

Rules Negotiations: Progress in Doha Round and key unresolved Issues

Centre for WTO Studies,
IIFT New Delhi
6 February 2014

Trade Remedies under WTO

Anti Dumping

Anti Subsidy (Countervailing duty)

Safeguard Measures

Doha Mandate - Para 28

- Negotiations are taking place in the Negotiating Group on Rules (NGR) aimed at clarifying and improving disciplines under the Anti Dumping Agreement and the Agreement on Subsidies and Countervailing Measures (ASCM), while preserving the basic concepts, principles and effectiveness of these agreements and their instruments and objectives. Members are also discussing new disciplines for fisheries subsidies.

Rules Negotiations in WTO- NGR

- ✓ Anti Dumping Agreement
- ✓ Subsidies Agreement
- ✓ Fisheries Subsidies

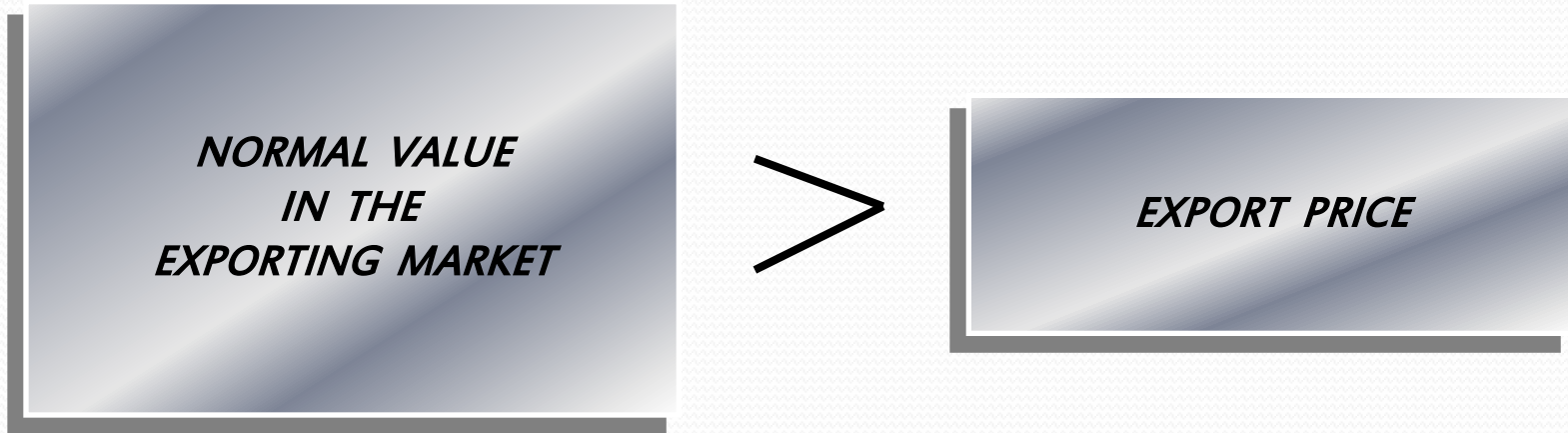
Why need to clarify and improve AD and ASCM disciplines

- Members' experience of implementation of these Agreements post WTO establishment
- Growing concerns of some members about excessive use/ discretionary powers of Investigating authorities- general tightening of disciplines
- Lack of clarity of certain provisions
- Enhanced transparency, improving due process
- Emerging jurisprudence on interpretation of these agreements

Anti dumping-Key concepts

- Dumping
- Injury
- Causal link

WHAT IS DUMPING ?



- ▶ **Difference between Normal Value and Export Price (based on fair comparison) is known as ‘Margin of dumping’**

Anti-dumping Measures Taken by WTO Members – 1.1.1995 to 31.12.2012

Country	Cases Initiated	Measures Imposed
Argentina	303	215
Australia	247	99
Brazil	279	133
Canada	166	106
China	200	156
EU	451	285
India	677	508
Indonesia	96	43

Anti-dumping Measures Taken by WTO Members 1.1.1995 to 31.12.2012 -contd.

