

The EU's Trade Policy in the Doha Development Agenda – An Interim Assessment on Rules Negotiations

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Abstract

At Doha Ministerial Conference in 2001, WTO members agreed to launch new trade negotiations on a range of subjects and other work, including issues concerning the implementation of the present agreements. Various issues in the WTO Doha Development Agenda were dealt with in the form of ‘single undertaking’ which include the trade remedy rules, *i.e.*, anti-dumping and subsidies rules. The EU, being the largest regional economy in the world, was no doubt a heavyweight in the Doha multilateral trade negotiations and so was its trade policy of great weight. To date, the EU had put forward a total of 10 submissions to clarify and improve the AD Agreement and the SCM Agreement at the end of 2006, and the submissions revealed the EU’s attitude toward the Rules negotiation; not aggressive but prudent and cautious. While Doha Round seemed doomed and gloomy, the EU, on the other hand, launched its new trade policy, the ‘Global Europe’ framework in 2006 pursuant to the goals set up by the conclusions of Lisbon European Council.

The new EU’s trade policy is comprised of a wider array of trade issues, aiming at maintaining its global competitiveness, and in light of the growing fragmentation and complexity of the process of production and supply chains as well as the growth of major new economic actors, particularly in Asia, there was a need for a revision of the EU Trade Defence Instruments (TDI) . A “Green Paper” on TDI was thus drafted and presented for public consultation by the Commission at the end of 2006, which is intended to make sure EU TDI fit in the trend of globalization as well as the European multinational corporations' competitiveness in the new economic context.

This paper intends to explore if the possible trade policy adjustment in the EU TDI will also facilitate to resolve the discrepancy between the EU and its counterparts in the Rules negotiations and provide a solid basis for the conclusion thereof. Section II of the article presents the ongoing DDA negotiations, *inter alia*, Rules negotiations. Section III will probe the negotiation objective and issues that EU concern by examining its submissions to the Negotiating Group on Rules as well as its implementation assessment. The EU’s new trade policy, in particular, that on the newly released “Green Paper” on the TDI will also be analyzed in section IV. This paper concludes that the EU policy on TDI is expected to be adjusted toward a framework favorable to other economic operators, such as users and consumers. Whether the public consultation for “Green Paper” is a process of consensus building is still an argument. It is likely that EU delegate will narrow down the gap between the EU and other exporting-oriented members in the Rules negotiations should the

revised TDI be expanded to a large extent.

I. Introduction

In 2001, WTO members agreed to launch new round of trade negotiations in the Fourth Ministerial Conference in Doha, Qatar. The entire package for the new round of trade negotiations is called the Doha Development Agenda.¹ Various issues in the WTO Doha Development Agenda were dealt with in the form of ‘single undertaking’ which include the trade remedy rules, *i.e.*, anti-dumping and subsidies rules..² European Union (EU)³, one of the major initiators and victims of the trade remedy instruments among WTO members, considered that clarification and improvement of the current multilateral trade remedy disciplines were drastically required in the Doha Round. Yet, the EU that has 25 member states makes up 40% of the world's merchandise trade⁴ has become the largest regional economic community, and because of its important position, its trade policy in Doha multilateral trade negotiations was without doubt of heavy weight.

It was EU's intention to improve the current multilateral disciplines on anti-dumping and subsidies at the initial stage of the Doha negotiations since 2001. However, no evidence on paper in the WTO has shown that EU is willing to take a more positive attitude to deviate from preserving the effectiveness of the anti-dumping as well as the subsidies and countervailing instruments. As EU inclines to be more prudent, it has not yet grant its approval on submissions tabled by its allies of numerous export-oriented economies, particularly, the “Friends of Anti-dumping Negotiations” (FAN). While Doha Round seemed doomed and gloomy, the EU, on the other hand, initiated its new trade policy, the ‘Global Europe’ framework in 2006, which was designed to enhance the EU's capacity to compete in

¹ WTO, *The Doha Development Agenda*, [hereinafter the DDA], available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/doha1_e.htm#28. Last visited on Mar. 7, 2007, Trade issues in the DDA include agriculture, services, market access for non-agricultural products (NAMA), trade related aspects of intellectual property rights (TRIPS), relation between trade and investment, interaction between trade and competition policy, transparency in government procurement, trade facilitation, WTO rules, dispute settlement understanding, trade and environment, electronic commerce, small economies, trade, debt and finance, trade and transfer of technology, technical cooperation and capacity building, least-developed countries, special and differential treatment, organization and management of the work programme.

² *The Doha Ministerial Declaration*, WT/MIN(01)/DEC/1, adopted November 20, 2001, available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm. Last visited on Mar. 7, 2007 at para. 47. Since disciplines for safeguard measures are not a subject of the DDA, it will be excluded from discussion in this paper. Disciplines for fishery subsidies and regional trade agreement mandated by DDA will be also excluded from discussion in this paper.

³ Although the three European Communities (EC, ECSC and EAEC) technically still exist, and the European Union as such does not have legal personality, throughout this paper the term European Union or EU shall be used to denote the Communities.

⁴ The WTO data shows that the export value of the EU amounted to \$3,988 billion U.S. dollars in merchandise trade of the world, and its import valued \$4,120 billion U.S. dollars in 2005. WTO, *WORLD TRADE REPORT*, 2006, at 11.

the global economy.⁵ A “Green Paper” was also presented for public consultation by the Commission.⁶ The “Green Paper”, a reflection on the EU’s Trade Defence Instruments (TDI), was an integral part of Lisbon agenda. It does not challenge the fundamental value of TDI, rather it carries the objective to transform current TDI into a modern mechanism to facilitate trade, but at the same time remain an effective response to unfair trading practices.

The resumption of DDA negotiations in 2007 is expected to keep WTO members on track toward the final stage of the Doha Round while the EU “Green Paper” on TDI will be put for public consultation. Whether the result of public consultation on “Green Paper” will have impact on EU’s current policy in DDA Rules negotiations deserves further studying, this paper intends to explore if the possible trade policy adjustment in EU TDI would resolve the discrepancy between the EU and its counterparts in Rules negotiations so as to provide a solid basis for the conclusion thereof. For this purpose, section II of the article will present the ongoing DDA negotiations, *inter alia*, Rules negotiations, and section III will probe negotiation objective and issues that EU concern through examining its submissions to the Negotiating Group on Rules. The EU’s new trade policy, in particular, on the newly released “Green Paper” on TDI will also be analyzed in section IV.

II. The Development of DDA Rules Negotiations

A. Rules Mandate

In 2001, WTO members agreed in Doha, Qatar to launch new trade negotiations on a range of subjects and other work, including issues concerning the implementation of the present agreements. WTO members made it clear in written documents in a ministerial declaration, the Doha Ministerial Declaration, to provide mandate for negotiations. One of the important DDA issues is the negotiations in “WTO Rules”, and the rules negotiations mainly focus on subject matters related to the Agreement on Implementation of Article VI of GATT 1994⁷ and the Agreement

⁵ Mandelson to ‘Lisbonise’ EU Trade Policy, EURACTIV, Oct. 5, 2006, available at <http://www.euractiv.com/en/trade/mandelson-lisbonise-eu-trade-policy/article-158509>. Last visited on Mar. 25, 2007

⁶ Commission of the European Communities, *Europe’s trade defence instruments in a changing global economy – A Green Paper for public consultation*, COM(2006) 763 final. Brussels, Dec. 6, 2006.[hereinafter Green Paper]

⁷ The Agreements on Implementation of the Article VI of the General Agreement on Tariffs and Trade 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, [hereinafter the AD Agreement].

on Subsidies and Countervailing Measures.⁸ Renegotiation of the WTO anti-dumping and subsidies rules was a concession by both developed and developing countries as a condition to move forward in the Doha Round.⁹ The anti-dumping and anti-subsidy negotiations were, thus managed to put relative strict limits on the scope and proceedings in the mandate of the Doha Ministerial Declaration. Paragraph 28 of the Doha Declaration, titled WTO Rules, states:

“In the light of experience and of increasing application of these instrument by Members, we agree to negotiations aimed at clarifying and improving disciplines under the Agreement on implementation of Article VI of the GATT 1994 and on Subsidies and Countervailing measures, while preserving the basic concepts, principles and effectiveness of these Agreements and their instruments and objectives, and taking into account the needs of developing and least-developed participants. In the initial phase of the negotiations, participants will indicate the provisions, including disciplines on trade distorting practices, that they seek to clarify and improve in the subsequent phase.”

