Council of the
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Delegations will find attached the partially declassified version of the above-mentioned document.

ANNEX

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Brussels, 7 February 2017
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RESTREINT UE/EU RESTRICTED

COMER 19
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OPINION OF THE LEGAL SERVICE[1]

From:	Legal Service
To:	Commercial Questions Working Party
Subject:	Compatibility with WTO law of the new methodology proposed by the Commission for protection against dumped and subsidised imports from countries not members of the EU

1. On 30 November 2016 the Commercial Questions Working Party asked the Legal Service whether the Commission's proposal for a Regulation amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union and Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union[1] is compatible with WTO law and, specifically, with the WTO Anti-Dumping Agreement ("ADA").[2] The present contribution responds to that question.[3] It also discusses some issues pertaining to the Agreement on Subsidies and Countervailing Measures ("SCM Agreement").

1 Doc. 14249/16 of 9 November 2016.
2 Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, OJ L 336 of 23 December 1994, p. 103.
3 This contribution does not cover Section 15 of China's Accession Protocol to the WTO.

I. THE COMMISSION'S PROPOSAL, AS IT RELATES TO THE NEW METHODOLOGY

2. In its proposal, the Commission proposes to amend radically its anti-dumping methodology as it is applied vis-à-vis countries that do not have a functional market economy and to replace it with a new methodology aimed at duly taking account of major distortions in the investigated countries. The proposal also aims to amend the basic anti-subsidy Regulation (section IV, below).

3. As far as the basic anti-dumping Regulation[4] is concerned, the Commission's proposal proposes to do two things.

4. <u>First</u>, the Commission proposes to abolish for WTO Members the current methodology used to calculate dumping margins for non-market economy countries (Article 2(7) of the Basic Anti-Dumping Regulation). Under the current system, normal values for non-market economy countries were calculated by reference to data established for a producer in a third – market economy – country[5] unless the investigated country is a WTO Member *and* the investigated producer can demonstrate that "*market economy conditions prevail for this producer or producers in respect of the manufacture and sale of the like product concerned*".[6]

5. <u>Secondly</u>, that system will be replaced with a system that would apply to any WTO Member country where the Commission determines that "*it is not appropriate to use domestic prices and costs in the exporting country due to the existence of significant distortions*".

6. A "*significant distortion*" may be deemed to exist "*inter alia, when reported prices or costs, including the costs of raw materials, are not the result of free market forces as they are affected by government intervention*".[7] The proposed new Article 2(6a)(b) provides further guidance on the criteria to be taken into account for the determination whether or not significant distortions exist.

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4 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 of 30 June 2016, p. 21 ("basic anti-dumping Regulation").
5 Article 2(7) of the basic anti-dumping Regulation.
6 Ibid., Article 2(7)(b).
7 Proposed Article 2(6a)(b).

7. In the case of such significant distortions "*it is not appropriate to use domestic prices and costs in the exporting country*".[8] The normal value would then be constructed "*on the basis of costs of production and sale reflecting undistorted prices or benchmarks*". The sources for such undistorted prices or benchmarks may:

"*include undistorted international prices, costs, or benchmarks, or corresponding costs of production and sale in an appropriate representative country with a similar level of economic development as the exporting country, provided the relevant cost data are readily available*".[9]

8. The Commission proposes that its services may issue a "*report describing the specific situation concerning the criteria listed in point (b) in a certain country or a certain sector*", which report and the evidence underpinning it would become part of the case file.

9. The question has been raised whether this system would be compatible with WTO law, and in particular with the ADA.

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8 Proposed Article 2(6a)(a).
9 Ibid.