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Advocate General's Opinion C-123/21 P | Changmao Biochemical Engineering / Commission

According to Advocate General Ćapeta, the Court may refrain from reviewing the compatibility of the Basic Anti-dumping Regulation in the light of the Protocol on the Accession of China to the WTO.

However, that exercise of judicial self-restraint is exceptionally possible only due to the flexible nature and structure of the WTO agreements.

On 11 December 2016, the 15-year period contained in the Protocol on the Accession of China to the World Trade Organization ('Chinese Accession Protocol') expired. Relying on that expiry, Changmao Biochemical Enginering Co. Ltd ('Changmao'), the appellant, brought an action before the General Court to challenge the Commission's decision to maintain anti-dumping duties on Changmao's imports of tartaric acid from China.[1] It claimed that, after 11 December 2016, the Commission would have to treat China as any other market economy country in anti-dumping investigations. For the purposes of the anti-dumping investigation at issue, that would have meant that the Commission would have been obliged to use Changmao's actual prices and costs of production in China in order to determine whether Changmao dumped its products on the EU market. Instead, however, treating China as a non-market economy country, the Commission used the costs and prices of a company in a surrogate country (that is, making use of the so-called 'analogue country methodology').

The Commission based this choice on Article 2(7) of the Basic Anti-dumping Regulation, [2] which permits the use of the analogue country methodology in relation to China. For its part, the appellant considers that that provision is no longer applicable to China after the expiry of the 15-year period, as it is not compatible with what remained of the Chinese Accession Protocol after 11 December 2016.

In the judgment under appeal, the General Court considered that it cannot review the conformity of EU law (in this case, the Basic Anti-dumping Regulation) with WTO law, of which the Chinese Accession Protocol forms part. [3]

Changmao challenged that finding in the present appeal.

In her opinion delivered today, Advocate General Tamara Ćapeta proposes that the Court uphold the General Court's judgment on that point and explains why the Court should refrain from exercising judicial review of the Basic Anti-dumping Regulation in the light of the Chinese Accession Protocol.

As a preliminary point, the Advocate General recognises the tension arising from the long-standing case-law

[1] Commission Implementing Regulation (EU) 2018/921 imposing a definitive anti-dumping duty on imports of tartaric acid originating in the People's Republic of China following an expiry review pursuant to Article 11(2) of the Basic Regulation (OJ 2018 L 164, p. 14).

[2] Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union (OJ L 176, 2016, p. 21).

[3] Judgment of 16 December 2020 Changmao Biochemical Engineering v Commission, T-541/18.

whereby the WTO agreements are not, in principle, among the rules in the light of which the legality of measures adopted by the EU institutions may be reviewed. She explains that, on the one hand, the binding force of international agreements to which the Union is a party and the power of judicial review granted by the Treaties to the Court are both the features of the EU constitutional order. They result in the Court's power to assess whether the EU institutions respect the Union's obligations stemming from the WTO agreements. On the other hand, by reason of the political reality of the international trade system, since early on, the Court has hesitated to exercise its powers of judicial review when it comes to the conformity of EU legislation with the WTO agreements.

In her Opinion, the Advocate General notes that this judicial self-restraint is the result of the Court's recognition of the flexible nature of the WTO system and the political reality that the Union's trading partners do not submit actions of their institutions falling within the scope of WTO law to the scrutiny of the courts. **Given those considerations, the EU institutions can, without the control of the Court, choose a certain interpretation of the provisions of the WTO agreements and decide, if necessary after assessing the relevant consequences, to depart from the Union's obligations under the WTO agreements.**

However, the Advocate General highlights that the decision not to exercise judicial review powers should not be misunderstood as a decision by the Court to withdraw completely from its prerogative of ensuring that the Union's international obligations are respected. **That judicial self-restraint is exceptional and only possible because the WTO agreements allow for it.**

In its case-law, the Court has recognised situations in which the reasons for self-restraint did not exist and in which it therefore reviewed EU law in the light of WTO law. One such case resulted in the judgment in *Nakajima*, [4] on which the appellant relied before the General Court.

The Advocate General considers that the General Court did not err in holding *Nakajima* inapplicable in the present situation. **She considers that there are two possible readings of that case-law. The narrow reading** entails an understanding that the Court reviews EU law in the light of WTO law when there is evidence of the EU legislature's intention to implement WTO law. The **broader reading** would be that the Court performs judicial review whenever it is satisfied that the EU institutions did not intend to depart from WTO law.

According to the Advocate General, **neither of those two possible readings is applicable in the present case.** The regime of the Basic Anti-Dumping Regulation established in relation to China may be understood as specific to the EU legal order. For this reason, the Court cannot conclude either that that regime represents the implementation of the Chinese Accession Protocol, or that the EU institutions did not intend to depart from that protocol.

The specific EU law nature of that regime is therefore a reason for the Court to refrain from exercising its power of judicial review of acts of the EU institutions in relation to the Accession Protocol.

[4] Judgment of 7 May 1991 Nakajima v Council, C-69/89.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

The full text of the Opinion is published on the CURIA website on the day of delivery.

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