The mandate was quite precise. It aimed to clarify and improve anti-dumping and subsidy rules without having any fundamental change on the Anti-dumping and Subsidies Agreements. For instance, in anti-dumping regime, the language of “preserving the basic concepts, principles, and effectiveness” in the Mandate denoted that concepts and principles of the AD Agreement such as dumping, price discrimination, or injury which must be maintained and cannot be altered. Also, negotiations shall serve as an effort to preserve the effectiveness of the AD Agreement and the SCM Agreement. Any improvements to the functioning of the anti-dumping and anti-subsidy mechanisms that will reduce their effectiveness cannot be accepted either. However, the effectiveness of current WTO anti-dumping and anti-subsidy rules per se also connotes, to some extent, bias discretion and cumbersome procedures that could still persist in members’ anti-dumping and subsidies codes. For that reason, it is expected that reforms in the AD Agreement and the SCM Agreement will not be drastic in the Rules negotiations.¹⁰

Additionally, the mandate required WTO members to negotiate WTO anti-dumping and anti-subsidy rules in two stages. In the initial stage, WTO

⁸ Agreement on Subsidies and Countervailing Measures, [hereinafter the SCM Agreement].

⁹ William A. Kerr and Laura J. Loppacher, *Anti-dumping in the Doha Negotiation: Fair Tales at the World Trade Organization*, J. WORLD TRADE, 38(2) 211, 2004.

¹⁰ *Id.*, at 215.

members needed to refer to the provisions, including disciplines on trade distorting practices they intended to clarify and improve. Review on the progress was scheduled at the Fifth Session of Ministerial Conference in Cancún, Mexico, September 2003.¹¹ After identifying issues that were in need of clarification and improvement, WTO members then proceeded with the second stage on substantive clarification and improvement of rules identified in the AD Agreement and SCM Agreement. The process of the anti-dumping and subsidy negotiations will be held and supervised by the Negotiating Group on Rules.¹²

B. Right on Track on Rules Negotiations

Rules negotiations have been well proceeded by the WTO members since the Doha Ministerial Conference in 2001. Given the increasing disputes between members in their implementation of the AD Agreement, negotiations on clarifying and improving multilateral anti-dumping rules have been the spotlights in the Rules trade talks. At the initial phase of identifying the issues for clarification and improvement in accordance with the Rules mandate, WTO members were aggressive in submitting their formal papers which identified their concerned issues of a general nature to the Rules Negotiating Group. The progress was made that participants of WTO Rule negotiation had completed stock-taking in the Cancún Ministerial Conference where 141 position papers were presented to identify issues they concerned.¹³

Although the work of Rules negotiations was once delayed due to the general situation in the DDA negotiations following the Cancún Ministerial Conference, it has since the spring of 2004 resumed its work in a vigorous and intensive manner.¹⁴ The fact was that the “July Package” provided an important step to push forward the DDA negotiations in some areas which includes Rules negotiations. In the “July Package”, the General Council of WTO takes note of the report by the Chairman of the Trade Negotiations Committee (TNC) on various proposals with respect to the issues of WTO Rules.¹⁵, and the “July Package” thus reassures the continuing of Rules negotiations.

¹¹ *The Doha Ministerial Declaration*, *supra* note 2 at para. 52.

¹² The task of the Negotiating Group on Rules is to host negotiations in the areas of anti-dumping, subsidies, and regional trade agreements.

¹³ WTO, *Negotiating Group on Rules, Note by the Chairman, Compilation of Issues and Proposals Identified by Participants in the Negotiating Group on Rules*, TN/RL/W/143, Aug. 22, 2003.

¹⁴ *Negotiating Group on Rules, Report by the Chairman to the Trade Negotiating Committee*, TN/RL/8, Apr. 8, 2004.

¹⁵ *Id.*, para. (f). It provides; “Rules, Trade & Environment and TRIPS: the General Council takes note

In the post-“July package” period, participants of Rules negotiations began to accelerate and intensify negotiating process. Members started to work on the basis of proposing specific amendments to Agreement text to ensure Rules negotiations have significant evolvement, both in terms of substance and of progress.¹⁶ The Rules negotiating process was fundamentally sound. The Hong Kong Ministerial Conference in December, 2005 provided an opportunity to bring the Doha Round closer to its conclusion in all areas. Ministers in Hong Kong acknowledge the achievement of substantial results in all aspects on Rules mandate which is important to the DDA, and take note on the issues discussed with respect to anti-dumping, subsidies, and countervailing measures.¹⁷ Ministers further directed the Rules Negotiating Group to complete the process of analyzing the proposals and launch a text-based negotiation of the AD and SCM Agreements. Consolidating texts of amendments of the Anti-dumping and SCM Agreements shall also be prepared in a timely fashion before the new deadline of the DDA, the end of 2006.¹⁸

After the Hong Kong meeting, Rules negotiation has been moved intensively and rigorously. Participants have **scrutinized** large numbers of proposals, almost exclusively on the basis of specific proposed texts on anti-dumping. Proposals for texts with respect to subsidies and countervailing measures are, somewhat tardy.¹⁹ The suspension of DDA negotiations in July 2006, which was once delayed for Rules negotiating process, was resumed by the participants in early 2007.²⁰ Currently Rules negotiating process is right on track and participants deeply engage and spend constructive efforts to ensure that Rules be in a solid basis for the final stage of the Doha Round. It is undeniable that the Doha Rules negotiations have gained much attention from WTO members more than six years later after the DDA negotiation. It is anticipated that the result on Rules negotiations will ultimately be linked closely to other aspects of the DDA negotiations, such as agriculture and non-agricultural market accesses, as it is required in the "single undertaking" in DDA.²¹ Without

of the reports to the TNC by the Negotiating Group on Rules and by the Special Sessions of the Committee on Trade and Environment and the TRIPS Council. The Council reaffirms Members' commitment to progress in all of these areas of the negotiations in line with the Doha mandates.”

¹⁶ WTO, *Negotiating Group on Rules, Report by the Chairman to the Trade Negotiating Committee*, TN/RL/13, July 19, 2005, at 2.

¹⁷ WTO, *Ministerial Declaration Adopted on 18, December 2005*, WT/MIN/(05)/DEC, Dec. 22, 2005, Annex D, paras. 1, 6-8.

¹⁸ *Id.*, paras. 10-11.

¹⁹ WTO, *Negotiating Group on Rules, Report by the Chairman to the Trade Negotiating Committee*, TN/RL/19, July 22, 2006, at 1.

²⁰ Participants in Rules negotiation started to submit their proposals in January 2007, before the resumption DDA trade talks in February 7, 2007. Participants, such as Australia, have separately submitted their proposals before resumption of trade talks. See WTO, *Withdraw of Subsidies, Communication from Australia, Revision*, TN/RL/ GEN/115/Rev. 1, Jan. 24, 2007..

