

The Doha Round of Negotiations on Rules

The State of Play

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One of the key negotiating agenda of the Doha Round is “clarifying and improving disciplines” under the WTO (World Trade Organisation) agreements on anti-dumping and subsidies. Their inclusion is significantly important for the developing countries, as they are frequent targets of such so-called trade remedial measures. To bring the subject on the Doha Development Agenda a coalition of developed and developing countries (known as ‘Friends of Antidumping Negotiations’) had to face stiff resistance from the United States. Also, because of the fact that anti-dumping is the most frequently used trade remedial measure most of the negotiations on rules generally centered on changing ways in which WTO Members administer anti-dumping actions.

The Doha Mandate

Paragraphs 28 and 29 of Doha Ministerial Declaration of the WTO Members are mandated as:

“In the light of experience and of the increasing application of these instruments by members, we agree to negotiations aimed at clarifying and improving disciplines under the Agreements on Implementation of Article VI of the GATT (General Agreement on Tariffs and Trade) 1994 and on Subsidies and Countervailing Measures, while preserving the basic concepts, principles and effectiveness of these Agreements and their instruments and objectives, and taking into account the needs of developing and least-developed participants. In the initial phase of the negotiations, participants will indicate the provisions, including disciplines on trade distorting practices that they seek to clarify and improve in the subsequent phase. In the context of these negotiations, participants shall also aim to clarify and improve WTO disciplines on fisheries subsidies, taking into account the importance of this sector to developing countries. We note that fisheries subsidies are also referred to in Paragraph 31.

We also agree to negotiations aimed at clarifying and improving disciplines and procedures under the existing WTO provisions applying to regional trade agreements. The negotiations shall take into account the developmental aspects of regional trade agreements.”

At the Hong Kong Ministerial Conference in 2005 the WTO Members reaffirmed their commitment to negotiations on rules contained in Annexure D of the Hong Kong Ministerial Declaration. It stated the “aim to achieve in the negotiations on Rules further improvements, in particular, to the transparency,

predictability and clarity of the relevant disciplines, to the benefit of all Members, including in particular developing and least-developed Members.” It is clear from the above that the aim is to clarify and improve disciplines while preserving the basic concepts and principles of these agreements, and taking into account the needs of developing and least developed countries.

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Recently the Chair of the WTO Negotiating Group on Rule, Ambassador Guillermo Valles Galmés circulated a draft text of proposed revisions to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the anti-dumping agreement) and the Agreement on Subsidies and Countervailing Measures (the SCM agreement).

The Anti-dumping Agreement

Duty assessment of anti-dumping measures

Many WTO Members believe that the methodology used by some countries to calculate dumping margins leads to highly inflated duties that are disproportionate to the amount needed to mitigate the injury to the domestic industry, as well as the level of dumping practiced by exporters. Some Members have particularly criticised the methodology followed by the US, where dumping margins typically average between 60 and 70 percent. Consequently, revisions in the anti-dumping agreement that could lower dumping margins have been a major focus of their submissions.

Some proposals that have drawn broad support include a ban on ‘zeroing’, a mandatory ‘lesser duty’ rule, and increased use of ‘price undertakings’. Zeroing is one of the most contentious issues in negotiations. Many

countries want the practice of zeroing banned in all circumstances while the US wants to ensure what they understand to have been negotiated during the Uruguay Round (that is, zeroing is permitted) maintained. WTO Members remain sharply divided on the desirability of a possible procedure for taking due account of the representatives of domestic interested parties when deciding whether to impose a duty and if so whether to impose that duty at the full margin of dumping or less.

Mandatory lesser duty rule

Article 9.1 of the anti-dumping agreement encourages the imposition of an anti-dumping duty lower than the full dumping margin if investigating authorities determine that the lesser amount is sufficient to offset the injury suffered or threatened to domestic industry. Many WTO Members favour amending the anti-dumping agreement to require a mandatory, rather than discretionary, 'lesser duty rule'. Developing countries are especially interested in seeing a mandatory rule applied to exports from their countries, and have proposed this measure as part of a special and differential treatment package.

Lack of Clarity on whether or not this provision has been removed from the text or whether it has been substituted by public interest test persists. However, the Chair has clarified that the lesser duty rule remains and if necessary one can lower an anti-dumping duty further by use of a public interest test. While it is an obligation to consider if a lesser duty is appropriate an additional public interest test would be a new consideration. Various delegations emphasised that public interest and lesser duty are distinct concepts and should not be traded off against each other.

Sunset of anti-dumping orders

The anti-dumping agreement specifies that each anti-dumping order must be terminated after five years unless authorities determine in a review that its expiration would be likely to lead to a recurrence of dumping and subsequent injury to domestic producers. Some WTO Members are critical of the use of this sunset clause and administrative reviews that determine it if relief is still needed. In particular, many have complained that US authorities base determinations of sunset review inordinately on submissions by their domestic industry.

