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Global Trade Practice

**Draft WTO Anti-Dumping and Subsidy Texts Released in Doha Round**

The Chair of the WTO Negotiating Group on Rules released draft consolidated texts of the Anti-dumping (AD) and Subsidy and Countervailing Measures (SCM) Agreements on November 30, 2007, in the context of the Doha Round of trade negotiations. These proposed revisions are the first of a new set of draft texts to be made available by the major Doha negotiating groups.

Referred to by WTO Director-General Pascal Lamy as “balanced and ambitious,” many of the revisions appear designed to increase transparency and enforce the procedural rights of exporting WTO Members. Notably, the proposal includes a new annex requiring the AD Committee periodically to review the overall “transparency and understanding of Members’ policies and practices.” Most of the revisions are reflected only in the AD Agreement, but the Chair of the Rules Group stressed that changes in the AD rules are generally assumed to apply also to the SCM Agreement, where appropriate.

The proposal addresses certain highly controversial issues, including “zeroing” in AD cases. Strongly defended by the United States, zeroing refers to the practice of only taking into account transactions at dumped prices when calculating dumping margins, while disregarding non-dumped transactions. Exports above “normal value” thus may not offset sales below normal value. The Appellate Body has ruled zeroing contrary to the current AD Agreement in virtually all cases. The draft proposal would only ban zeroing in new AD investigations when prices are compared on a weighted-average to weighted-average basis. Zeroing would be permitted otherwise in investigations and administrative/interim, new shipper, and sunset reviews and duty refund procedures.

But several of the draft proposals would be contrary to US practice. These include a proposal requiring domestic industries to specifically request sunset reviews based on “sufficient evidence,” and a separate requirement that all measures be terminated no later than ten years after being imposed. However, within two years of terminating a measure under this latter provision, the authorities could initiate a new investigation of the same product on an expedited basis, and immediately apply provisional measures based on the best information available.

The draft text also proposes a detailed anti-circumvention provision, something Members have long debated without agreement. The proposal would require authorities, before finding circumvention, to determine that subject imports have been “supplanted” either by imports of parts or assemblies completed in the subject country or a third country, or by imports of a “slightly modified product” from the subject country. The duty must have been the “principal cause” of the production shift and the new product must “undermine the remedial effect of that duty.” Further, where completion or assembly occurs in a third country, circumvention may only be found if the completed products are shown to be dumped in the subject country. In determining the value of parts or assemblies, the draft adopts the European Union’s thresholds requiring 60 percent parts content and 25 percent value added.

In determining injury, before reaching the required causation finding under the current rules, investigating authorities must seek to “separate and distinguish” the injurious effects of subject imports from those of other factors. The new draft would appear to weaken this requirement by providing that authorities need not quantify such injurious effects or weigh the effects of dumped imports against those of other factors.

For the first time, the draft would require Members, in deciding whether to impose AD measures, to “take due account” of comments by industrial users, suppliers, and consumer organizations. Importantly, however, these proposed “public interest” procedures could not form the basis for a WTO dispute settlement claim. Moreover, in line with US practice, the draft would scrap the “lesser duty” principle, which expresses a preference for imposing a duty less than the calculated dumping margin if doing so would be adequate to remove injury.

An important proposed revision to the SCM Agreement concerns “dual pricing” arrangements. Consistent with Appellate Body rulings and the US and EU views in the recent Softwood Lumber disputes, a subsidy may exist under the draft text if domestic regulated input prices are lower than the inputs’ market value. If there are no unregulated prices, or if such prices are deemed distorted by prevalent price regulation, export prices or other countries’ market prices may serve as the benchmark. Benchmark data from that country’s market or the world market could also be used to establish a subsidy indirectly benefiting an exporting industry, which operates downstream of the direct recipient of the subsidy.

Finally, the draft SCM Agreement proposes a new annex prohibiting a defined list of eight categories of subsidies in the fisheries sector. The draft contains a number of derogations to these provisions, as well as somewhat complex provisions allowing differential treatment of developing countries.

In releasing the revised texts, the Rules Group Chair expressed the desire “to help the rest of the multilateral negotiations move forward.” He acknowledged that “intensive technical and detailed work” by the Group remains. Indeed, the more controversial revisions may fuel a heated debate. These provisions might be leveraged to encourage developed countries to make greater agricultural concessions or to accept developing countries’ positions on industrial tariffs. The Rules Group is scheduled to meet several times over the coming months.

Click [here](#) to view the draft text on these proposed revisions at the WTO website.

For more information on the draft AD and SCM texts, the Doha negotiating process generally, or Mayer Brown’s Global Trade Group, please contact Duane Layton in our Washington, DC office at 202-263-3811 ([dlayton@mayerbrown.com](mailto:dlayton@mayerbrown.com)), or Paulette Vander Schueren or Edward Borovikov in the Brussels office at 32-2-502-5517 ([pvanderschueren@mayerbrown.com](mailto:pvanderschueren@mayerbrown.com) or [eborovikov@mayerbrown.com](mailto:eborovikov@mayerbrown.com)).

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