²¹ *The Doha Ministerial Declaration*, *supra* note 2, at para. 47.

doubt, the results of the Rules mandate in all areas are the essential elements reflecting the overall balance in the Doha Round. The negotiations in the past suggest that any results in WTO Rules, particularly in anti-dumping, must be highly detailed and text-based. Also, political concern is crucial for the results of Rules negotiations, but such results are not likely to emerge before a comparable level of detail on the trade-offs in other areas of the DDA is clear.²²

III. EU in Rules Negotiations

A. Anti-dumping Negotiation

1. Reasons for Participation

No one will refute that the AD Agreement, and in associated with the WTO Dispute Settlement System, have contributed considerably to clarifying and improving anti-dumping disciplines since the establishment of the WTO. However, whether the current AD Agreement fits well to the modern changing business context remains in question. There are several reasons for the EU's support on the Doha anti-dumping renegotiation:

(1) The Surge of Anti-dumping Actions

The effecting of the WTO trade liberalization was not synchronized among the members, but the fact is that many of the WTO members have chosen increased recourse to the anti-dumping instrument in order to be able to address unfair and injurious trade practices. The WTO data reveal that members have totally initiated 1237 anti-dumping actions from the establishment of WTO until the Doha Ministerial Conference was held in 2001, and increased to 2938 up to June 30, 2006.²³

(2) The EU Has Become the Major Anti-dumping Target

As the AD Agreement is part of the single package of the WTO, all members are automatically bound by the AD Agreement.²⁴ Members who adopt and utilize

²² Chiang-feng Lin, *The WTO Anti-dumping Negotiation Development – Taiwan's Perspective*, in THE WTO TRADE REMEDY SYSTEM, EAST ASIAN PERSPECTIVES, 227 (MITSUO MATSUSHITA, DUKGEUN AHN, AND TAIN-JY CHEN EDS, CAMERON MAY, LONDON, 2006)

²³ *AD Initiations: By Exporting Countries, From: 01/01/95 To: 30/06/2006*, available at http://www.wto.org/english/tratop_e/adp_e/adp_stattab1_e.xls. Last visited on 03/20/2007.

²⁴ AD Agreement, *supra* note 7, art. 1.

anti-dumping legislation must be in accordance with the provisions of the AD Agreement, and many of them have started using the anti-dumping laws that they adopt. The frequent anti-dumping users existed at the time of the Uruguay Round, are mostly the developed countries that have now also become major targets of anti-dumping actions.²⁵ In particular, the EU and his member states have faced with a total of 501 anti-dumping investigations from 1995 until 2006 and become one of the major targets of anti-dumping actions.²⁶

(3) The AD Agreement Needs Further Clarification and Improvement

The widespread and ever-expanding use of the anti-dumping instruments has triggered considerable discrepancy between WTO members in their interpretation and application of the current anti-dumping rules. Disputes pursuant to the Understanding on Rules and Procedures governing the Settlement of Disputes in WTO have therefore increased. WTO members have totally filed 242 complaints under the Dispute Settlement System for the period from 1995 to 2001, 38 of which relate to anti-dumping disputes.²⁷ The panels and Appellate Body have contributed to greater clarification in the interpretation of the AD Agreement but some areas thereof would benefit from further clarification and improvement.

(4) Anti-dumping Actions Are Costly And Lack of Transparency

Anti-dumping investigation is a time-consuming and costly proceeding. Cooperation in anti-dumping investigations inevitably leads considerable human and financial burden to participants therein, which results in unsatisfactory feeling among the WTO members. Reduction in administrative burden associated with the participation in anti-dumping proceedings is thus drastically needed. Improvements in transparency and rights of parties concerned during the anti-dumping proceedings shall also be merited.²⁸

2. Objectives and Issues Concerned

²⁵ EDWIN VERMULST, *THE WTO ANTI-DUMPING AGREEMENT* 5-6 (New York: Oxford University Press, 1st ed. 2005). Until 1990, the major frequent anti-dumping users were Australia, Canada, the EU, and the United States.

²⁶ Cliff Stevenson, *Global Trade Protection Report 2007 Data & Analysis*, Apr. 2, 2007, available at <http://www.antidumpingpublishing.com>. Last visited on 04/14/2007.

²⁷ *Panel/AB Reports and Arbitration Awards in WTO AD Agreement Disputes*, World Trade Law net, available at <http://www.worldtradelaw.net/dsc/database/ad.asp>; *List of All WTO Complaints Brought Pursuant to the DSU*, World Trade Law Net, available at <http://www.worldtradelaw.net/dsc/database/searchcomplaints.asp>. Last visited on 03/22/2007.

²⁸ Pierre Dider, *The WTO Anti-Dumping Code and EC Practice Issues for Review in Trade Negotiations*, 35 J. WORD TRADE (1), 33 (2001).

Based on the abovementioned reasons, the EU intends to pursue four main goals through taking clarification and improvement of the current WTO anti-dumping rules. These objectives are to strengthen the current disciplines, preserve the effectiveness and objectives of the anti-dumping instrument, simplify and clarify certain provisions, and consider the need of developing countries. Issues needed to be clarified and improved to achieve such goals are specified as follow.²⁹

(1) Strengthening the Disciplines

To strengthen the current anti-dumping rules, issues with respect to disclosure and access to non-confidential documents, mandatory lesser duty rule, public interest test, swift dispute settlement mechanism for initiation of investigation, as well as reduction of investigation costs are in need of further clarification and improvement.

(2) Preserving the Effectiveness And Objectives of the Anti-dumping Instrument

Economic globalization has increased the opportunity of circumvention, and it has become increasingly difficult to secure the enforcement of anti-dumping measure. Bearing in mind that anti-dumping measures are the result of complex, intensive and costly investigations, it is necessary to preserve the effectiveness and objectives of the anti-dumping measures. However, the current AD Agreement is silent on this issue. Rules with respect to anti-circumvention are thus needed.³⁰

(3) Simplifying And Clarifying Certain Provisions

The findings indicated in various WTO Panel and Appellate Body reports have contributed to significant clarification or simplification on some anti-dumping rules. Provisions being clarified or simplified therein should be therefore included in the AD Agreement as part of the context.

(4) Considering the Needs of Developing Countries.

²⁹ WTO, *Submission from the European Communities Concerning the Agreement on Implementation of Article VI of GATT 1994 (Anti-dumping Agreement)*, TN/RL/W/13, July 8, 2002, at 2-4.

³⁰ The EU proposed provisions relating to anti-circumvention of anti-dumping measures during the Uruguay Round. However, the conclusion of Uruguay Round did not resolve circumvention issues. Paul Demaret, *The Metamorphoses of the GATT: From Havana Charter to the World Organization*, 34 COLUM. J. TRANSNAT'L L 145 (1995).

Special and differential treatment in the context of implementation of the AD Agreement is critical important for developing countries. The EU stands for the needs of developing countries and a special and clearly defined developing country package should be prepared for the conclusion of the Doha Round. In this respect, parameters and requirements shall be established to serve the interests of developing countries for the purpose of reducing the possibility of abusing the anti-dumping instrument.

