degree. For example, on imports of glass fibre fabrics, the European Commission's use of non-market economy methodologies against China led to a finding of a 99.7 percent dumping margin and a 30.7 percent subsidy margin for imports from China which were much higher than the dumping (20 percent) and subsidy (10.9 percent) margins calculated for imports from Egypt.[127] Thus, the anti-circumvention instrument allows the EU to extend duties resulting from the application of non-market economy methodologies to market economy countries, thereby leading to significantly higher duties than would have been found through an anti-dumping or anti-subsidy investigation.

This is not to say that the EU should not take actions against third counties corporations' subsidiaries abroad if their imports injure its domestic industry. Rather, the EU should follow the rules in place and target these subsidiaries through anti-dumping and countervailing measures following regular investigations. Indeed, it seems that, through the anti-circumvention instrument, the EU itself circumvents the substantive and procedural rules incorporated in the Anti-Dumping and SCM Agreements.

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126 See for example, Council Regulation (EC) 338/2008, OJ 2008 L 117/1 where the Commission opened an anti-circumvention *ex officio*.

127 Commission Implementing Regulation (EU) 2020/492, OJ 2020 L 108/1; Commission Implementing Regulation (EU) 2020/776, OJ 2020 L 198/1. See also V. Crochet and V. Hegde, *supra* note 14.

C. *Impact on Legitimate Commercial Activities and the International Development Path*

The new trend of extending the scope of the anti-circumvention instrument to target downstream processing plants using inputs made in China is quickly escalating out of proportion. Between December 2020[128] and November 2022, the EU initiated eight anti-circumvention investigations to target downstream production operations abroad.[129] As such, the anti-circumvention instrument has become the main instrument to target imports from countries other than China as more anti-circumvention investigations were initiated than anti-dumping and anti-subsidy investigations during that time. At the same time, the US seems to be walking in the footsteps of the EU by also using its own anti-circumvention instrument to target increasingly complex downstream operations abroad[130] and the United Kingdom is considering following suit.[131]

While one of the aims of the companies targeted might have been to avoid the duties on imports from China, it is neither the sole purpose nor the decisive one in most cases. Indeed, these companies did not set up mere 'screwdriver' plants but invested significant amounts in new downstream factories in search of markets and/or efficiency.

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128 The date of initiation of the first anti-circumvention investigations targeting legitimate internationalization of production activities by Chinese companies in Thailand discussed above.

129 European Commission, *Trade Defence Investigations (Ongoing Investigations)* (2022), available at https://tron.trade.ec.europa.eu/investigations/ongoing.

130 The US's recent practices have been heading in the same direction by using the anti-circumvention instrument to target complex downstream manufacturing processes by Chinese companies which expanded production operations overseas. Based on our search under US Federal Register via www.govinfo.gov, we identified around 43 anti-circumvention measures imposed by the US government between 2012 and 2021. Among these measures, 31 involved China including 19 cases concerning assembly operations in a third country, 5 concerning assembly operations in the US, and 7 on other types of circumventing activities. A recent example concerned imports of welded oil country tubular goods (OCTG) completed in Brunei and the Philippines using inputs manufactured in China. In 2010, the US Department of Commerce (USDOC) imposed anti-dumping and countervailing duties on certain OCTG goods exported from China. In November 2020, the USDOC self-initiated an anti-circumvention investigation based on information suggesting that Chinese companies had established production facilities in Brunei and the Philippines to manufacture OCTG goods using hot-rolled steel sheet and strip from China and then exported the OCTG goods to the US, thereby circumventing the existing anti-dumping and countervailing duties. Despite the complex production process of OCTG, the USDOC found that the Chinese companies' investment in Brunei and the Philippines was merely assembly operations used to circumvent the US duties. See USDOC, Oil Country Tubular Goods from the People's Republic of China: Decision Memorandum for Preliminary Affirmative Determinations of Circumvention (4 August 2021); USDOC, Oil Country Tubular Goods from the People's Republic of China: Final Affirmative Determinations of Circumvention, Federal Register Notices 67443 (26 November 2021).