Country	Cases Initiated	Measures Imposed
South Korea	113	72
Mexico	109	89
South Africa	217	129
Turkey	162	146
USA	469	312

916 cases out of total 4230 initiations were against China.
664 Measures out of total 2719 Measures are against China
97 Measures against India.

Source: WTO

Main Sectors of Anti-dumping Measures

Sector	Number of Measures
Chemical and allied products	585
Plastics, resins and rubber articles	338
Paper, Paperboard and articles	121
Textiles and articles	239
Articles of Stones, Plaster, Glass	93
Base Metals and articles	769
Misc. Manufactured articles	64

Source: WTO

Initiation and subsequent procedures

- ▶ Gazette Notification of Initiation
- ▶ Information Gathering- Questionnaires
- ▶ Preliminary determination
- ▶ Verification of information of domestic industry & exporters
- ▶ Oral Hearing
- ▶ Issue of Disclosures statement
- ▶ Final Determination
- ▶ Overall timeline of investigation- One year normally, extendable by six months (Article 5.10)

State of Play in Rules Negotiations

- Chairs' first draft text of 30 November 2007
(TN/RL/W/213)
- Revised text of 19 December 2008
(TN/RL/W/236)
- In Fisheries Subsidies- Roadmap
- Intense negotiations in 2009, 2010 and up to March 2011
- Chair's revised text of 21 April 2011
(TN/RL/W/254)

Groupings in Rules Negotiations on Anti Dumping

- Friends of Anti Dumping Negotiations (FANs)
 - Brazil, Chile, Chinese Taipei, Colombia, Costa Rica, Hong Kong China, Israel, Japan, Republic of Korea, Mexico, Norway, Singapore, Switzerland, Thailand, Turkey
 - African Group
 - APEC
 - LDCs
 - SVEs

Chair's Unbracketed text- broad convergence on transparency/ due process related proposals

- Allocation of costs (Article 2.2.1.1)
- Use of Exchange rates (Article 2.4.1)
- Model matching (Article 2.4.3)
- Threat of material injury (Article 3.7)
- Prior notice before initiation (Article 5.5)
- No back to back initiation (Article 5.10 bis)
- Maintaining of public file (Article 6.4 bis)
- 20 days response time at Disclosures stage (Article 6.9)
- Price Undertakings (Article 8)

NGR Chair's Unbracketed text (continued)

- New shipper reviews (Article 9.5)
- Public notice at the stage of initiation and preliminary findings (Article 12)
- On the spot verification (Annex I)
- Use of facts available (Annex II)
- Review of Members' Anti dumping policy and practices (Annex III)

Bracketed Issues in Anti Dumping Agreement

- Zeroing
- Sunset reviews
- Lesser Duty Rule
- Public Interest
- Anti Circumvention
- Causation – non-attribution
- Product under consideration
- Material retardation
- Definition of domestic industry – producers who are importers
- Information request to affiliated Parties
- Third country dumping and S&D for developing countries

Article -2.4 ADA

- **Fair Comparison of normal value and export price for dumping margin determination.**

Article -2.4.2 Comparison Methodology

Determination of Dumping Margin

- Normally to be established on Weighted Average to Weighted Average comparison of NV with EP (WA-WA)
- Transaction to transaction comparison of NV and EP (T-T)
- Weighted average normal value with individual export transactions in certain situations- export prices differing in regions, purchasers or time periods (WA-T).
- Zeroing of negative dumping margin?