B. Negotiations in Subsidies and Countervailing Measures

1. Reasons for Participation

Negotiations in subsidies and countervailing measures do not obtain the same level of attention as that of anti-dumping in Rules negotiations, some issues in the SCM Agreement are still in need of further clarification and improvement. The obligations of WTO members, in respect of subsidies laid down in the SCM Agreement, are categorized in the “traffic lights” approach – red (prohibited), green (non-actionable), and amber (actionable).³¹ Prohibited or red subsidies, *i.e.* export subsidies, have gained much attention in the WTO Dispute Settlement system since the conclusion of the Uruguay Round. During the period of 1995 to 2001, only one of the eight dispute settlement cases brought against subsidy practices involved exclusively export subsidies.³²

For the actionable subsidies, in particular those indirectly granted to certain products, are much less explicit as they are less functional and effective than those for export subsidies, similarly, non-actionable or green subsidies, *i.e.* R&D, environment and regional aids, have proven to be ineffective because they are only available by the end of 1999.³³ With respect to countervailing measures, experience has shown that investigations can still be initiated without the necessary justification despite of increased initiation standards.

2. Objectives and Issues Concerned

There are needs for clarification and improvement on the current “traffic lights”

³¹ Anwarul Hoda and Rajeev Ahuja, *Agreement on Subsidies and Countervailing Measures: Need for Clarification and Improvement*, J. WORLD TRADE 39 (6) 1012 (2005).

³² WTO, *WTO Negotiations Concerning the WTO Agreement on Subsidies and Countervailing Measures, Proposals of the European Communities*, TN/RL/W/30, Nov. 21, 2001, at 1.

³³ The SCM Agreement art. 31& art.6.1 (subsidies presumed to cause serious prejudice), art. 8 & 9 (non-actionable subsidies for R&D, environment and regional aid) expired on 1 January 2000.

approach pertaining to the subsidies categories as only few subsidies rules are considered functional. It is necessary to streamline the current rules of subsidies and countervailing measures through establishment of clear and uniform rules for all types of subsidies. Therefore, EU's main objective in the negotiation of Doha subsidy and countervailing disciplines is to ensure workability and effectiveness of the current SCM Agreement.³⁴ The EU has taken steps to identify issues that should be clarified and improved in order to meet the objective. In general, these issues can be categorized into subsidy disciplines, countervailing disciplines, and the need of developing countries.

(1) Subsidy Disciplines

A widespread of non-transparent subsidies are currently disguised and intended to circumvent the subsidy disciplines under the SCM Agreement. These disguised subsidies have the same severe trade-distorting effects as that of direct subsidies. To effectively bring such subsidies into the reign of multilateral subsidy disciplines, some issues need to be addressed and be further perfected. These issues include more operational rules for the disguised subsidies and state-controlled entities, and these disguised subsidies can be characterized to make "entrust or direct" promulgated in Article 1 of the SCM Agreement. Issues relating to strengthen current subsidy disciplines also include clearer rules for local content subsidies. Also, clarifications on export financing and effective notification rules are covered. The EU also proposed issues with regard to subsidies and environment which are worth the attention.³⁵

(2) Countervailing Disciplines

For the disciplines of countervailing measures, there is a need for improvement of the asymmetry between the SCM Agreement and the AD Agreement. Issues with respects to strengthening of the rules, increase of the effectiveness, and reduction of the cost of investigations are explored in the proposal for the AD Agreement, and are expected to gain the same level of clarification and improvement in the multilateral disciplines of countervailing measures.³⁶

(3) Developing Countries

³⁴ TN/RL/W/30, *supra* note 432, at 2.

³⁵ TN/RL/W/30, *supra* note 32, at 2-4.

³⁶ *Id.*, at 4-5.

It is unquestionable that tight disciplines on trade distorting subsidies are in fact in the interests of all participants in the world trading system, including developing countries, and certain types of subsidies will contribute to development of the countries, particularly, the developing countries. The EU deems special and differential treatment necessary for some developing countries, and special and differential treatment shall be clearly defined and be provided on a temporary basis to countries limited. For least developed countries, notification obligation of specific subsidies under Article 25 of the SCM Agreement could be conducted under the framework of the Trade Policy Review Mechanism.³⁷

C. Clear Objectives but Prudent Approach in Rules Negotiations

Apparently, the EU has clear goals on specific issues at the beginning of Rules negotiations. The EU has totally presented 10 submissions to clarify and improve the AD Agreement and the SCM Agreement by 2007. The submissions show that the EU does not seem to be aggressive but prudent and cautious in the Rules negotiations. In respect of anti-dumping regime, the EU handed over 5 submissions to identify and clarify issues concerned, and 2 submissions to propose specific rules needed to be improved. However, the EU's effort in Rules negotiations is unjustifiable from the number of submissions therein. To some extent, some issues concerned by the EU, such as mandatory lesser duty rule, have been identified and proposed for improvement by other participants, particularly the FAN's associates.³⁸ Yet, no evidence on paper shows the EU's willingness to take a more affirmative and aggressive attitude to endorse the submissions of FAN and its associates, *i.e.*, position of tightening disciplines on the conduct of anti-dumping investigations. On my observation in the Rules negotiation forum, the EU tended to be cautious and prudent on the issues proposed or drafted to be improved by FAN and its associates. The EU normally raises questions regarding the issues, or drafts amendments to other member's submissions. It is highly regarded that the proposed amendments will increase burden on EU's investigation authorities.

Alternatively, the EU strategically concentrated on the issues related to its objective of strengthening the current disciplines in the second phase of the Rules negotiations, *i.e.*, after Cancún Ministerial Conference. Two submissions for amendments of the AD Agreement have been put on the table. One is to set up an

³⁷ *Id.*, at 5.

³⁸ See WTO, *Proposals on The Mandatory Application of The Lesser Duty Rule, Paper from Brazil, Hong Kong; China, India, and Japan*, TN/RL/GEN/99, Mar. 3, 2006.

independent group of experts to resolve the dispute of initiation of investigations.³⁹ The other is to reinforce the transparency and streamline the anti-dumping actions by setting up an anti-dumping activities review system conducted by the Committee on Anti-dumping Practices.⁴⁰ In addition to the proposed amendments, the EU also successfully put the issue of standard questionnaire on the rules negotiation table. The Negotiating Group on Rules has established a Technical Group to develop a standardized anti-dumping questionnaire,⁴¹ This group is making progress toward its goal.

Issues in respect of S&D treatment for developing and least developed members, however, have not been specifically proposed for improvement by the EU while many developing participants have continuously emphasized the importance of the functionality of such treatment.⁴² Also, S&D package for the developing countries should be prepared for the conclusion of the Doha Round, as mentioned in the EU's objectives. The EU, therefore, seems unlikely to put details of S&D package on the table before other objectives in anti-dumping negotiation have been achieved.

The status of effecting the disciplines of subsidies and countervailing measures has been so far less animated than the anti-dumping. In spite of this, the EU has, presented 2 submissions to identify issues concerned, and 2 submissions to improve specific rules needed. With respect to subsidy disciplines, the EU intends to identify additional prohibited subsidies on the basis of the objective criteria. This is an approach different from that of the U.S. The EU thus proposed textual amendment on Article 3 in the SCM Agreement to cope with the disguised subsidies from the governments discriminatively in favor of domestic industries.⁴³ On the disciplines of countervailing measures, the EU has explored issues that are asymmetric to the provisions of the AD Agreement. These issues include use of the facts available, reviews of countervailing measures, uses of sampling techniques, newcomer reviews,, and constructive remedies for developing countries. Text-based amendments to rule such issues have also been proposed to align with what in the AD Agreement.⁴⁴

³⁹ WTO, *Independent Group of Experts for Enforcement of Initiation Standards, Submission from the European Communities*, TN/RL/GEN/109, Apr. 20, 2006.

⁴⁰ WTO, *Transparency of Anti-dumping Activity, Submission from the European Communities*, TN/RL/GEN/110, Apr. 20, 2006.

⁴¹ WTO, *Negotiating Group on Rules, Report by the Chairman to the Trade Negotiating Committee*, TN/RL/13, July 19, 2005, at 2.