131 UK Trade Remedies Authority, *Economic Research into the Circumvention of Trade Remedies*, November 2022.

Such an expansive use of anti-circumvention measures thus gives rise to the exact concerns raised by governments that have opposed uniform anti-circumvention rules since the Uruguay round negotiations. That is, the misuse of anti-circumvention to target legitimate commercial activities. In today's world, countries, regardless of size and level of development, have increasingly engaged in global value chains including through foreign direct investment, and such engagement or investment has been driven primarily by economic development goals and commercial considerations.[132] The abuse of the anti-circumvention instrument raises not only barriers and costs to trade but also policy uncertainties for investment decisions, which in turn would have profound impacts on supply chain resilience and economic growth for all countries involved.[133]

China is not an exception in the trend of globalization of supply chains but has actively participated in it to become a critical player. The rapid growth of Chinese investments worldwide has largely been motivated by supportive government policies[134] and commercial needs.[135] Notably, when it comes to the Asia-Pacific region, the fact that many countries in the region are 'BRI-participating economies' suggests that Chinese investment in these economies has a strong bearing on the strategic and commercial goals embedded in the BRI.[136] The steel industry, which has been a leading target of trade defence measures, offers a good example. In this industry, all major steelmakers including Chinese ones 'have been investing in downstream steel facilities and steelmaking capacity in foreign locations' for reasons unrelated to circumvention of trade defence measures.[137]

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132 See eg. World Development Report 2020, *Trading for Development in the Age of Global Value Chains* (2020), available at https://www.worldbank.org/en/publication/wdr2020, at 37; H. Suzuki, *Building Resilient Global Supply Chains: The Geopolitics of the Indo-Pacific Region* (2021), available at https://www.csis.org/analysis/building-resilient-global-supply-chains-geopolitics-indo-pacific-region.

133 See generally S. Miroudot and H. Nordström, 'Made in the World? Global Value Chains in the Midst of Rising Protectionism', 57 *Review of Industrial Organization* (2020) 195; C. Constantinescu, A. Mattoo and M. Ruta, 'Policy Uncertainty, Trade and Global Value Chains: Some Facts, Many Questions', 57 *Review of Industrial Organization* (2020) 285.

134 See Section 2 above.

135 See eg. CSIS, *China Power Team, Does China Dominate Global Investment?* (2021), available at https://chinapower.csis.org/china-foreign-direct-investment/.

136 See eg. OECD, *China's Belt and Road Initiative in the Global Trade, Investment and Finance Landscape* (2018) ,available at https://www.oecd.org/finance/Chinas-Belt-and-Road-Initiative-in-the-global-trade-investment-and-finance-landscape.pdf, at 9 and 24.

137 See eg. OECD, *A First Look at the Steel Industry in the Context of Global Value Chains* (2017), available at https://one.oecd.org/document/DSTI/SC(2017)4/en/pdf, at 4, 6 and 13; T. S. Yean and Y. W. Jin, *Chinese Steel Investments in ASEAN* (2020), available at https://www.iseas.edu.sg/wp-content/uploads/2020/03/ISEAS_Perspective_2020_50.pdf, at 3-4.

In this regard, the companies targeted in EU anti-circumvention investigations, discussed above, followed a pattern of internationalization similar to that taken before them by Western and East Asian companies. They set up subsidiaries abroad to conduct downstream processing operations of inputs produced by their mother companies for legitimate commercial reasons, particularly to take advantage of lower labour and transportation costs and more advantageous trading conditions and to better supply markets that they previously exported to from China. These are the same reasons behind the internationalization of production operations by other foreign multinationals over the past decades.

This extension of the scope of the anti-circumvention instrument to target legitimate internationalization of production activities may thus have a chilling effect on Chinese outward foreign investment. The EU's practice suggests that unless Chinese companies invest in a fully vertically integrated plant that does not rely on inputs originating from China, they may now be at risk of getting caught by the anti-circumvention instrument. Besides affecting Chinese companies, it is mainly host countries that will pay the price as they will not get the economic benefits of Chinese investment. Indeed, the participation of many economies in the BRI is strong evidence of the benefits that Chinese investments can bring for their development and industrialization.[138] These benefits were also repeatedly highlighted by governments of host countries during the investigations discussed above. The extension of the scope of the anti-circumvention instrument could thus result in loss of employment, tax and industrialization opportunities for countries lower in the international division of labour that count on Chinese investment to set them on a path to development.

