

**NEGOTIATING ANTI-DUMPING AND SETTING PRIORITIES
AMONG OUTSTANDING IMPLEMENTATION ISSUES IN
THE POST-DOHA SCENARIO:**

**A FIRST EXAMINATION IN THE LIGHT OF RECENT
PRACTICE AND DSU JURISPRUDENCE**

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1. Introduction

The negotiating mandate contained in paragraph 28 of the WTO Ministerial Declaration¹ is probably the result of a carefully drafted compromise containing two mainstream indications. On the one hand, negotiations are “*aimed at clarifying and improving disciplines under the Agreements on Implementation of Article VI of the GATT 1994*”, reflecting the desire of victim (including some developing) countries to limit by “clarification” some loopholes or practices existing in the Anti-Dumping Agreement (ADA), and, on the other hand, such negotiations will have to “*preserv[e] the basic concepts, principles and effectiveness of these Agreements*” reflecting the concerns of some WTO Members reluctant to further discuss existing practices.

The above mandate should be read in conjunction with the Work Programme on Implementation-Related Issues and Concerns and the Decision of 14 November 2001² where some progress was recorded in the area of anti-dumping with regard to some specific implementation issues.

Other implementation issues that were raised during the preparation for the Doha Ministerial Conference will have to be addressed within the context of the mandate outlined above. These remaining implementation issues are discussed in detail in section 3 of this paper.

During the preparations for the Seattle and Doha Ministerial Conferences, implementation issues and reform of the ADA were one of the recurrent issues in which developing countries placed part of their negotiating capital. Intense debate and discussions took place in the WTO Anti-Dumping Committee on certain practices adopted by Members in administering anti-dumping legislation. But, a number of proposals made regarding the implementation phase resembled those made during the preparations for the Seattle Ministerial Conference with few innovations.

In recent years, it has become progressively evident that the view of anti-dumping as a North–South issue did not correspond to reality. For instance, at an UNCTAD Expert Meeting held in December 2000³ there was an opportunity to take stock of some of the developments and some new issues were brought into the debate. Prior to the Uruguay Round, the primary users of anti-dumping measures were developed

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1. WTO, *Ministerial Declaration adopted on 14 November*, WT/MIN(01)/DEC/1 (20 November 2001).
 2. WTO, *Implementation-Related Issues and Concerns, Decision of 14 November 2001*, WT/MIN(01)/DEC/17 (20 November 2001).
 3. UNCTAD, *Report of the Expert Meeting on the Impact of Anti-Dumping and Countervailing Actions, Geneva, 4-6 December 2000*, TD/B/COM.1/34 (28 December 2000).

countries. However, in the period from 1995 to 1999, anti-dumping investigations more than doubled also because of the increasing adoption and utilization by developing countries of the anti-dumping instrument. Developing countries have also been active petitioners in anti-dumping dispute settlement cases.⁴

Thus, the common perception inherited from the Tokyo Round, until the establishment of WTO, of the ADA as the *rich man's trade remedy* is rapidly changing since many developing countries have become active users of anti-dumping investigations in respect not only of developed countries but also of other developing countries and, in extreme cases, least developed countries (LDCs). The traditional argument used by developing countries that loopholes or absence of clear disciplines in the anti-dumping multilateral rules have increased the possibility of abuses and discretionary practices now also applies to their national legislation and administrations.

During the forthcoming negotiations developing countries will have to take into account that the greater the precision and predictability of the rules, the greater the difficulty in administering them and utilize effectively and lawfully the anti-dumping instrument. This may hold especially true for developing countries' administrations, given their limited human and financial resources. Some developing countries have already experienced difficulties and have been brought before the WTO dispute settlement body.⁵ The difficulties encountered by developing countries, and especially the LDCs, in utilizing the anti-dumping instrument have already been raised in the context of the debate on implementation and during the preparatory process for Doha. Some countries have advanced the idea that simplified procedures should be devised for LDCs.⁶ There is no doubt that increased technical assistance and capacity-building activities could contribute significantly to improving the capacity of those countries in administering anti-dumping laws.

In the post-Doha scenario and with the prospect of long and real negotiations on anti-dumping issues, it will be important to revisit some of the outstanding issues for negotiations in relation to the progress and the case law developed by the Panels and the Appellate Body (AB) on anti-dumping issues. This exercise may be useful in setting priorities. Also, it is necessary to prioritize the negotiating issues and to fully appreciate the technical implications to avoid unnecessary waste of negotiating capital. This paper attempts to outline some of the negotiating issues raised in the

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4. Inge Nora Neufeld, *Anti-Dumping and Countervailing Procedures: Use or Abuse? Implications for Developing Countries*, UNCTAD, Study Series No. 9 (2001).
 5. WTO, *Guatemala Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, Report of the Panel, WTO/DS156/R (24 October 2000). WTO, *Argentina – Definitive Anti-dumping Measures on Imports of Ceramic Floor Tiles from Italy*, Report of the Panel, WTO/DS189/R (28 September 2001).
 6. UNCTAD, *Impact of Anti-Dumping and Countervailing Duty Actions – Background note by the UNCTAD secretariat*, TD/B/COM.1/EM.14/2 (24 October 2000).

preparatory process for Doha, with the findings of some Panel and AB reports⁷ and practices adopted in the course of anti-dumping proceedings.

The paper will conclude with some discussion on the value and implications of the Panel and AB reports. Sidestepping the question of *res iudicata*, it is important to ascertain at the level of domestic implementation what has been done to abide by the findings of Panel and AB reports. Some negotiators argue that even if AB reports have ruled in favour of a strict interpretation of some articles of the ADA, such findings do not have the authority of a precedent and are applicable only to the party in the dispute. These observations are certainly true. However, Panel practice and implementation by national authorities of AB reports appear to indicate that it is difficult to ignore, in practice, the findings of the AB reports.⁸ This has to be taken into account during the negotiations in order to avoid insistence on issues that may not ultimately determine the expected gains or value from a developmental point of view.

2. Issues addressed in the Ministerial Decision

The Decision of the Ministerial Conference on the Implementation-Related Issues and Concerns⁹ (the Decision) sets out, in paragraph 7, a series of actions taken by Members with respect to some of the implementation issues raised during the preparation for the Ministerial Conference. In this part, it will first be outlined which decisions were taken at the Conference and which issues were left outstanding.

Paragraph 7, entitled “Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994,”¹⁰ contains the following:

"7.1 Agrees that investigating authorities shall examine with special care any application for the initiation of an anti-dumping 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.

7.2 Recognizes that, while Article 15 of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 is a mandatory provision, the modalities for its application would benefit from clarification.

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