⁴² See for instance, WTO, *Special And Differential Treatment And Technical Assistance in Trade Remedies, Submission by Kenya*, TN/RL/GEN/143, June 27, 2006.

⁴³ WTO, *Subsidies, Submission from the European Communities*, TN/RL/GEN/135, Apr. 24, 2006, at 2-3.

⁴⁴ WTO, *Countervailing Measures, Paper from the European Communities*, TN/RL/GEN/93, Nov. 18, 2005.

IV. Rethinking of EU's TDI – Green Paper

A. Global Europe - New Trade Policy for the Modern Europe

1. Background

Facing the global competition, the EU has growing concerns to maintain its prosperity and sustainable development in today's world. An ambitious plan, "Lisbon Agenda", was thereby discussed and concluded in Lisbon European Council of March 2000. "Lisbon Agenda" provides a vision that moves the EU forward to a competitive and dynamic knowledge-based economy by 2010. However, the objectives set up in "Lisbon Agenda" are to some extent ambitious as well as its coverage is too broad to be achieved with ease.⁴⁵ A revised "Lisbon Strategy" specifically concentrating on growth and employment was thereby endorsed by the EU in 2005.⁴⁶ The amendment of "Lisbon Strategy" heralded a transitional change for the EU's new trade policy vis-à-vis globalization. As trade is one of the most important integral components to achieve Lisbon Strategy, a contribution to the EU's Growth and Jobs Strategy" was released by the Commission on October 4, 2006,⁴⁷ even though the DDA reached impasse in the year of 2006.

2. Purpose

The EU's new trade policy, Global Europe, sets up clear and specific goal indicated in the Communication: "The purpose of this Communication is to set out the contribution of trade policy to stimulating growth and creating jobs in Europe. It sets out how, in a rapidly changing global economy, we can build a more comprehensive, integrated and forward-looking external trade policy that makes a stronger contribution to Europe's competitiveness. It stresses the need to adapt the tools of EU

⁴⁵ See Roel Beetsma and Xavier Debrun, *Implementing Lisbon: Incentives and Constraints*, in Euro Area Policies: Selected Issues, IMF Staff Country Report No. 04/235 (Washington: International Monetary Fund, 2004); Andrew Hughes Hallett, Svend E. Hougaard Jensen and Christian Richter, *The European Economy at Cross Roads: Structural Reforms, Fiscal Constraints and the Lisbon Agenda*, Research in International Business and Finance, 2005, at 19, 229-50.

⁴⁶ Commission Staff Working Document in support of the report from the Commission to the Spring European Council, March 22-23, 2005, on the Lisbon Strategy of economic, social and environmental renewal, SEC(2005)160, Brussels, 28.1.2005, available at http://ec.europa.eu/growthandjobs/pdf/SEC2005_160_en.pdf. Last visited on Apr. 18, 2007.

⁴⁷ *Global Europe: Competing in the world. A contribution to the EU's Growth and Jobs Strategy*. Brussels, October 4, 2006. SEC (2006) 1230, [hereinafter Global Europe]. Also *EU pledges more trade deals, calls on Europe to reject protectionism*, INT'L HERALD TRIBUNE, 4 October 2006. 'Europe to overhaul trade policy', BBC News, October 4, 2006.

trade policy to new challenges, to engage new partners, to ensure Europe remains open to the world and other markets open to us.”⁴⁸ Therefore, Global Europe sheds some light on the competitiveness of the EU industries and the need for the EU to adapt the tools of new trade policy to strengthen the competitiveness of EU’s industries on global stage.

3. Content

In order to comply with the “Lisbon Strategy” which aims to stimulate growth and creating jobs in Europe, the Commission’s working document has setting up a new blueprint for a prospective EU’s external trade policy, of which purposes is to stimulate growth and creating jobs in Europe. In the preamble of the Global Europe, it is emphasized that the heart of the Commission’s agenda is set up for economic prosperity, social justice and sustainable development and to equip Europeans for globalization. Though the external dimension was underlined to achieve the Growth and Jobs Strategy, an effective policy to boost EU’s competitiveness must link internal and external policies.

Global Europe specifies two dimensions for a prospective EU’s trade policy. In its first section, titled “seizing the opportunities of globalization”, the challenges and opportunities brought about by globalization are narrated. The EU’s multilateral enterprises (MNEs) enjoy the fruits of globalization by combining advanced technologies and foreign capital with large pools of increasingly well educated labour in the developing world.⁴⁹ Facing the growing competition from the emerging economies such as the BRICs (Brazil, Russia, India and China), the EU has encountered both the challenges and the opportunities on an unprecedented scale in an era of globalization. In order to seize the opportunities in a world of globalization, the EU stands for the position that openness to trade is the key for growth and jobs in the EU. While a modern trade policy for growth and jobs is considered necessary to strengthen EU’s competitiveness, the EU confirmed that openness to trade, internally and externally, is essential for growth and jobs. In other words, the EU promotes a trade policy by activism abroad, but not protectionism at home. In the era of globalization, the EU may thus face the dilemma that European manufacturers have to compete with European distributors/importers outsourced the production outside the EU.⁵⁰

⁴⁸ *Id.* Global Europe, at 3.

⁴⁹ *Id.* Global Europe, at 4.

⁵⁰ *Id.* Global Europe, at 6-7.

In the second part, titled “external competitiveness: an action plan for Europe”, the Commission initiates an action plan for Global Europe by reconfirming the commitments to the Doha multilateral negotiations and launching a new generation of FTA negotiations.⁵¹ Special attention is paid to the last subject on Commission’s working schedule – to conduct a review of the effectiveness of TDI⁵². The use of TDI ought to be implemented against unfair trade, not to the extent that undermines the economic benefits of European enterprises that products are manufactured abroad and sold to EU’s market. Notwithstanding, this is not to say the interests of outsourcing enterprises are well regarded. The Commission also heralded the benefits of trade policy must pass on the citizens and society in general. In light of the new challenges posed by globalization, the Commission would therefore review EU’s current TDI.

B. The Challenges of TDI

1. TDI Framework

The regime of TDI in the EU is comprised of trade protection measures concerning anti-dumping, anti-subsidy, and safeguards. TDI is functioned as a trade protective mechanism against unfair priced imports, subsidized imports or abruptly imported goods with huge quantities in so far as these are harmful to the EU economy. The rules with respect to TDI in the EU are not only derived from the WTO agreements, *i.e.*, the AD, SCM, and Safeguards Agreements, but also shall be operated in compliance with the principles thereof. Therefore, these trade protective instruments may be challenged by the exporting countries in WTO adjudicating body, should they consider the measures in question inconsistent with WTO rules. Currently, the EU authorities may take protective measures with regard to dumped imports under Regulation 384/96.⁵³ As for subsidized imports and dramatic shifts in trade flows, the EU may initiates protective measures pursuant to the relevant provisions of Regulation 2026/97⁵⁴ and 519/94 separately.⁵⁵

⁵¹ For the discussions on the EU’s new generation FTAs, *see* Simon J. Evenett, “*Global Europe*”: *An Initial Assessment of the European Commission’s New Trade Policy*, AUSSENWIRTSCHAFT, 385-395 (2006)

⁵² *Supra* note 47. Global Europe, at 23.

⁵³ *See* Council Regulation (EC) No. 384/96 of December 22, 1995 on protection against dumped imports from countries not members of the European Union, O.J. L. 56/1, 06/03/1996; the regulation has been amended on several occasions, the recent amendment is Council Regulation (EC) No 2117/2005 of 21 December 2005 amending Regulation (EC) No 384/96 on protection against dumped imports from countries not members of the European Community, O.J. L. 340, 2005.