In addition, the risk for third countries is further exacerbated by the fact that this new use of the anti-circumvention instrument can be applied even in situations where the downstream producer is not related to a Chinese company subject to trade defence measures. This may result in companies in third countries shifting purchases of inputs from China to less efficient producers and more expansive inputs from third countries for fear of getting caught in the net of the anti-circumvention instrument.

While the EU's anti-circumvention actions have so far focused on the internationalization of production operations by Chinese companies, they may be increasingly applied to companies from other third countries which are now starting their internationalization process. As a result, developing

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138 See OECD, *supra* note 136.

countries should be wary of this new practice not only because it creates an obstacle to their industrialization which relies on Chinese investment and Chinese inputs, but also because their own companies may soon become the target. If this trend continues, it may thus prevent the legitimate internationalization of production activities by non-Western companies, while global activities by Western multinationals are not similarly impacted. As a result, the EU's expansive use of anti-circumvention measures can be a catalyst for trade tensions and retaliatory actions. Amid the rise of unilateralism and economic nationalism worldwide, the EU's extension of the scope of the anti-circumvention instrument may thus simply add fuel to the current crisis in international cooperation on trade regulation.

5. Putting the Lid on the Anti-circumvention Instrument

There is a pressing need to constrain the recent expansion of the scope of the anti-circumvention instrument. In this section, we consider several approaches to achieve this and the challenges they may face.

One option is for affected exporting producers to bring actions for annulment against the anti-circumvention measures concerned before the EU Courts. It can be argued that Article 13(2) of the Basic Anti-Dumping Regulation[139] cannot be applied to situations where the inputs used in the finished product cannot be disassembled without being damaged. Indeed, such inputs would not constitute 'parts' under EU law[140] as they would require further working operations to be turned into the final product.[141] The problem with this approach is that it is unlikely to be fruitful. Under EU law, the European Commission has a 'broad margin of discretion' in applying the Basic Regulations, and the anti-circumvention instrument in particular, so that the EU Courts' review is rather limited in this

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139 With regard to the extension of the use of countervailing measures, it could be argued that Article 23 of the Basic Anti-Subsidy Regulation, *supra* note 61, (that is the provision under EU law which encapsulate the anti-circumvention instrument with regard to anti-subsidy measures) does not include a provision similar to Article 13(2) of the Basic Anti-Dumping Regulation, *supra* note 57, regarding assembly operations in third countries so that countervailing duties might not be extended in such cases.

140 Commission Delegated Regulation (EU) 2015/2446, OJ 2015 L 343/1, at Articles 35(3)(c) and 47. See also, Explanatory Note (VII) of the second part of General Rule 2(a) for the interpretation of the Harmonized System.

141 Case C-2/13, *Directeur général des douanes et droits indirects and Chef de l'agence de la direction nationale du renseignement et des enquêtes douanières v. Humeau Beaupréau SAS* (EU:C:2014:48), at paras. 38-51.

regard.[142] As such, although in our opinion the terms of the Basic Regulations have been stretched beyond what is permissible, it is possible that the EU Courts would side with the European Commission.[143]

Moreover, even if a claim were successful, the European Commission could invoke Article 13(1) of the Basic Anti-Dumping Regulation [144] instead. This provision indicates that the European Commission can use the anti-circumvention instrument as long as a practice, process or work, for which there is insufficient due cause or economic justification other than the imposition of the duty, leads to a change in the pattern of trade. The illustrative list of such a practice, process or work, which includes assembly of parts in the Basic Anti-Dumping Regulation, is left open. This provides room for the European Commission to find that downstream production operations constitute a practice, process or work (even if not assembly or completion of parts) so that anti-circumvention can be used without having recourse to Article 13(2) of the Basic Anti-Dumping Regulation. Thus, litigation before the EU Courts provides little hope for curtailing the abuse of the anti-circumvention instrument. Furthermore, it would not solve the recent expanded use of this instrument in other countries such as the US.