Some WTO Members strongly support a mandatory termination of anti-dumping orders within five years. Many others favour a more moderate approach that would list specific circumstances or definitive factors that authorities must consider before extending anti-dumping orders. Some others criticise the length of time that sunset review procedures take to complete

and favour a mandatory twelve-month time limit. Based on this proposal, recent text calls for termination of a measure once it has been in a place for 10 years. It does not allow for an 'expeditious action' to be taken in the two years following termination, if a domestic industry lodges another properly documented application against the same product.

Anti-circumvention

WTO Members are sharply divided on whether or not specific rules on anti-circumvention should be included in the text, and on the adequacy of the proposed rules contained in the Chairman's text. A new addition to the text intends to allow investigation authorities to deal with situations where exporters and importers are deliberately avoiding the payment of anti-dumping duties by circumventing an anti-dumping determination without having to have a domestic industry apply for another investigation. At present there are no rules in the anti-dumping agreement, which covers circumvention.

Transparency provisions

A large number of proposed amendments are aimed at enhancing transparency and due process during an anti-dumping investigation. Suggestions on maintaining a public file of an investigation and allowing prompt access to it, providing reports of verification visits and providing increased information in public notices are being debated.

Causation

There is an attempt to bring the WTO Appellate Body jurisprudence by clarifying the essentials of causation assessment when considering injurious effects attributable to dumped imports and to other factors.

The SCM Agreement

There are relatively very few proposed changes to the SCM (Subsidies and Countervailing Measures) agreement apart from the addition of Annexure VIII, which contains provisions on fisheries. Annex C of the working document relating to fisheries subsidies was released on 28th May 28 2008. The stated objective of the proposed rules on fisheries subsidies is to conserve global fisheries resources and to encourage fisheries management.

With regard to the scope of prohibition (of fisheries subsidies) in general, some WTO Members find it too ambiguous, while some other Members find the content on the same considerably short of their expectations. Certain Members view the list of proposed prohibitions as far too broad. Few other Members countries consider that the scope of the proposed prohibition is too narrow

and advocate extending it to cover additional subsidies, especially to further downstream activities. A consensus on the issue of prohibition remains elusive.

Regarding general exceptions (Article II of the Chairman's text), some Members consider that many of the proposed exceptions are narrowly defined and the conditions attached to them are too restrictive. Some other Members consider that the management conditionalities associated with general exceptions lessen the need for tailoring those exceptions narrowly.

Some Members suggested that all management requirements are not essential in regard to each exception. However, they also suggested that subsidies covered by general exceptions have no possibility to contribute towards over-fishing. A number of other Members, on the other hand, consider that for the disciplines to be effective any general exception must be limited in number and scope, and subject to strict conditionalities.

On special and differential treatment (Articles III.1, III.2, III.3 and III.4 of the Chairman's text), there is some agreement among the Members that new fisheries subsidies disciplines must include provisions for substantial special and differential treatment for developing country Members. However, they differ over the nature and extent of such provisions.

In case of least developed countries (LDCs) most Members consider appropriate the proposed blanket exception for subsidies granted by them.

However, views differ considerably as to which types of otherwise prohibited subsidies should be permitted as well as on respective conditionalities that should be attached thereto. In this regard, many developing countries consider the draft provisions to be too narrow, and subject to too excessive conditionalities to be usable in practical terms.

Regarding the exception for subsidies to subsistence-oriented fisheries (Article III.2(a)), some developing country Members said that this category should be

broadened beyond subsistence-oriented fisheries to cover all artisanal fisheries and small-scale commercial fisheries. However, some other Members strongly oppose any broadening of this exception.

In case of fisheries management (Article V.1 and V.2 of the Chairman's text), many Members strongly support the inclusion of sustainability conditionalities for the provision of subsidies under general exceptions or S&DT provisions. Nevertheless, views on this differ substantially on the strength of such management requirements.

Conclusions

On anti-dumping, most of the WTO Members continue to hold their positions on most of the contentious issues while some progress has been made on enhancing transparency of investigation process. On subsidies, although there is some progress on non contentious additions to the text, positions on major issues still remain far from consensus. Thus, the proposed changes to the anti-dumping and SCM agreements are far from achieving consensus among the WTO Members. Furthermore, given that there are currently no provisions relating to fisheries subsidies, it may take considerable time and effort to develop consensus among the WTO Members on this issue.

As a step forward, on 14th July 2008 the Chairman of the Negotiating Group on Rules sent a fax to all WTO Members outlining his views as to how negotiations on rules could proceed in the period after the establishment of modalities in agriculture and industrial goods (non-agricultural market access). He outlined a tentative work programme in which a series of very intensive meetings will be start from early September 2008. He intends to begin with a two-week session on fisheries subsidies, and then to proceed on anti-dumping issues and horizontal subsidies. This roadmap for negotiations on rules, therefore, appears to be positive.

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