⁵⁴ *See* Council Regulation (EC) No 2026/97 of October 6, 1997 on protection against subsidized imports from countries not members of the European Community, O.J. L. 288/1, 1997. Originally, anti-dumping and anti-subsidy proceedings were based on the same legislative instruments, given they

Of all the trade defence instruments, anti-dumping proceedings are those most frequently resorted to by the EU authorities. From 1995 to 2005, the EU imposed 194 definitive anti-dumping measures. China and India were the most frequently targeted countries and were imposed 38 and 16 measures respectively during this period. With respect to anti-subsidies measures, the EU has 12 measures still in force at the date of October 31, 2006. In addition, the EU has only ever imposed 8 definitive safeguard measures under the WTO Safeguards Agreement and only one of these is still in force.⁵⁶ In view of the paramount practical significance of the anti-dumping measures in the EU, the design and application of anti-dumping tools always attract much attention.

2. Challenges

It is undeniable that TDI has effectively and rigorously protected EU's interest against unfair trade. There have been, however, far-reaching changes in the global economy and in the structure of the EU economy since the establishment of the WTO and last major reform of EU's TDI. In particular, globalization has made the practice of trade, not only between companies but also between countries, more complex, and a lot more interconnected than it was even a few years ago. To gain competitive advantages internationally, many more EU companies now produce goods outside the EU for import into the EU, or operate their supply chains extending to non-EU states. This trend has challenged the conventional concepts of what constitutes EU production as well as EU economic interests, the things TDI intends to defend. To be able to respond to these changing circumstances, the content and the use of TDI is needed to take account of new realities of globalization.⁵⁷

Several TDI cases in recent have highlighted an issue on whether current TDI system can reflect such complexity of global market. In *Footwear*, for instance,

had in common many substantive and procedural concepts. This situation changed, however, with the enactment of Regulation 3284/94, which, for the first time, provided for a separated legal instrument to deal with subsidized imports. Regulation 3284/94 was replaced in 1997 by Regulation 2026/97.

⁵⁵ For safeguard measures applies to non-WTO members, see Council Regulation (EC) No 519/94 of March 7, 1994 on common rules for imports from certain third countries and repealing Regulations. A transitional product-specific safeguard mechanism for imports originating in the People's Republic of China, see Council Regulation (EC) No 427/2003, O.J. L. 65, Mar. 8, 2003. Edwin Vermulst *et al. Recent European Community Safeguards Policy: "Kill Them All and Let God Sort Them out?",* J. World Trade 38(6) 955-984 (2004).

⁵⁶ Green Paper, *supra* note 6, at 4.

⁵⁷ EU, *Commissioner Mandelson's Meeting with the Committee on International Trade (INTA)*, May 29, 2006, available at http://ec.europa.eu/commission_barroso/mandelson/speeches_articles/sppm101_en.htm. Last visited on 04/09/2007.

whether adoption of anti-dumping measures is consistent with the EU's economic interest, *i.e.*, Community interest, has led to a rift in the EU-25 member states. This anti-dumping case was filed by Italian shoemakers, mostly small-scale and often family-run business with high labor cost, for complaining on leather footwear unfairly imported from China and Vietnam. The Commission then launched a dumping investigation in July 2005 and highly exceptional measures in form of gradually increasing provisional anti-dumping duties are thereby imposed.⁵⁸

However, the EU members faced a deadlock on reaching agreement on proposal of definitive measures.⁵⁹ The disagreement on anti-dumping duties caused a bitterly divisive and likely damaging North-South split within the EU. While Italy along with France, Spain and Portugal argued that their shoemakers were being unfairly smothered by their Asian counterparts, Germany, Britain and the Nordic members, particularly Sweden, backing from their retailers, strongly opposed the anti-dumping duties. After tough negotiations, the EU-25 member states reached compromise by adopting highly unconventional measures in form of the 16.5 and 10 percent anti-dumping duties for a reduced period of time, two years instead of five years, against China and Vietnam respectively.⁶⁰ The tumult, caused by *Footwear* case, within the EU, however, brings into debate for the true meaning of "Community interest"? In addition, some EU members, such as Sweden, also questioned the practices of current EU's anti-dumping measures which have become more of an instrument to protect EU domestic industry from global competition. They, thus, argued that EU's trade policy is needed for further adjustment to a modern and globalized European economy.

3. Reflection

The clamor caused by *Footwear* case became an impetus for the EU to revisit current TDI. On May 4, 2006, the EU Trade Commissioner Peter Mandelson presented a new thinking for EU's trade policy vis-à-vis globalization. He stated anti-dumping rules need to adapt to the complexity of global market, while strongly defending such rules as necessary to ensure public confidence in fair trade. The

⁵⁸ Commission Regulation (EC) No 553/2006 of 23 March 2006 imposing a provisional anti-dumping duty on imports of certain footwear with uppers of leather originating in the People's Republic of China and Vietnam, O.J. L.98/3, 2006, para. 293.

⁵⁹ Andrew Bounds, *EU governments reject tariff plan for Chinese shoes*, FIN. TIMES, Aug. 4, 2006, available at <http://search.ft.com/searchArticle?queryText=Chinese+and+Vietnamese&javascriptEnabled=true&id=060804008478> Last visited on 04/11/2007.

⁶⁰ Tom Rachman, *EU imposes long-term tariffs on Asian shoes*, INT'L HERALD TRIBUNE, Oct. 4, 2006, available at <http://www.ihrt.com/articles/2006/10/04/business/trade.php>. Last visited on 04/11/2007.

Commissioner also indicated he would launch a formal reflection on the use of anti-dumping measures in the second half of 2006.⁶¹

The TDI reform also sends a clear message - barriers to fair trade both abroad and within the EU must be removed. Indeed, TDI shall be utilized to protect producers located in the EU from unfair competition and it shall not be used to counter the genuine comparative advantages of exporting economies. Therefore, review of current TDI system to reflect on the re-location of EU domestic industry to non-EU states, such as Asian countries, is truly in need. Especially it is important to ensure the rules of Community interest test can actually provide the balance between the interests of domestic producers affected by, for instance, alleged dumping and those affected by anti-dumping measures. The Commissioner would, therefore, consult with experts and industrial representatives to reflect on and possibly reform such trade defensive tools.⁶²

On July 11, 2006, a seminar was held and the professional opinions regarding improvement of TDI were grouped and delivered.⁶³ The focus of the experts may not be identical, nevertheless, they all share with the same view that it is necessary to reflect upon the role of TDI in the global economy. Some significant issues, such as the Community interests, and the problems in investigations were also explored in depth. Further amelioration of TDI is thereby considered in need. Whilst the debates raised by *Footwear* case came into interval, the EU announced its new trade policy, Global Europe. The new trade policy indicates EU's economic interests are global and highly complex. The importance of Doha multilateral negotiations on Rules is well noted in this communication and the need for the EU to adopt a modernized trade policy in a changing global economy is sought. In particular, the design and application of TDI also need to reflect that complexity in order to align

⁶¹ EU, *Europe's response to globalization: where does EU trade policy go from here?* Speech by Peter Mandelson. Wolfsberg, Switzerland, May 4, 2006, available at http://ec.europa.eu/commission_barroso/mandelson/speeches_articles/sppm096_en.htm

⁶² EU, *Commissioner Mandelson's Meeting with the Committee on International Trade (INTA)*, *supra* note 59.