Another option is to bring this issue before an international dispute settlement forum which could be either the WTO or an FTA. The legality of the anti-circumvention instrument is highly questionable under international trade rules. This is so because its use results in the application of anti-dumping or countervailing measures to products originating from countries that are not involved in the original anti-dumping or countervailing investigation.[145] Since an anti-circumvention investigation is focussed on the existence of circumventing activities, the imposition of the existing anti-dumping or countervailing measures arguably does not comply with the substantive and procedural requirements set forth in the Anti-Dumping Agreement or the SCM Agreement.[146] Taking assembly operations as

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142 Case C-21/13, *Simon, Evers & Co* (ECLI:EU:C:2014:2154), at para. 48.

143 An action for annulment has been brought against the two anti-circumvention measures on imports from Morocco discussed above. See Cases T-245/22 and T-246/22, *PGTEX Morocco v Commission*.

144 As well as of the Basic Anti-Subsidy Regulation, *supra* note 61, at Article 23(3).

145 W. Zhou, 'Circumvention and Anti-Circumvention: Rising Protectionism in Australia', 15 *World Trade Review* (2016) 495, at 511-515; A. Willems and B. Natens, *supra* note 122, at 505-510.

146 See Section 3.A above. Furthermore, Article 18.1 of the Anti-Dumping Agreement, *supra* note 47, and Article 32.1 of the SCM Agreement, *supra* note 48, prohibits actions to be taken against dumping and subsidization respectively except in the form of anti-dumping and countervailing measures.

an example, Article 13 of the Basic Anti-Dumping Regulation requires the European Commission to investigate a range of factors which may show that assembly operations have resulted in circumvention of existing anti-dumping/countervailing duties, rather than whether there is dumping/subsidy causing injury to EU domestic industries. This means that an affirmative anti-circumvention determination which leads to the extension of the duties is not based on findings of dumping/subsidization, injury and causation, thereby failing to satisfy the pre-conditions for the imposition of such duties under the Anti-Dumping Agreement and/or SCM Agreement. Given the fact that most FTAs reproduce or incorporate WTO rules on anti-dumping and countervailing measures or forbid certain types of trade defence measures altogether, arguments could also be advanced to challenge the use of the anti-circumvention instrument thereunder.[147]

China, or an aggrieved country having attracted Chinese investment, could thus consider bringing a challenge before the WTO or under an FTA. This could be done in two ways, leading to different results. One way is to challenge particular anti-circumvention measures (known as an 'as applied' challenge in WTO parlance). Where an anti-circumvention measure is found to be in breach of WTO or FTA rules, it must be brought in compliance with the findings. Under EU law, the European Commission is indeed mandated to implement an adverse WTO ruling against its trade defence measures by bringing such measures in line with WTO rules.[148] In practice, this may well mean that the Commission would have to terminate the measures and then initiate anti-dumping or countervailing investigations instead. This approach would, however, not preclude authorities from repeating the same or similar violations in future cases.[149]

The other way is to challenge the legislation encapsulating the anti-circumvention instrument itself or the repeated practice[150] of using such instrument (known as an 'as such' challenge). If it is established that this legislation itself, or its repeated use, violates international trade rules, such legislation or practice would need to be brought in line with the rules. In other words, this would mean repealing, or not using again, the anti-circumvention instrument. Nevertheless, under EU law, the EU is under

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147 T. Prusa, 'Anti-Dumping and Countervailing Duties', in A. Mattoo *et al*. (eds), *Handbook of Deep Trade Agreements* (2020).

148 Council Regulation (EU) 2015/476, OJ 2015 L 83/6.

149 For a detailed discussion of China's practice, see W. Zhou, *China's Implementation of the Rulings of the World Trade Organization* (2019), at 152-182.

