

Measures for Making Trade Procedures and Remedies More Effective

Part 2: Trade Remedies

Harsha Vardhana Singh

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1. Introduction

Trade remedies conventionally comprise safeguards, anti-dumping and countervailing measures. Of these, safeguards are imposed on “fair” trade while the other two on dumped or subsidised imports which are considered causing “unfair trade”. While safeguards are a conventional flexibility to restrict trade when imports cause injury to domestic industry, the main focus of trade remedies is now on trade measures that prevent unfair trade from causing injury to domestic industry, i.e. anti-dumping and countervailing measures.

Trade remedy measures are usually viewed from the perspective of importing countries. However, since Indian exports are also affected by trade remedy measures used by others, we need to establish processes also to reduce the incidence of protectionist impact against our exporters. The Indian Government is already making efforts in this regard. A more consistent and comprehensive approach would improve performance in this area which is continuing to evolve as practices and legal decisions at WTO keep developing new elements within the database of activities and options to consider. Section 2 addresses the various ways in which processes for trade remedies could be made more effective.

Since the significant trade remedies aim at addressing unfair trade, any examination of these issues in a dynamic context needs to bear in mind the evolving views on unfair trade, i.e. which additional practices are being considered as unfair trade. In this context, an important point is that the scope of “unfair” actions has expanded over time. Developed economies have since about two decades considered “standards” also as an “unfair trade practice” on the grounds that weak standards are one way of attracting foreign investment and also reducing production costs. In response, the policies used tend to go beyond the required level and in effect often could be considered as protectionist. In this area of “unfair practice”, India has the possibility of raising its specific trade concerns at the relevant forum of WTO, i.e. the Committees on Technical Barriers to Trade (TBT), and on Sanitary and Phytosanitary Measures (SPS). This mechanism is utilised much less than its potential, and we should improve the processes to increase the number of concerns which we take to the WTO in the area of TBT and SPS. Section 3 of the paper addresses this issue.

The scope of practices which are considered as “unfair trade” practices continues to increase and even the definition of relevant standards have evolved for example to cover sustainable and social standards (i.e., environment and labour), and corporate social responsibility. In

addition, concerns have emerged about the covert subsidies and competitive advantage provided to state enterprises, use of sovereign funds to tilt the level playing field and non-implementation of IPR regimes in a “fair” manner. For instance, the current major trade spat between US and China, the US action against IPR practices of China are being justified on the ground that they counter China’s unfair trade practice. Similar concerns have been raised regarding State Enterprises, Competition Policy, etc. and based on that some new rules have been agreed in the Comprehensive and Progressive Trans Pacific Partnership (CPTPP).¹Section 4 provides a short discussion of these issues.

2. Conventional Trade Remedies (Anti-Dumping, Countervailing Measures, Safeguards)

Each of the three conventional trade remedies involve investigation of the relevant imports and their injurious impact on domestic industry, and to prepare the situation so that Indian exporters can be supported when they face trade remedy action abroad. It is with the latter aspect in mind that the Government has established cells that help our exporters in processes involved in anti-dumping measures and co-ordinate all CVD investigations against Indian exports by external agencies. It is noteworthy that information on subsidies is available in greater detail with the Government than the industry, and countervailing investigations of Indian subsidised exports also involve requests for information from the Government.

Tables 1 to 3 in the Annex show that India is a very active user of anti-dumping measures and to some extent of safeguards (though safeguard measures are comparatively few and far between). India is relatively less focused on countervailing measures.

Tables 1 and 2 in the Annex also show that for the period July 2016 to June 2017, India had similar number of measures against its exporters for both anti-dumping and countervailing. Safeguards measures are applied to all WTO members. Thus, India is subject to every safeguard measure taken by WTO members, other than those which might be taken specifically under an FTA.

