

Trade Remedial Measures

More Distortion, Less Remedy!

The Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 and Subsidies & Countervailing Measures (SCM) entered into force on 1 January 1995. Contrary to its defined role, the use of trade remedial measures like anti-dumping (AD) and countervailing duties (CVD) has witnessed an exponential increase in the last few years. The number of AD investigations has grown rapidly over the 1990s, and there is widespread concern over their use for protectionist purposes as the WTO increasingly constrains recourse to more traditional forms of protection. This increased use has, in fact, dented the trade remedial attribute of these measures. This has created the need of having substantial and procedural reforms in the trade remedial provisions.

I. The Doha Mandate

The Doha Declaration in para 28 mandates the review of the Agreements on Implementation of Article VI of GATT 1994 and SCM. The negotiations are aimed at clarifying and improving disciplines under these two agreements, while preserving the basic concepts, principles and effectiveness and their instruments and objectives, and taking into account the needs of developing and least-developed participants (WT/MIN(01)/DEC/W/1). The negotiations are being undertaken in the Negotiating Group on Rules, under the overall supervision of the Trade Negotiations Committee established by the Ministers.

II. Current State of Play: Anti-dumping

The negotiations on AD are being driven by the “Friends of AD Negotiations”, a Group of 13 developed and developing countries, and the United States. The “Friends” consider that the AD rules are being abused as a protectionist tool. Hence, there is a need for a clearer definition of the key concepts in the ADA, improvement in margin calculations, and greater transparency in AD investigations. The US opposes most changes sought by the “Friends”. It emphasises the need to focus on procedural issues in AD investigations, their transparency, trade-distorting practices and circumvention.

Besides, at Doha, in their Decision on “Implementation-Related Issues and Concerns,” Ministers agreed that investigating authorities shall examine with special care any application for the initiation of an AD investigation where an investigation of the same product from the same Member resulted in a negative finding within the 365 days prior to the filing of the application and that, unless this pre-initiation examination indicates that circumstances have changed, the investigation shall not proceed (WT/MIN(01)/17, para. 7.1).

Ministers also referred three implementation-related issues to the Committee or its Working Group on Implementation for consideration and recommendations, to be completed within 12 months. The Working Group on Implementation was directed to -

- to draw up recommendations concerning the time-frame to be used in determining a negligible volume of imports under Article 5.8 (WT/MIN(01)/17, paras. 7.2-7.3).
- examine modalities for the application of Article 15 and draw up recommendations on how to operationalise it, and
- directed to draw up guidelines for the improvement of the annual reviews under Article 18.6 (WT/MIN(01)/17, para. 7.4).

After Doha, the negotiating committee empowered to look into these matters, has held eight meetings. Diverse views, as expected, of developing and developed countries have surfaced during these meetings. But, the deadlines, in a

majority of cases, have not been met. The three issues mentioned here have been explained below:

De Minimis Margin

Article 5.8 of the ADA states that AD duties will not be levied if the dumping margin is below 2 percent of the export price. Similarly, no action would be initiated if the volume of dumped imports for individual countries were less than 3 percent of the volume of imports unless countries, which individually account for less than 3 percent of imports collectively account for more than 7 percent of imports.

The most fundamental problem in this Article is that these margins remain the same for both developed and developing countries. This ignores the trading realities of the multilateral trading regime. The solution to this problem is to have separate *de minimis* margin for developing countries. India has proposed that the threshold pertaining to *de minimis* dumping margin should be raised to 5 percent for imports from developing countries and the threshold of volume of imports below which no anti dumping duty shall be levied should also be upwardly revised for imports from developing countries. India has also proposed that the cumulating provision of 7 percent for developing countries be removed.

Special and Differential Treatment

The above stated proposals have been made by many developing countries including India as part of its proposal of operationalising the provisions of Article 15 of ADA. Article 15 states that special regard be given to special situation of developing countries when the application of AD measures is being considered. This Article further states that possibilities of constructive remedies are to be explored before AD duties be levied on developing countries. However, this has not been honoured in practice by developed countries.

Another important strategy that is being propagated by India to operationalise the provisions of Article 15 is to make the imposition of lesser duty, as given in Article 9.1 of ADA, mandatory for developed countries. The “friends” Group has also demanded to make the provisions of Article 9.1 mandatory. Article 9.1 states that a lesser duty may be imposed if it is adequate to remove the injury that is being caused to the domestic industry. In June 2003, Australia and the EU supported the “Friends” proposal to make this practice mandatory (TN/RL/W/119). The US has expressed its opposition to such a proposal.

Annual Review

The annual review of ADA (Article 18.6) is the only provision on which the Committee on AD Practices has been able to prepare draft recommendations (G/ADP/W/429). Article 18.6 of the ADA calls for annual review of the

implementation and operation of the agreement. The draft recommendations that have been prepared by the Committee on AD Practices would buttress transparency.

Newly Adopted Issues

It is interesting to note that the Committee on AD practices, based on the recommendation of its working group, decided to refer the following four new topics to the Working Group for discussion and the possible development of an agreed understanding or recommendations. (G/AD/W/433). The EU and the US suggested these issues. The working group would be taking up these issues in October 2003.