150 On challenging repeated practice, see Panel Report, *US – Anti-Dumping Methodologies*, at para. 7.305.

no obligation to amend the Basic Regulations themselves following an adverse WTO ruling. For example, the EU did not amend the Basic Anti-Dumping Regulation after losing the *EEC – Parts and Components* dispute, whereas it did do so following the more recent WTO reports in *EC – Fasteners (China),* which found that a provision of the Basic Anti-Dumping Regulation was 'as such' inconsistent with the Anti-Dumping Agreement.[151] It is thus uncertain whether the EU, or another country whose anti-circumvention instrument would be found to violate the rules 'as such', would withdraw its anti-circumvention instrument altogether. Indeed, the anti-circumvention instrument is a sensitive topic and, with the current shakiness of the WTO dispute settlement mechanism,[152] the country found to be running afoul of the rules may well prefer to face potential economic retaliation[153] rather than comply with a ruling. However, even in this situation, the successful litigant could use the dispute as a steppingstone to build political momentum for negotiations.

The third option is for governments to reach an agreement on the anti-circumvention instrument via negotiations at the WTO. This is desirable as it would provide the most systemic response to the recent expansion of the scope of the instrument. It is urgently needed given the proliferation and growing abuse of the instrument by WTO members and the resulting potential escalation of trade tensions as flagged above. The key challenge is how to resolve the opposing views of the two camps of WTO Members to reach a compromise. Such a compromise will need to be based on the creation of uniform rules on anti-circumvention which explicitly authorize the use of the anti-circumvention instrument, thereby reflecting the position of the pro-anti-circumvention camp. This would contravene the views of the opposing side which would not agree to legalising an instrument aimed at targeting circumvention altogether.[154] Yet, faced with the recent expansion of the scope of the anti-circumvention instrument orchestrated by the EU, these countries may wish to reconsider their

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151 WTO Appellate Body Report, *EC – Fasteners (China)*, 28 July 2011, WT/DS397/AB/R, at para. 385; Council Regulation (EU) 765/2012, OJ 2012 L 237/1.

152 Due to a current lack of standing WTO Appellate Body (the appeal court of the WTO), it is possible for a defeated WTO Member to block the dispute settlement process by appealing the panel report 'into the void', thereby preventing its formal adoption by the WTO. See P. Ungphakorn, *Technical note: Appeals 'into the void' in WTO dispute settlement* (2021), available at https://tradebetablog.wordpress.com/technical-note-appeals-into-the-void-in-wto-dispute-settlement/#:~:text=After%20the%20Appellate%20Body%20stopped,adopted%20by%20the%20WTO's%20membership.

153 The WTO and most FTAs allow the successful complaining State to impose retaliatory trade measures until compliance is achieved.

154 See Section 3.B above.

position. Indeed, at this point, the use of the anti-circumvention instrument to target illegitimate business practices aimed at avoiding trade defence duties has become so widespread that there is not much point in attempting to block its legitimization under international trade rules.[155]

While the anti-circumvention instrument should be explicitly allowed, strict conditions must be imposed on its use. As discussed above, the conditions that are currently applied by EU and US authorities, focusing on the value added during the processes undertaken abroad, changes in the pattern of trade and economic justification, are not sufficient to prevent the anti-circumvention instrument being applied to legitimate internationalization of production operations. To put the lid on the expansion of the scope of the instrument, interested countries could thus accept most of the elements of the latest proposals put forth by the US and the EU,[156] but should attempt to introduce two additional conditions.

The first condition could be that, when it comes to production operations in third countries, only assembly and completion operations of parts should be covered, not other types of downstream processing operations that require substantial investment. 'Parts' are defined under international customs rules as inputs which do not need 'any further working operation for completion into the finished state'.[157] Thus, only processes through which the inputs maintain their physical and technical characteristics should be targeted under the anti-circumvention instrument. Other inputs indeed do not constitute parts.[158] In this respect, a useful test is to assess whether an input can be disassembled without being damaged so as to determine whether it constitutes parts.[159] If this is not the case, then the input should not be treated as parts so that the process concerned does not constitute assembly or completion operation of parts.[160] This condition would help confine the scope of the anti-circumvention instrument to 'screwdriver' assembly operations which have little positive spill over effects on the host country as they do not result in significant investment.

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155 UK Trade Remedies Authority, *supra* note 131.