¹ These issues and how to address them at WTO are discussed in summary form in my Op Ed at <https://www.financialexpress.com/opinion/unfair-trade-practices-a-strong-wto-can-play-a-key-role/1135503/>

The Authority that conducts trade remedy investigations should have all three investigations under the same Body. The process of doing so has begun and should be completed in a manner that effectiveness is enhanced.

2.a. Number of investigators, and setting up a fully equipped agency with relevant information and outreach activities

At present, the Authority has on average about 7 cases per investigator. This is a huge work load in a process which is very data intensive. This work load should be reduced by increasing the number of investigators, to smoothen the process and improve its efficiency. Further, the aim should be to create the Directorate General as a self-contained organisation with in-house legal and analytical support, as much as possible.

The investigating agency needs to be more fully equipped with sections which develop and keep requisite information that is in addition to the existing database and required for efficient working.

There is a need for the investigating agency to also inform the industry about the correct procedures, and even have an outreach programme that would educate the stakeholders on the correct ways of using the system. Errors in the applications, or inadequate information provided could both delay the processes and give rise to inefficient outcomes which could be challenged for their inadequacies. Thus, it should be possible for the domestic industry to informally discuss with, or make presentation to, the Anti-Dumping Authority to understand the details of the requirements for the petition.

A regular Division may be created within the investigating agency to for carrying out such education and outreach programmes. To give effect to this initiative, we should examine the regular activities of the US and EU investigating agencies to inform and advise the stakeholders to educate them and even guide them.

2.b. Establish research initiative to help investigating authority and more informed policy making for trade remedies

Both anti-dumping and countervailing measures are very data-intensive processes, with the former involving far more detail and the latter suffering from the opacity of information on

subsidy schemes. The investigations are time bound and the information required can be burdensome. If some research institute is given the task to:

- Collect information on countervailing investigations made by the US, Canada, EU and Australia.
- Subsidies discussed in the WTO Committee on Subsidies and Countervailing Measures
- Data on top ten industries and factors that are affecting their performance.
- Preparation of material on trade remedies which could be used for outreach programmes to educate the stakeholders.
- Examine processes used in other agencies which have a better record of timely and more thorough investigations.

2.c Create special opportunities for training of Indian officials as well as for other developing countries

To expedite the work of the Authority, regular training be provided to staff, including exposure to practices of developed economies. The training could be provided both in India, and by attaching some young lawyers or investigator to law firms in US, EU, Australia or New Zealand, i.e. nations which have established record of training others, and companies which have strong litigation presence. Such plans have been made in the past and agreement from law firms was obtained to provide the training gratis or pro bono. This could again be a focus for improving trade remedy practices and procedures.

Together with this, India could develop a global hub to provide training to low income economies in both fair trading practices and share the experience on trade facilitation with them. Part of this training could also include a wider outreach of training programmes such as ZED, operated by the Quality Council of India.

2.d. Address the issue of changes in data availability arising from introduction of GST, and linking up with relevant Ministries for pertinent data

With a change in the tax regime, some of the data available earlier, such as domestic production of specific products, is proving more difficult to procure because the authority which was a source for such data (Excise) is no longer keeping that information. In this situation, the GST data should be examined to see how this gap may be best addressed.

Regarding trade remedies, it is noteworthy that safeguard investigations can be initiated without necessarily having an application from domestic industry. It would be useful, thus, to develop at least data on domestic production and imports on capital intensive industries. This information could be housed in, and progressively improved by, the relevant Ministries.

2.e. Management Information System (MIS) tools

A structured MIS system should be put in place so that the relevant queries for activities involved in the processes for trade remedies are easily addressed, and investigators or policy makers are alerted in due time if certain problems are likely to arise. This MIS should be pertinent to both the information within the investigating Authority, as well as some other institutions whose data would be relevant for trade remedies.

A very important use of the MIS system would be to identify concerns that may be expected to arise on a regular basis in investigations, or to alert the agency if certain legal requirements are not met.

