# WTO negotiations on rules: prospects for reform 'from the centre'

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A key development in the Doha Ministerial was the decision to put negotiations on 'rules' (anti-dumping and subsidies) on the negotiating agenda. The Cancún Ministerial offers WTO members and the global community a chance to consider the changes to the rules and how best to move toward a constructive agreement by the end of the Round.

In this brief, we put forward a proposal for constructive reform of the rules on anti-dumping and subsidies 'from the centre'. A new 'centrist' agreement on rules would preserve the basic tenets of the rules on anti-dumping and subsidies and balance the interests of all concerned groups.

## 1. Problems with current rules

As the Doha Ministerial Declaration states, negotiations on anti-dumping and subsidies are aimed at "clarifying and improving" these disciplines. Even the United States, the most notable defender of the status quo on these rules, acknowledges that lack of transparency and inconsistent application of the rules are problems.

However, observers point to more serious defects. Rules can be applied in ways that inflate dumping and subsidy margins and distort trade flows. The injury standards can be misapplied to find injury too readily.

Addressing these distortions is increasingly important: other methods of restricting trade have been eliminated (e.g. voluntary restraint agreements in 1995, the Agreement on Textiles and Clothing in 2005) and trade remedy proceedings will become the trade restraint of choice for many countries. If they are to bear an increasing burden of responsibility for managing trade in politically sensitive products, the rules must be sensible and balanced, and must consider all relevant interests.

***a. Anti-dumping.*** Anti-dumping rules govern the imposition of additional duties on products found to be priced too low and causing or threatening injury to the producers of competing products in the importing market. The methods of calculating whether 'dumping' and injury exist and measuring the appropriate amount of the duties to be imposed are the subject of many of the proposals for improvement in the rules.

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If duties are too high, or last longer than necessary, there could be adverse consequences for the global trading system. Developing countries are particularly vulnerable to harm from excessive anti-dumping duties. Also, anti-dumping measures should provide a practically available remedy.

***b. Subsidies.*** Many of the issues under the Agreement on Subsidies and Countervailing Measures (ASCM) are similar to anti-dumping issues. Subsidies should be defined practically and duties be accurately calculated. These measures can be subject to abuse through excessive subsidy margins. This should be checked, while the remedy remains available for petitioners.

## 2. A proposal for constructive reform from the centre

The Doha Ministerial Declaration itself represents a compromise on the scope of reform of anti-dumping and countervailing duty measures. As noted above, the Doha Declaration preserves the basic rules on anti-dumping and countervailing measures. Within this framework, constructive change is possible. Indeed, constructive change in this area may be essential to the final success of the Round.

***a. Anti-dumping.*** The rules negotiations can move towards the traditionally accepted basis for imposing these duties, which is to address predatory behaviour. The current Anti-dumping Agreement requires no evidence of predatory behaviour or intent. Anti-dumping duties should remedy the evil of predation, while balancing the interest of producers with that of consumers in the importing economy. There are several reforms that would help strike this balance.

*i) Below-cost sales.* The Agreement should avoid penalising profit-maximising business behaviour. Economics teaches that a business seeking to maximise profits will sell below average cost, but never below marginal cost. Thus, selling goods at less than average cost of production on a short-term basis is not *per se* anti-competitive behaviour. While marginal cost may be difficult to calculate in practice, exploring this reform is an important priority.

*ii) 'Lesser duty' rule.* National authorities are encouraged under the current Anti-dumping Agreement to impose a lesser duty than the full amount of the calculated duty if the injury to the complaining industry is eliminated by the lower duty. If this rule were mandatory, the amount of relief for domestic producers would be balanced with the interests of consumers in the importing country.

*iii) 'Public interest'.* Many countries consider the effect of imposing duties on the economy of the importing country, including downstream users before imposing anti-dumping duties. A 'public interest' test in the Anti-dumping Agreements would provide a new balancing of interests. Such a test could be limited to situations where the consequential harm would significantly outweigh the benefits to the petitioning industry.

*iv) Full consumer standing.* The Agreement currently does not give users and consumers of products subject to anti-dumping cases full rights as parties. While the Agreement recognises the interest of consumers and industrial users (see Article 6.12), their ability to participate fully is not protected.

*v) Prospective vs. retrospective system of duty collection.* The negotiators may consider placing anti-dumping proceedings on a 'prospective' method of duty collection, to avoid unnecessary uncertainty in administration of duties. The 'retrospective' system used by the United States creates great risk for importers who do not know the final cost of imported goods subject to these cases.

***b. Countervailing duties.*** Issues *ii-v* noted above apply with equal force to countervailing duties. In addition, countervailing duty measures should strive to gauge the magnitude of subsidies more accurately.

Trade-distorting subsidies should be discouraged; however, there are government supports that may not distort trade significantly. The rules negotiations should consider practical ways to determine whether subsidies necessarily distort trade. Another area that has caused considerable problems is 'privatisation', which could be definitively addressed.

***c. Injury.*** Injury standards require attention in order to balance relevant interests in anti-dumping and countervailing duty cases. The injury requirements, if too lax, could lead to excessive restrictions on trade (this is a common complaint about current rules). If the standards are too stringent, relief could become unduly difficult to obtain.

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A detailed discussion of the specific injury proposals is beyond the scope of this paper, but a key issue deserving close attention is 'non-attribution', a requirement that injury not be attributed to imports when it is caused by other factors. Recent dispute settlement cases require that national authorities clearly rank all causes of injury to domestic industries in the importing country. This is a burdensome requirement. Discussion of the appropriate interests to be balanced by the rules on non-attribution would seem to be in order.

***d. Dispute settlement.*** The United States has expressed concern about the standard of review in dispute settlement cases under the Anti-dumping and Subsidies Agreements. Article 17.6 of the Anti-dumping Agreement provides that a national authority's interpretation of the agreement should be sustained if it is a 'permissible' interpretation. To date, dispute settlement panels and the Appellate Body have found one 'permissible' interpretation of each of the Agreement's provisions. In the negotiations, the United States is urging that the 'deferential' standard of review be clarified and expanded. Such an outcome would seem to depend on an increasing level of trust of the processes of the national authorities.

The dispute settlement decisions have been inaccurately accused of 'rewriting' the agreements; nor have they unduly restricted the agreements. Nevertheless, many of the decisions in this area are politically difficult for national authorities to implement, so compliance remains a problem.

## Conclusions

The key to a successful conclusion of the Round may well turn on a constructive and rational agreement on rules. The issues in the rules negotiations involve politically sensitive choices for WTO Members. This is the case in a number of other areas as well. However, in the trade remedies area, the issues are complex.

Agreement on trade remedies is possible if parties remain flexible and pragmatic. The good news is that the issues involve the details of administration rather than the fundamental rules of anti-dumping and countervailing duties. The key is to focus on the necessary balancing of interests of domestic industry (petitioners), exporters and consumers. The rules need careful analysis and understanding of the basic interests and principles involved. ❐

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