- Article 2.2 – in determining the dumping margin, when sales in the domestic market of the exporting country cannot be used, there are two alternatives, one; to use the comparable export price in a third country, two; to use the constructed normal value under Article 2.2.
- Article 2.4.1 – provides for comparison between export price and the normal value by conversion of currencies.
- Article 6.7 – states that during AD investigations authorities may carry out investigations in other countries after obtaining the consent of the relevant parties.
- Article 13 – states that every member country whose national legislation provides for AD measures should maintain judicial, arbitral, or administrative tribunals for prompt review of administrative actions that lead to final determinations of AD duties. The Working Group would be discussing the implementation of this Article in terms of the types of review provided, as judicial, arbitral and administrative reviews operate in different spheres and also have different connotations.

Other Important Issues

Notwithstanding the importance of these proposals, there are a few important Articles that should be given predominance by the Working Group. Cancun would provide the right opportunity to do so. These Articles are - Article 2.4.2 (Zeroing in method), Article 4.1 (Definition of domestic industry), and Article 11.3 (sunset clause). The zeroing method has been denounced by the Appellate Body (AB) in a number of cases. It is therefore pertinent to institutionalise the rulings of the AB. The definition of “domestic industry” rests upon the concept of “major proportion” and what constitutes “major proportion” is nowhere defined in the ADA. The “sunset clause” allows the AD measures to be applied beyond 5 years if national authorities determine that their removal would be likely to lead to a continuation or recurrence of dumping and injury.

III. Current State of Play: Subsidies & Countervailing Measures (SCMA)

The Doha mandate on SCMA is similar to one on AD. The issues under consideration by the Negotiating Group on Rules are – “de minimis” level of permissible subsidies, special treatment for export subsidies in developing countries, rules for imposing countervailing duties on developing countries’ exports, fisheries subsidies disciplines and export credit disciplines. Besides, para 10 of the Decision on “Implementation-related Issues and Concerns” agreed on some important issues related to the subsidies and countervailing agreement. Some of the implementation issues are explained below:

CUTS-CITEE Issue Papers

No. 1..... Implementation Issues	No. 7..... Investment
No. 2..... Special & Differential Treatment	No. 8..... Trade Facilitation
No. 3..... Movement of Natural Persons	No. 9..... Transparency in Government Procurement
No. 4..... Trade Remedial Measures	
No. 5..... Trade and Environment	No. 10..... Non-agricultural Market Access
No. 6..... Competition Policy	No. 11..... Trade, Debt and Finance

Constant Dollar Methodology

In paragraph 10.1 of the Implementation Text, Ministers agreed that Annex VII(b) to the SCMA included the Members that were listed therein until their GNP per capita reached US\$1,000 in constant 1990 dollars for three consecutive years. It was also agreed that the committee on SCM would develop an appropriate methodology for calculating constant 1990 dollars and if no such methodology is developed then the methodology proposed by the Chairman of the Committee shall be applied. According to the Report (2002) of the committee on SCM (G/L/585), no proposals have been received for developing a new methodology.

Review of CVD Investigations

Para 10.3 states that there is an agreement amongst the member countries that committee on SCM shall continue its review of the provisions of the SCMA. The substance of the review was conducted on the basis of the proposals submitted by Brazil and India. The review process is continuing through a methodology of asking questions and providing answers among the member countries.

The proposals submitted by India have constituted a major part of the ongoing review process. The key proposals made by India are pertaining to:

- Article 16: Provides the interpretation of domestic industry in terms of “major proportion of total domestic production”.
- Article 15.1: The interpretation of the term “like product” given in footnote 46 to Article 15.1 of the SCMA. Problems arise in determining the likeness of the products as the investigating authorities fail to take into consideration the significance of differential nature of products.
- Article 14: It has been observed that investigating authorities impose CVD in excess of the benefits conferred. Therefore it is pertinent that SCM committee should review Article 14 by recommending certain deductions from the subsidy amount, which should be mandatorily taken into consideration by investigating authorities while determining the level of countervailing duty.
- Article 21.2: Talks of review by the authorities imposing the CVD in wake of new developments that may have taken place. The need is to have an automatic adjustment of the countervailing duty corresponding to the subsidy margins of the subsidy schemes that have been withdrawn.

Extension of Transition Period

In pursuing the implementation issue given in para 10.6, a total of 22 member countries sought extension of transition period pursuant to Article 27.4 of the SCMA. The committee on SCM considered the extension requests and the reservation of rights at special meetings. At the special meetings a delegation of developed countries made a proposal regarding the countries to which extensions pursuant to Article 27.4 could be granted. But later on the proposals were reverted.

IV. Conclusions

The comprehensive negotiations in the areas of AD and SCM provide an opportunity to the developing countries to eliminate or substantially reduce the imbalances in the rules thereon and also eliminate or substantially reduce the harassment of the developing countries arising out of the operation of some of these rules in developed countries. However, since Doha not much progress has been made on this front. Keeping this in view, the Draft Cancun

Ministerial Text (JOB(03)/150/Rev.1) has further instructed the Negotiating Group on Rules to accelerate its work on anti-dumping and subsidies & countervailing measures with a view to shifting its emphasis from identifying issues to seeking solutions.

Proposals and other documents can be found at <http://docsonline.wto.org/>.