156 See Negotiating Group on Rules, *supra* note 103, at Annex A; Negotiating Group on Rules, *supra* note 104, TN/RL/GEN/29; TN/RL/GEN/71; TN/RL/GEN/106; Committee on Anti-Dumping Practices, *supra* note 104, G/ADP/IG/W/54; G/ADP/IG/W/55.

157 Explanatory Note (VII) of the second part of General Rule 2(a) for the interpretation of the Harmonized System.

158 Components would thus constitute parts.

159 See, on this under EU customs law, Commission Delegated Regulation (EU) 2015/2446, OJ 2015 L 343/1, at Articles 35(3)(c) and 47.

160 See, on the difference between assembly, production and processing under EU customs law, Commission Delegated Regulation (EU) 2015/2446, OJ 2015 L 343/1, at Article 37.

The second condition on which the negotiations should focus is to ensure that the anti-circumvention instrument can only be used to target foreign expansion of production operations which are motivated solely or primarily by circumventing trade defence measures so as to avoid the instrument being applied to legitimate business activities.[161] To do so, a 'but for' test[162] could be introduced whereby authorities are required to establish that the internationalization of production operations would not have taken place in the absence of the imposition of anti-dumping or countervailing measures.[163] This test does not require circumvention to be the sole purpose,[164] but it needs to be a decisive factor that led to the internationalization of the production operations. Where the establishment of production facilities overseas is primarily driven by factors other than circumvention, it should not be targeted by the anti-circumvention instrument regardless of whether circumvention is also one of the underlying objectives or of the impact of the production operations in the third country on the effectiveness of trade defence measures. Such impact can, and should, be addressed instead through anti-dumping or anti-subsidy investigations.

Accepting the proposals set forth by the EU and the US with these additional conditions could achieve a reasonable balance between the demand for legitimizing the anti-circumvention instrument in international trade rules and the need to restrain its abuse. Yet, it might be difficult to reach an agreement on this issue at the WTO as this would require consensus by all WTO Members. Countries attempting to attract non-Western foreign direct investment and wishing to protect themselves from this expanded use of the anti-circumvention instrument could, in the meantime, consider inserting relevant provisions, based on our proposals above, in their future FTAs with developed countries. Such provisions should be carefully drafted so as to ensure that the application of the anti-

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161 A rather similar test was put forth by the Court of Justice of the European Union but is loosely applied by the European Commission in practice. See Joined Cases C-247/15 P, C-253/15 P and C-259/15 P, *Maxcom Ltd v. Chin Haur Indonesia*, EU:C:2017:61, para. 102.

162 This would involve examining the situation that would have existed but for the measure in question. See, Panel Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, 23 March 2012, WT/DS353/R, as modified by Appellate Body Report WT/DS353/AB/R, at para. 7.117.

163 In this regard, the test of insufficient economic justification other than the imposition of the trade defence measures used in EU law could be used together with an interpretative not clarifying that this test must be read as a 'but for' test.

164 As a result, this would be different from anti-circumvention in 'origin investigations' under Article 25 of the former EU Customs Code. See E. Vermulst, *supra* note 5, at 499.

circumvention instrument to exports from one of the FTA's parties is clearly prohibited.[165] This would be a useful start to put the lid on the expansion of the scope of the anti-circumvention instrument and to pave the way for negotiations at the multilateral level.

6. Conclusion

Companies from rapidly emerging markets have been set on a path to become business hegemons, on equal footing with their Western and East Asian counterparts. To better serve their markets and improve efficiency, they have started internationalizing their production operations and setting up affiliated factories in third countries closer to their export markets or where such operations can be more efficiently conducted. The process they are following is nothing new as it has been threaded by developed countries' multinationals long before them. Indeed, these corporations first internationalized in the first half of the twentieth century when they started facing increasing domestic competition in their export markets and rising trade barriers. In the second half of the twentieth century, this process continued and accelerated as multinational corporations created global value chains in order to increase efficiency and reduce costs.