Important examples of the legal requirements are the obligations specified under the WTO Agreements, especially on timelines for providing notice to affected parties, investigation and consideration of a minimum gap between the receipt of application and preliminary measure. Not following such timelines will make it easy to challenge the measures in WTO, and also lead to lack of good governance in the system as such.

In this context, the MIS may be kept up to date also by incorporating the results from disputes on trade remedies addressed by WTO Panel Reports. This aspect of MIS could also be shared by domestic industry both to alert them about practices which are not appropriate, as well as inform them about practices which they could question if they are subjected to trade remedy measures abroad.

Another part of MIS could be a checklist of evolving practices that are part of new trade agreements. These practices would be an indication of procedural improvements and fair-play of application of good governance. An example is Annex 6-A of the chapter on Trade Remedies in CPTPP.²

²<https://www.mfat.govt.nz/assets/Trans-Pacific-Partnership/Text/6.-Trade-Remedies-Chapter.pdf>

2.f. Research support, especially for information on countervailing measures

Information on subsidies provided by other nations is opaque, and difficult to get. It would be useful to have researchers follow information of subsidies being challenged in other nations and changes in subsidy policies as they take place in major trading economies. This should be done in an organised way so that research products are useful for policy processes. Such information can be useful also for more efficient conduct of countervailing investigations, developing the subsidy schemes of India, and for more substantive discussions with other Governments if Indian exports are subjected to countervailing investigations.

2.g. Legal basis for safeguards against FTA partners

Under WTO, safeguards measures have to be taken against all imports. India still does not have the legal basis for applying safeguards in a limited manner only to imports from FTA partners. That is required to address situations under FTAs where surge of imports from FTA partners needs to be controlled, without taking safeguards against other nations. India needs to develop this specific legal basis quickly, especially since there is considerable concern on imports under FTAs causing serious injury to domestic industry.

2.h. Supply chain analysis and public interest issues should be more formally and structurally included in the investigation

The Indian Government has emphasised “Make in India” programme. Its tariff policies announced in the budget also reflect a focus on Make in India. In addition, the Government recognises that there is a need for Indian producers to more substantively link up with global value chains. Costs of operations need not only to be reduced for those providing inputs into both domestic and global value chains, but we must be alert that policy actions do not unduly increase the costs of those attempting to connect with domestic and global value chains.

Trade remedy measures increase the price of the product subject to the measure. If the product is an input into the supply chain, this would mean that the competitiveness of domestic producers that will utilise that input would be lower.

It is for this reason that the Anti-Dumping Agreement provides for possibility of duties being less than the margin of dumping (the so-called public interest provision). Article 9.1 of the WTO Anti-Dumping Agreement states:

“The decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the authorities of the importing Member. **It is desirable that the imposition be permissive in the territory of all Members, and that the duty be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry.**” (emphasis added)

This requires developing the skills of injury analysis and having more detailed information on value chains than is currently the practice in trade remedy investigations.

2.i. Negotiations to improve trade remedy practices

Large scale negotiations on improving mutual practices applying to trade remedies is not likely to be a success, because of the insistence of the US on getting their practice of “zeroing” accepted by all. Zeroing is considered an unfair method of calculating dumping margins, and WTO panels have found it inconsistent with WTO provisions on anti-dumping.³ Therefore, any progress in negotiation on trade remedies has to be made through one of two methods:

- Adopt good practices in domestic procedures to bring efficiency of operations, fair and transparent practices, and establish processes that provide support also to Indian exporters subject to trade remedy measures abroad;
- Negotiate bilateral or plurilateral agreements with emphasis on good governance to be applied mutually for trade remedies.

