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Trade Remedies Brief Guide for Businesses

Like all good stories, the one about world trade has two sides. While liberalization and membership in the World Trade Organization (WTO) has opened up trade opportunities for businesses, it has also resulted in more national measures blocking market access on the grounds of “unfair pricing” and “massive exports” by exporters. Products such as steel, iron and chemicals from developing countries and transition economies have been increasingly subject to such measures - known as “trade remedy actions” or “trade defence instruments”. The consequences are serious for an exporter or a country subjected to such measures. Even being charged with dumping carries a heavy penalty in the effort required to set the record straight. **So exporters should take care to avoid creating grounds for such actions.**

Trade remedies are exceptions to the WTO principles of free trade, whether based on claims of unfair pricing (dumping or subsidies), or to counter fair but massive increases in exports (safeguards). The procedures are also unique in the WTO system in giving an active role to the business community. **Governments seek trade remedies almost exclusively on the instigation of local business or because of business concerns.**

The WTO identifies three main types of import restraints as trade remedies:

Antidumping measures.

The most commonly used are antidumping measures to counteract unfairly low prices. Goods are considered “dumped” when companies export them at prices lower than those at which they sell in their home market. Dumping is not illegal in itself; it becomes actionable when it results in injury to local businesses in the importing country. Therefore, in order to initiate an antidumping investigation, local businesses must demonstrate evidence of dumping, injury to themselves and a causal link between the dumped prices and the injury to them. Generally, this takes the form of a written application to the relevant national authority (in Ukraine, the Ministry of Economic Development and Trade). This authority will provide a notice of receipt of the application to the government of the exporting country. All interested parties (importers, exporters, producers etc) receive a copy of a notice of initiation (which includes a copy of the application). The national authority also issues a notice and/or a report to the public.

Countervailing duties.

Countervailing duties counteract subsidies by national authorities that unfairly enable their companies to produce or export at a lower price through providing subsidies of one form or another to producers and exporters. These actions include greater government involvement by nature.

Safeguard measures.

These measures do not counteract an unfair practice, but allow countries to suspend import surges temporarily in order to grant local industries time to adjust to increased foreign competition on national markets. However, if a country is thought to be breaking the rules by imposing limits for unjustified reasons, other WTO members can - and do - challenge them through the WTO's dispute settlement system.

Business concerns

The business sector and legal experts cite these main business concerns:

Heavy procedural requirements. During antidumping investigations, the EU, for example, and Ukraine as well, gives exporters only 37 days to complete its questionnaire, which can be insufficient time to complete it in detail. Also, accounting and other measures can differ significantly from one's home country

Use of "sampling". When a country investigates a group of companies, if there are a lot of companies exporting, the investigators may choose certain companies as a sample group for in-depth investigation. It uses findings from the sample as the basis to calculate whether or not the entire group has been dumping goods. Because this system lacks precision, exporters not included in the sample may consider that they are unduly penalized.

Simultaneous actions. Although not authorized in Ukraine, exporters may be subject to simultaneous antidumping and anti-subsidy actions from an importing country. Such practices are too burdensome for many companies.

Rules not transparent. Certain national authorities have discretionary power in their operations, and that makes the rules regarding investigations less than transparent.

Lack of expertise and resources. A company may be 'on its own' in defending a trade remedy case. There is little support relationship between business and government in coping with trade remedy proceedings initiated by other national authorities.

Recommendations

What should a company do to prepare before, during and after a potential antidumping or countervailing duty investigation? A number of suggestions to help overcome these difficulties are outlined below:

Before a case is filed

- Companies vulnerable to action should have a good knowledge of their export trends and profit levels as well as those of their competitors.

- In a situation of loss or decline in profits, particularly in sensitive sectors such as steel or textiles, it may not be wise to try to compensate by increasing exports. A drop in profits that occurs simultaneously with an export boost can lead to an assumption of dumping. In such cases, companies should already have prepared coherent, verifiable arguments backed up with hard data to counter any charges.
- Exporters need to be attentive to danger signals such as deterioration of competing national producers' financial performance as well as increases in market share, since some countries' laws makes it easy for companies to press for action against foreign competition if they have financial problems. Again, an exporter must be well prepared to respond to dumping charges.

When a case is filed

- While the WTO dispute system addresses issues in the trade remedies world, businesses do not have the legal status to bring cases to the WTO Dispute Settlement Body. They must request their national authority to initiate proceedings, and it is by no means certain that requests will be successful. What is certain is that it will usually take some time to sort out. Therefore, in a dispute over trade remedies, it is better to explore first the alternative solutions available under domestic laws.
- Exporters who are under investigation should gather data very quickly. They should collect detailed information. Businesses need to ensure they submit complete, correct and verifiable data. They must also be well prepared during every stage of the verification visit by trade remedy planners.
- A country whose business is under investigation can request an extension of time to reply to the questionnaire. It can also require the full text of the written application for action, and thus build up a detailed rebuttal against charges.
- Parties may request protection of confidential information, obtain access to non-confidential information submitted by other parties and make submissions based on that information.
- Businesses are recommended to document verbal information they provide to authorities.

- Exporters should be informed if authorities are to make on-the-spot investigations.
- Exporters should identify their best option at an early stage: whether to be included in the sample used to determine the duty, and, as a result, be subject to an individual margin; or not to be included and therefore benefit from the average duty that is imposed.
- Parties have the right to be informed of the essential facts that form the basis of any final decision in sufficient time to defend their interest. Businesses under investigation should use this right.
- Intergovernmental negotiations can avert the need for action in WTO and expensive litigation, particularly if the case of the complaining party has weak points, which defending countries need to identify.

Beyond anti-dumping

Even when an anti-dumping or countervailing duty measure is imposed, or where safeguard protections have begun, this is not the end of the story. The company can appeal through the administrative and judicial process of the imposing country. The exporting country government (If a member of the WTO, as Ukraine) can also appeal to the WTO Dispute Settlement Body. But it should initiate the process immediately by requesting a consultation and deciding on panelists. To save time and resources, the exporting country should consider limiting its challenges to the weakest part of the decision rather than focusing on all its possible defects.