The internationalization of Western and East Asian corporations has benefited host countries enormously in many ways, setting several of them on their own path to industrialization and development. The internationalization of Chinese companies, and companies from other rapidly emerging markets, is likely to have similar effects on countries lower in the international division of labour. This is why these countries have been seeking inward foreign direct investment, for example, by taking part in the BRI and other international initiatives led by advanced developing countries. Yet, countries wishing to attract non-Western and East Asian investment are getting in the crosshair of developed countries which have been setting up a framework of unilateral economic measures to slow the growth of Chinese and other emerging countries' companies as well as their internationalization.

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165 For example, the Euro-Mediterranean Agreement, *supra* note 113, which prohibits the imposition of trade defence measures other than anti-dumping measures. However, this did not prevent the EU to argue, based on textual ambiguities, that the use of the anti-circumvention instrument against imports from Morocco was nevertheless allowed. See, Commission Implementing Regulation (EU) 2022/302, OJ 2022 L 46/49; Commission Implementing Regulation (EU) 2022/301, OJ 2022 L 56/31.

Indeed, through several initiatives, these countries are attempting to prevent foreign companies from becoming multinationals which could potentially dethrone their own at the top of the business ladder. The expansion of the scope of the anti-circumvention instrument to target legitimate downstream production abroad discussed in this article is one such initiative. However, it should not be seen in isolation. It is complemented by many others which have a similar economic aim. In the field of trade defence, the EU's recent practice of countervailing cross-border subsidies given by the Government of China to Chinese subsidiaries abroad is notable.[166] It is complemented by the EU's recent Foreign Subsidy Regulation which is aimed at targeting foreign corporations internationalizing their operation within the EU market.[167] The resurgence of investment screening on national security grounds in the US and EU Member States has similarly been used to protect economic interests and to slow the internationalization of foreign corporations by preventing them from investing in these countries.[168] This has also been mirrored in the post-investment phase as Western countries have forced many foreign corporations to divest from parts of their businesses operating in their territories.[169] As the grip of unilateral external economic law[170] is tightening around emerging global corporations from rapidly developing countries, their home governments should be wary of these developments. Countries wishing to attract investment from these corporations and to integrate themselves into global value chains to accelerate their development should be wary too.

While the expansion of the scope of the anti-circumvention instrument is a fairly recent phenomenon, it has accelerated rapidly to become the EU's preferred way to target imports from countries other than China. To constrain this practice, targeted countries may challenge it before an international

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166 In essence, this is the tool the EU uses when a Chinese subsidiary is set up abroad but does not use inputs of Chinese origin so that it cannot be targeted by the anti-circumvention instrument. See Crochet and Hegde, *supra* note 14.

167 V. Crochet and M. Gustafsson, 'Lawful Remedy or Illegal Response? Resolving the Issue of Foreign Subsidization under WTO Law', 20 *World Trade Review* (2021) 343.

168 C. Schmucker and S. Mildner, *Investment screening: protectionism and industrial policy? Or justified policy tool to protect national security?* (2021), available at https://www.g20-insights.org/policy_briefs/investment-screening-protectionism-and-industrial-policy-or-justified-policy-tool-to-protect-national-security/.

169 See, for example, China Trade Monitor, *FCC Revokes Telecom Services Authority for Two Chinese Companies* (2022), available at https://www.chinatrademonitor.com/fcc-revokes-telecom-services-authority-two-chinese-companies/; China Trade Monitor, Canada Excludes Huawei, *ZTE from 5G Market* (2022), available at https://www.chinatrademonitor.com/canada-excludes-huawei-zte-from-5g/; R. Chesney, *TikTok, WeChat, and Biden's New Executive Order: What You Need to Know* (2022), available at https://www.lawfareblog.com/tiktok-wechat-and-bidens-new-executive-order-what-you-need-know.

170 J. Chaisse and G. Dimitropoulos, 'Special Economic Zones in International Economic Law: Towards Unilateral Economic Law', 24 *Journal of International Economic Law* (2021) 229.

forum while at the same time seeking to revive international discussions on this issue. This may mean reneging on their previous stance of rejecting the legitimization of an anti-circumvention instrument altogether. However, it may help them get out of the legal limbo resulting from the lack of international rules, which effectively leaves abuses of the anti-circumvention instrument unrestricted by international oversight.