⁶³ The viewpoints expressed by the invited experts focus on a broader framework of TDI. The eight external experts are Peter Bernert (EuroCommerce), R. Bethke, A. Van den Hoven, Ambassador Tariq Fatemi, C. Dordi, Sheila Page, André Sapir (Professor of Economics, ECARES, Université Libre de Bruxelles), and J. Eggert (Foreign Trade Association). Some of them paid particular attention to the use of anti-dumping measures. See André Sapir, *Some Ideas for Reforming the Community Anti-Dumping Instrument*, available at http://trade.ec.europa.eu/doclib/docs/2006/august/tradoc_129815.pdf; J. Eggert, *Observations on the EU Anti-Dumping Regulation - FTA Position for the Expert Meeting*, available at http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_129812.pdf, Full text of the reflection papers delivered by the experts are available at http://ec.europa.eu/trade/issues/respectrules/anti_dumping/legis/index_en.htm. Last visited on 04/02/2007.

with this new trade policy. Thus, the EU Commission has already paved a way to further discussion on the reflection of current TDI although the Doha trade talks came to a standstill in July 2006. On December 6, 2006, the Commission officially issued a green paper⁶⁴ for public consultation as a steppingstone for the reform of TDI. The purpose of the Green Paper is aimed at inviting a public reflection on how the EU can continue to use them to best effect in the European interest, as an integral part of the Commission's previous Global Europe agenda.⁶⁵ In the Green Paper, all sections begin with a brief background description, following by some questions. The Commission would welcome the views of all interested parties, including the viewpoints of public authorities in third countries. The deadline to reply to the questionnaire is set by 31 March 2007.⁶⁶ After collecting the replies from all interested parties by the deadline, the Commission will proceed to make proposals on a revised TDI. Six major themes concerning EU's TDI are proposed in the Green paper for public consultation, and thirty-two questions are accordingly proposed, which are discussed as follow.

1. The Role of TDI in A Changing Global Economy

The use of TDI is considered controversial, *inter alia*, in an economic sense. Some argue that the use of TDI is to some extent justified in that the international market is *per se* imperfect and no international competition authority exists to regulate and monitor the anti-competitive behaviors. The role of TDI came as the center of discussion in a changing global economy.⁶⁷ Also, the more frequent use of anti-dumping measures also raised some doubts concerning the reluctance from the EU enterprises to initiate anti-subsidy investigations. The conventional knowledge of TDI is that it may be too easily used at the disposal of the protectionists. Given the reflection on EU's current TDI 'does not question the fundamental value of TDI'⁶⁸, the role of TDI in modern global economy is open for discussion. Therefore, the reflection on the role of TDI may be considered as a discourse with regard to the

⁶⁴ An EU's Green Paper is generally aimed at initiating debates and for public consultation. A Green Paper is not legally binding, but individuals and interested parties are encouraged to comment on the working document. A Green Paper may be followed by a set of proposals, which may enter into law in later stage. In 2006, 12 Green Papers, including Global Europe, are proposed. A full list of EU's Green Papers is available at http://europa.eu/documents/comm/green_papers/index_en.htm

⁶⁵ Green Paper, *supra* note 6, at 3.

⁶⁶ As of 16 April 2007, 245 replies are received by the Commission. GLOAL EUROPE, Europe's Trade Defence Instruments in a changing global economy - A Green Paper for public consultation: Replies to the Questionnaire, available at http://ec.europa.eu/trade/issues/respectrules/anti_dumping/rq061206_en.htm. Last visited on Apr 18 2007.

⁶⁷ Green Paper, *supra* note 6, at 5.

⁶⁸ *Id.*

possible alternatives to the use of TDI and to what extent could TDI achieve its ends.

2. The Weighting of Different EU Interests in TDI Investigations

The Community interest test is an additional criterion in EU's trade remedy rules. Before the EU is determined to impose an anti-dumping/anti-subsidy measure, the Commission has to demonstrate that the enforcement of TDI measures is consistent of the Community interests.⁶⁹ However, the dramatic changes in the economic structure both at EU's scale and at global level driven by globalization rendered the EU's evaluation for the 'real' Community interests more complicated. As is well demonstrated in the abovementioned *Footwear* case, the Commission has to consider whether the interests of EU producers, the importing business or the consumers are well taken into account. The common business practice of outsourcing production outside the EU made the weighting the interests of different EU's economic operators more difficult. Therefore, some more flexible practices are proposed to fine-tune trade defence measures. For instance, the proposed measures may be adjusted downwards, following the community interest test. Furthermore, whether the EU shall seek to have WTO Rules changed to allow Community interest tests used in investigations is open for discussion.

3. The Launch and Conduct of Trade Defence Investigations

A number of technical issues are identified relating to the launching and conduct of TDI investigations.⁷⁰ For example, early consultations prior to anti-dumping investigations are addressed.⁷¹ Whether the use of anti-subsidy instrument against transition economies is admissible is to be discussed, which has been extensively discussed in the US recently. The involvement of Small and Medium Enterprises (SMEs) in trade defence investigations is noted, in that the costs are merely too high for the SMEs to take part in the anti-dumping/anti-subsidy investigations. Other technical issues such as standing requirements, *de-minimis* rules, dumping margin calculation, new exporters and restructuring plans are also included for further elaboration.

Most of the issues concerning the launch and conduct of trade defence

⁶⁹ For instance, in anti-dumping regime, *see* Council Regulation (EC) No. 384/96, art. 21.1.

⁷⁰ Green Paper, *supra* note 6, at 9-10.

⁷¹ A more exporter friendly mechanism of early consultation prior safeguard investigations has been stipulated in the procedure of EU's special safeguard mechanism against China's products. *See* Council Regulation 427/2003, OJ L 65/1, 8.3.2003. arts. 6.5, 6.6.

investigations are raised to be further clarified, as the stakeholders have expressed their concerns in the past TDI practices. For example, the review on ‘standing requirements’ for the Community industry to initiate an anti-dumping/anti-subsidy, the calculation for dumping margin with regard to ‘start-up costs’ and the treatment of new exporters. Moreover, it remains open to the discussion that the early consultation prior to the launch of an anti-dumping/anti-subsidy case and the use of anti-subsidy instrument in transition economies, which is not stipulated in the WTO Agreements.

4. The Form, Timing and Duration of TDIs

With regard to the imposition, form, duration and expiry of trade, four issues are addressed, namely, timing of provisional measures, form, timing and duration of measures, reimbursement of duties after expiry review and higher thresholds for expiry review.⁷² Some suggested that provisional anti-dumping and countervailing duties be adopted by the Commission by two and nine months after launching the investigations. Shall the deadlines of imposing provisional anti-dumping or countervailing duties be shortened, the injury would be remedied more rapidly, but the administrative burden would also be imposed on EU’s authorities. A more flexible deadline for the investigating authorities or a rigid shorter deadline for imposition anti-dumping measures is subject to further elaboration. Some further discussions will be laid on the possibility for greater use of flexible measures in anti-dumping and anti-subsidy investigations, *i.e.* shortening the duration of TDI measures depending upon the products in question or the industries related. In addition, the threshold for sunset review is suggested to be higher to in prevention of renewing anti-dumping measures too easily.

5. Transparency of TDI Investigations

Ensuring the transparency is vital to the credibility of EU’s TDI. On the one hand, the investigations of TDI is ought to assure the confidentiality of commercial information during the investigation. On the other hand, a number of possible options could be considered to improve the transparency of trade defence investigations. The options on table include the establishment of a hearing officer during for trade defence investigation, public hearing for country-wide Market Economy Status (MES) decisions, greater openness for information regarding the anti-dumping committee, and better access to non-confidential files.

⁷² Green Paper, *supra* note 6, at 11-12..