3. Specific Trade Concerns in the area of standards

The area of standards which includes technical barriers to trade and sanitary and phytosanitary measures, are increasing their impact on international trade and the possibility of “unfair practices” in this area is also increasing. India should establish processes both to implement them appropriately, as well as to protect its own interests when others use their

³ The concept of zeroing in anti-dumping is explained in http://trade.ec.europa.eu/doclib/docs/2012/february/tradoc_149065.pdf Under zeroing, the dumping margin is artificially increased because all transactions with negative dumping (i.e. price is more than costs), are considered as zero when calculating the average dumping margin, which is the upper limit for imposition of anti-dumping duty.

standards policy in an unfair manner. In this section, we focus on the latter. The former is a much larger area of discussion which could be addressed separately.

In the WTO's TBT Committee, members raise their specific trade concerns (STCs) to seek solutions. In 2016, India was not among the top ten members raising such concerns.⁴ In contrast, India's measures are amongst those which are cited as subject of the trade concern raised in the TBT Committee.⁵ This is a situation worth considering, because Indian exports are subject of trade concerns arising due to technical barriers to trade. India needs to improve its system of identifying and notifying STCs to the WTO.

The situation is very different in the case of STCs raised by India in relation to health and safety standards under sanitary and phytosanitary measures. From 1995 to 2017, while 22 specific trade concerns were raised relating to Indian measures, India raised 32 specific trade concerns pertaining to measures of other WTO members.⁶ The system seems to be working more effectively for this area of standards.

4. Emerging issues in unfair trade and need for greater co-ordination

As enterprises in developed economies have lost market shares in global markets, the scrutiny of operational conditions in countries that are the main beneficiaries in international trade has focused on finding ways in which “unfair conditions of operation” have led to improving their competitive position. This has led to identifying practices which adversely affect “competitive neutrality” and lead to a non-level playing field. Thus, weak social and sustainable standards in order to reduce costs and attract FDI on that basis, covert subsidies to state enterprises, the use of sovereign funds, corporate social responsibility⁷, use of competition policy tools to create advantages for domestic enterprises, and nonadherence to IPR rules and conditions in a fair manner are all areas that have come up as examples of “unfair trade practices” used to gain undue advantage in global markets. A number of these areas were addressed in the TPP agreement and are now part of the CPTPP Agreement.⁸

⁴ See, Charts 14 and 15 of <file:///G:/MY%20DATA/Downloads/39R1.pdf>

⁵ See, Charts 16 and 17 of <file:///G:/MY%20DATA/Downloads/39R1.pdf>

⁶ See, Table 1.1 of <file:///G:/MY%20DATA/Downloads/GEN204R18.pdf>

⁷ Article 201.0 of CPTPP, in its Chapter on Environment, addresses corporate social responsibility.

⁸ See, <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-concluded-but-not-in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-text/#CPTPP>

Two important features of these unfair trade areas are significant. One, they are covered by different international institutions, and not just the WTO. Second, this list is evolving, as shown for instance by the emphasis on wages in NAFTA negotiations.⁹

In this background, it would be appropriate to have a larger co-ordination Body for trade-related issues, which receive inputs on developments in different for a that are relevant for trade procedures and forward planning.

The ongoing developments and the looming trade tensions also indicate a need for a comprehensive framework to address “unfair trade” in general at the WTO. Some initial ideas on this are presented in a recent Op Ed by the author.¹⁰ The idea is to recognise that there are various ways in which WTO members perceive trade practices to be unfair, including lack of a focus on development and non-level playing field created by agricultural subsidies. While these issues can be addressed specifically, the idea would be to begin negotiations on a general framework of disciplines for addressing unfair trade practices. In specific, the Op Ed states:

“Thus, discussions could begin under the WTO General Council, or even a Working Party, based on an assessment of the conceptual features which are already part of the WTO agreements that deal with “unfair trade”, i.e. anti-dumping (AD) and subsidies and countervailing measures (SCM). A useful model could be the General Agreement on Trade in Services (GATS), with a general framework of agreed disciplines regarding “unfair trade”, supplemented with schedules of disciplines addressing specific areas of “unfair trade practice”. These schedules for individual topics would be agreed separately for each area of concern. These would cover areas not already part of the WTO, such as the issues covered in CPTPP under the chapters on competition policy, and state-owned enterprise and designated monopolies. In addition, the discussion may consider any other areas which are seen as a major cause of trade tensions.