What is zeroing

- Not to offset negative dumping margins found at interim/model level comparison, while aggregating the overall dumping margin

WTO Disputes on Zeroing

- Around 18 disputes related to the issue of zeroing
- EC-Anti-dumping duties on Cotton type Bed linen-First case by India (DS 141)
- The Panel found that use of zeroing was inconsistent with Article 2.4.2 of ADA (30 October 2000) upheld by the Appellate Body (1 March 2001)
- Thereafter, series of disputes relating to US practice of use of zeroing in original investigation and administrative reviews
- Appellate Body held that use of zeroing in the original investigation and in administrative reviews was inconsistent with Article 2.4.2 and Article 9.3 of ADA
- Other important rulings in DS 322, DS 344 and DS 350

Duty assessment systems

- Prospective assessment
 - India, the EU, Canada, Brazil, Australia
- Retrospective assessment followed only by the US.
 - Anti Dumping order
 - Administrative review

Article 3.5- Causation and Non-Attribution- WTO jurisprudence

- It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports.

Article 3.5- Causation and Non-Attribution- WTO jurisprudence (DS 184 -US Anti dumping on Steel products from Japan)

- ▶ The Appellate Body observed that the non-attribution language applies "solely in situations where dumped imports and other known factors are causing injury to the domestic industry *at the same time.*"
- ▶ AB: "to ensure non-attribution, investigating authorities must "appropriately assess the injurious effects of those other factors," a step which involves "separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports." The AB noted that the AD Agreement does not prescribe the process by which Members choose to engage in separating and distinguishing the relevant effects.

Causation-non attribution

- New text on non-attribution analysis perceived as weakening of non-attribution.
- Some relevant factors in the text relegated to footnote.
- New text requires qualitative analysis of evidence.
- Without obligation to quantify the injurious effects of dumped imports and other factors
- Disagreement continues on new text

Causation-non attribution

- What should be the approach?
- Status -quo to be maintained
- Most Members do not support mandatory quantitative analysis.
- It can be a qualitative analysis.

Article –4 of ADA Definition of Domestic Industry

- Domestic producers as a whole of the like product or those whose collective output constitutes a **major proportion** of the total domestic production of the product.
- Producers related to the exporters and importers, or who are themselves importers may be excluded from the domestic industry for the purpose of definition of domestic industry.

Definition of Domestic Industry -Article 4.1 WTO Case laws

- **Argentina-Anti-dumping on Poultry from Brazil (DS 241)**
- “A” major proportion rather than “the” major proportion
- Panel held that there can be more than one “major proportion” for the purpose of defining “domestic industry” indicating that each individual “major proportion” need not exceed 50%
- Rejected Brazil’s claim that Argentina violated Article 4.1 by defining “domestic industry” in terms of domestic producers representing 46% of total domestic production

EC Fasteners-DS 397

- The Appellate Body found that in the fasteners investigation the collective output of those producers included in the domestic industry definition which accounted for 27% of the total domestic production, represented a low proportion in relation to the total
- AB reversed Panel's findings that EU did not act inconsistently with Article 4.1 in defining domestic industry comprising producers accounting for 27% of total EU production of fasteners



Sunset Reviews

- Automatic Sunset after [X] or 10 years.
- Improved Rules for likelihood analysis.
- SSR based on application of domestic industry having support as per Article 5.4.
- Suo moto SSR.
- Completion of review preferably before the end of five year period. + 6 months
- Completion of review to be effective at the end of five year period.
- If review results in termination of duty – obligation to refund duty **with interest**.

Sunset Reviews

- SSR determination shall be based on positive evidence and objective examination of all relevant factors.
- Expeditious action by IA in case dumping causing injury again occurs within two years of termination of duty.
 - ✓Application of provisional measures.
 - ✓Retroactive provisional measures upto 90 days

Review of Members Anti dumping policy and practices – Annex III

- New Annex to share AD practices of Members.
- Similar to TPR.
- Detailed information on all aspects of AD policy and practices of a Member to be prepared by Sectt.
- First cycle of review begins one year after Doha Round.
- The Members having initiated most cases to be reviewed first.

Review of Members Anti dumping policy and practices – Annex III

- New Annex burdensome.
- Resource intensive.
- Several developing countries have opposed.