In comparison with the US trade remedy system, TDI seems less transparent in terms of access to confidential files. The establishment of a new post of a hearing officer, the internet access to non-confidential information and more transparency to advisory anti-dumping and anti-subsidy committee are suggested to improve the transparency of TDI investigations. In particular, public hearing on the determination to award MES is deemed necessary, in view of the importance and political sensitivity to award MES to an individual country, such as China.

6. The Institutional Process

The policy-making of EU's trade policy is *per se* complicated. The investigations are mostly dominated by the Commission, whereas the Council has the last say in determining the imposition of definitive trade defence measures. Additionally, the European Court of Justice has jurisdiction towards the decisions. Some concerns have been expressed that whether the investigation results shall be subject to further consideration.⁷³ However, a more profound institutional arrangement might be needed, if coherence amongst the institutions at EC level is needed. The *sui generis* of EU made it unique from all other transnational organization. Nevertheless, the complexity of the decision-making of EU's decision on the imposition of trade defence measures is highly politicized.⁷⁴ It is therefore challenged whether they are the other ways to ameliorate as the decisions are made.

Table 1 Green Paper and Issues Concerned

	Title	Issues for public consultation in Green Paper
Part 1.	Role of TDI measures in global economy	- Use of TDI in global economy
Part 2	Weighing different EU interests in investigations	- Community interests - Viability test for EU industry
Part 3	Launching and conduct of trade defence investigations	- Early consultations before AD investigation - Market economy treatment in anti-subsidy investigations - Standing requirements - De-minimis threshold - Dumping margin calculation (start-up costs)

⁷³ Green Paper, *supra* note 6, at 14.

⁷⁴ See Evenett, Simon J. and Vermulst, Edwin, *The Politicisation of EC Anti-dumping Policy: Member States, their Votes and the European Commission*. THE WORLD ECONOMY, 28(5), 701-717, May 2005

	Title	Issues for public consultation in Green Paper
		and OCT) - New exporters review - Restructuring plans - Small and medium enterprises (SMEs)
Part 4	Form, timing and duration of trade defence measures	- Timing of provisional measures - More flexible measures in AD, Anti-subsidy investigations - Reimbursement of ADD/CVD after sunset review - Higher thresholds for expiry reviews
Part 5	Transparency in trade defence investigations	- Hearing Officer - Public hearing for Market Economy Status (MES) Decision - A level playing field for information - Better access to non-confidential files
Part 6	Institutional arrangement	- To improve TDI decision-making

V. Conclusion: An interim Assessment

Tariffs concessions have been the foci in the GATT rounds before Uruguay. The successful conclusion of Uruguay Round came up with several trade-related agreements. International norms on rules, namely, the AD Agreement and the SCM were established and enforced by the WTO members. However, the ambiguity of the agreement language as well as the problems in implementation has led to several trade disputes in context of the WTO adjudicating body. Therefore, WTO members in the Doha Ministerial Meeting of 2001 decided to commence a new round of trade talks with regard to various trade-related issues, including the rules on trade. An *ad hoc* negotiation body, the Negotiating Group on Rules, is thereby established to clarify and improve the agreements concerned, in accordance with the Doha Mandate. The EU, as the largest regional economy in the world, doubtless plays an influential role in the WTO multilateral trade negotiations. The EU's overall participation in the WTO negotiation positions may vary issue by issue. However, EU's participation in Rules negotiations and its latest development of trade policy at home always get special attention.

At the initial stage of Rules negotiations, the EU has set up some negotiation objectives based on its implementation of the agreement, and sought for some further clarifications on the interpretations of agreements. The EU, being one of the most

frequent users of anti-dumping and countervailing measures, has vowed to strengthen the current disciplines in Rules regime. Nevertheless, in Rules negotiation fora, the EU has been more prudent and reactive; instead of actively make amendments to current disciplines. Even though some proposals have been contributed by the ally of numerous export-oriented economies, particularly the FAN associates, the EU has not yet expressively endorsed on these submissions.

While Doha Round seemed doomed and gloomy, the EU, on the other hand, launched its new trade policy, the 'Global Europe' framework in 2006, according to the goals set up by the conclusions of Lisbon European Council, *i.e.*, the Lisbon Agenda of 2000. As is heralded in the Lisbon Agenda, the EU has set up a strategy to maintain competitiveness with a knowledge-based economy, as well as to boost employment. The Baldwin's report mandated by the Finnish presidency suggests that a new paradigm of globalization is taking shape, and the EU has to be ready to the new challenge accompanying with the globalization. The high intensity of globalization has changed the today's international trade. The new style of 'trade in tasks', termed by Baldwin such as off-shoring, and out-sourcing, will prevail in the global trade. Baldwin's argument can be exemplified in the EU's recent trade disputes on textiles and footwear imports manufactured in China. In *Footwear*, the EU uncommonly determined to impose anti-dumping duties of 16.5% and 10% on certain leather shoes, by a marginal voting of 13 to 12. The case has vividly demonstrates how divergent opinions of member states could be against the imports, which might be outsourced by EU producers. In addition, the requirement of the 'community interests', while imposing the anti-dumping duties, has to be reconsidered in a globalized era. Some argue that the interests of EU's consumers are not appropriately addressed in the current TDI. The real 'community interests' ought to shift from the protection for European producers to a more balanced consideration for European consumers, retailers and etc. It might be envisaged that a public debate may pave way to a more coherent and modernized TDI.

In compliance with EU's overall focus on the "Lisbon agenda" which is designed to enhance the EU's capacity to compete in a global economy, particularly in the context of its enlargement, new trade policy is thereby proposed. In addition, considering the growing fragmentation and complexity of the process of production and supply chains as well as the growth of major new economic actors, particularly Asian countries, adjustment of current TDI seems needed. A "Green Paper" for TDI, a part of EU's new trade policy - the Global Europe framework, was, thus, drafted and presented for public consultation by the Commission at the end of 2006. The

content of “Green Paper” includes various issues, ranging from the fundamental value of the TDI, Community interest, the specific technical issues on the procedural issues and institutional arrangement, are raised for public debates. The aim of “Green Paper” does not intend to challenge the fundamental value of TDI. Rather, it intends to make EU’s TDI system fit in the trend of globalization as well as enhance the competitiveness of European multinational corporations. Based on this goal, the current TDI system shall be transformed into a modernize mechanism to facilitate trade, but, at the same time, remain an effective response to unfair trade practices.

The resumption of DDA negotiations in 2007 would put members on the track toward the final stage of the Doha Round. At the same time, the EU “Green Paper” for TDI is put for public consultation. The EU’s trade policy on TDI might be accordingly reformed, given some consent is reached amongst the member states, and the different economic operators. Some explanations are sought for EU’s change for TDI. As the deadline for the replies for the Green Paper is by 31 March 2007, it is not yet known whether the future TDI will fine-tune, to minimal extent, the current TDI or a more radical reform, to a larger extent. Interestingly, issues identified in “Green Paper” to some extent are similar to issues concerned by the numerous export-oriented members of WTO, FAN in particular. If the issues raised in “Green Paper” were reached consensus within member states of the EU, it is possible to narrow down the gap between the EU and other exporting-oriented members in the Rules negotiations. Therefore, the revision on TDI may also be deemed necessary to forge more consensuses on the trade rules, so that the EU may strengthen the impetus for negotiation momentum. The interim assessment on EU’s rules negotiations suggests that the EU delegation in Geneva could simply not go beyond its mandates from Brussels and played a more active role in international negotiations, as consensuses are void. The Green Paper will lead to a series of legal documents, amending to the current TDI. On one hand, it can be considered as a response from the pressure of globalization; on the other hand, it stimulates public debate on the TDI and thereby forges an integral part of EU’s new trade policy in DDA.