⁹ See for example, “US explores including wage factor in NAFTA auto rules: sources” in <https://in.reuters.com/article/us-trade-nafta-autos/u-s-explores-including-wage-factor-in-nafta-auto-rules-sources-idINKBN1H61KF>

¹⁰ “Unfair trade practices: A strong WTO can play a key role”, <https://www.financialexpress.com/opinion/unfair-trade-practices-a-strong-wto-can-play-a-key-role/1135503/>

The resulting disciplines may range from soft to hard law. Further, most WTO members may be exempt from these disciplines, because their actions would be unlikely to cause the relevant “adverse effects” on trade. For them, these would serve mainly as guiding principles.

The general framework could include existing concepts under WTO agreements such as notification, evidence based on factual investigation, serious injury, steps to avoid circumvention of measures, de minimis, higher obligations for those whose share in world trade is above a specified threshold (akin to Article 27.5 and 27.6 of the WTO Subsidies and Countervailing Measures Agreement), no obligations for countries below a specified threshold level (akin to Annex VII of WTO Subsidies Agreement), a framework similar to the Telecom Reference Paper with disciplines that combine a set of legal obligations and guidelines, a transition period for implementing the obligations (akin to Article 27.4 of WTO Subsidies Agreement). In addition, similar to the WTO TRIMS Agreement, there could be an illustrative list of trade policy actions that would be considered as relevant to be addressed by the overall framework and the schedules.”

If India plans such initiatives with care and co-ordination with other WTO Members, it could take a leading role in renewing WTO while also being informed of the issues that would affect the procedures for trade remedies.

ANNEX

Table 1. Major Countries Using Anti-Dumping Measures, period ending June 2017

Country	Anti-dumping Measures in Force on 30 th June 2017 (definitive duties and price undertakings)	Initiations of new investigations, 1 st July 2016 to 30 th June 2017	Definitive/Provisional Measures Against India, 1 st July 2016 to 30 th June 2017
United States	315	47	4 / 2
India	276	55	N. A.
EU	115	12	0 / 0
Brazil	176	12	1 / 0
Turkey	156	19	0 / 0
China	95	12	0 / 0
Mexico	66	6	1 / 0

Source: WTO (Annex C of [file:///G:/MY%20DATA/Downloads/1193%20\(1\).pdf](file:///G:/MY%20DATA/Downloads/1193%20(1).pdf))

Table 2. Countervailing Measures by WTO Members, period ending June 2017

Country	Countervailing Measures in Force on 30 th June 2017 (definitive duties and price undertakings)	Initiations of new investigations, 1 st July 2016 to 30 th June 2017	Definitive/Provisional Measures Against India, 1 st July 2016 to 30 th June 2017
United States	91	19	4 / 1
Canada	22	6	0 / 0
EU	16	0	0 / 0
Australia	11	5	0 / 1
China	5	1	0 / 0
Mexico	3	0	0 / 0
Peru	2	1	0 / 0
Brazil	1	1	0 / 0
India	1	0	N. A.
Turkey	1	0	0 / 0

Ukraine	1	0	0 / 0
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Source: WTO (Annex L of [file:///G:/MY%20DATA/Downloads/1195%20\(2\).pdf](file:///G:/MY%20DATA/Downloads/1195%20(2).pdf))

Table 3. Safeguard in Force on 23rd October 2017

Country	Safeguard in Force on 23 rd October 2017
Vietnam	4
Turkey	4
Indonesia	4
India	3
Malaysia	3
Morocco	3
Philippines	3
Thailand	3
Tunisia	3
GCC Member States	2
Ukraine	2
United States	2

Source: WTO (Annex 3 of <file:///G:/MY%20DATA/Downloads/1192.pdf>)