Public interest

- To establish procedures in national laws to take due account of representations made by domestic interested parties whose interests might be affected.
- These may also include suppliers of inputs to the domestic industry.
- These procedures shall not be subject to DSU.
- These procedures shall not be subject to judicial review requirements.
- To keep the decisions taken on public interest outside the purview of national judicial review: Not possible

Lesser Duty Rule -Article 9.1

- Lesser duty rule-DM or IM
- Only that amount of duty which is sufficient to remove the injury to the domestic industry.
- Chair's text deleted the LDR provision, even on desirable basis.
- India, Japan and Brazil had moved proposal for mandatory application of LDR.
- US has been strongly opposed to mandatory LDR.

Anti-circumvention -New Article 9 *bis*

- Imports of the product subject to duty supplanted by
 - Imports in parts or unfinished forms from the same country subject to duty
 - Imports start from a third country by assembling the parts/unfinished forms imported from country subject to AD duty.
- Value of parts/unfinished forms 60% or more of total value of parts in the finished product.
- Value addition 25% or less

Anti-circumvention -New Article 9 *bis*

- Anti circumvention investigation to be initiated only on the basis of duly substantiated request made by domestic industry satisfying standing as per Art 5.4.
- Anti-circumvention duty can apply only if the imports of the parts/unfinished forms are found dumped
- However, no fresh injury determination is required.

Material Retardation

- **Article 3.9** A determination of material retardation of the establishment of a domestic industry shall be based on facts and not merely on allegation, conjecture or remote possibility. An industry may be considered to be in establishment where a genuine and substantial commitment of resources has been made to domestic production of a like product not previously produced in the territory of the importing Member, but production has not yet begun or has not yet been achieved in commercial volumes. In making a determination whether an industry is in establishment, and in examining the impact of dumped imports on the establishment of that industry, the authorities may take into account evidence concerning, *inter alia*, installed capacity, investments made and financing obtained, and feasibility studies, investment plans or market studies.



Material Retardation

- Issues
- Members generally support improved disciplines for injury determination on account of material retardation.
- Areas of concern / lack of clarity
- A like product not previously produced
- Domestic industry in establishment
- The threshold of 10% of meeting the domestic demand

ASCM text

- Definition of subsidy Article 1 ASCM
- Financial Contribution
 - Grants, loans, equity
 - Government revenue due is foregone
 - Government provides goods or services other than general infrastructure
- Benefit is conferred
- Specificity- certain enterprises, industry or regions
- De facto or de jure

CVD Measures taken by Members from 1-1-1995 to 31-12-2012

Country	Number of Measures imposed
Canada	21
EU	30
Mexico	10
Brazil	7
Australia	6
Peru	5
South Africa	5
US	75
Total	177*
*Above are main users of CVD Measures. India has not imposed any CVD Measure	Source: WTO

CVD Measures imposed against exporting countries from 1-1-1995 to 31-12-2012

Exporting Country	Number of Measures
China	42
Brazil	8
EU	11
India	33
Indonesia	8
Canada	3
US	7
Venezuela	3
	Source: WTO

Chair's text-few unbracketed issues

- Regulated pricing- Article 2.1 (c) and 14 (d)
- In the case of regulated prices in the country of provision, export price to third country or external benchmarks can be used
- Concerns over terms 'predominant role of governments', 'distortion of prices', 'external benchmarks'

Bracketed Issues ASCM

- Certain Financing by Loss making Institutions
- Export Competitiveness
- Export Credits – Market benchmarks
- Export Credits-Successor undertakings

New proposals

- Countervail procedures
 - China's proposal on new subsidy allegations and pre-initiation consultations
 - India and China's joint proposal to improve use of facts available in CVD investigation similar to Annex II of Anti dumping Agreement
- Tax and Duty Rebate scheme (India's proposal) only the excess amount of tax rebate to be countervailed
- Graduation from Annex VII-proposal by Bolivia, Egypt, Honduras, India, Nicaragua and Sri Lanka



Thank you.