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# Dumping and Subsidies in the WTO

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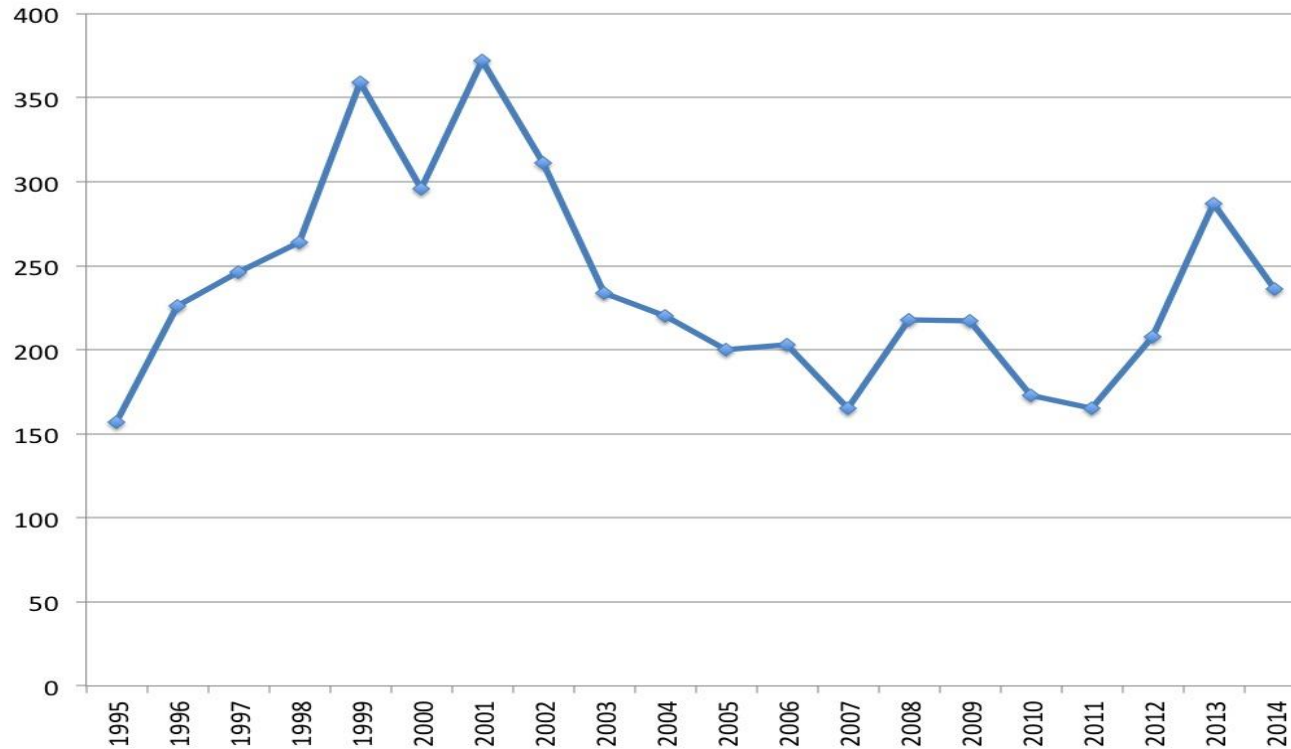
# Dumping

- **What is dumping?**
  - Introduction of a product into the commerce of another Member at a lower price than its ‘normal value’ (Arts VI GATT/ 2.1 ADA)
- **Why would entities engage in dumping?**
- **Does WTO law prohibit dumping?**
  - Dumping = action by private company
  - WTO law only regulates responses by WTO members to injurious dumping
  - Key difference with SCM Agreement
- **WTO rules on dumping**
  - Article VI GATT
  - Agreement on Implementation of Article VI GATT (ADA)
- **Actively used trade instrument (1995-2012)**
  - Total of 4230 anti-dumping investigations; 2719 AD measures
  - Main users: India (508); US (312); EU (285); Argentina (215); China (156); Turkey (146); Brazil (133); SA (129)
  - Key targets: China (664); Korea (181); Chinese Taipei (149); US (145); Japan (122); Thailand (112); Indonesia (103); Russia (102); EU(64)
- **Highly controversial and politically sensitive – Why?**

# Determination of Dumping

2.1 For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

# Anti-Dumping Investigations



# Dumping Definitions

- There is dumping if:
  - The normal value is higher than the export price (Arts 2.1-2.4 ADA)
  - There is injury to the domestic industry (Arts 3.1-3.4 ADA)
  - There is a causal link between dumped imports and the non-attribution requirement (Art 3.5 ADA)

# Requirements

5.2 An application under paragraph 1 shall include evidence of (a) **dumping**, (b) **injury** within the meaning of Article VI of GATT 1994 as interpreted by this Agreement and (c) a **causal link** between the dumped imports and the alleged injury. Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph. The application shall contain such information as is reasonably available to the applicant on the following:

# Normal value versus Export Price

- The normal value is higher than the export price
  - Through a fair price-to-price comparison (Normal value > Export price = Margin of dumping)
  - Normal value = home market price (but Art 2.2 ADA alternatives)
  - Export price = transaction price (but Art 2.3 alternatives)
  - Calculation of dumping margin (many complex methods) (Art 2.4.2 ADA)

# Injury to the domestic industry

- **Injury**

- Material injury (Art 3.1 ADA) = based on positive evidence and objective examination of both:
  - Volume of dumped imports and effect on domestic prices (Art 3.2 ADA)
  - Consequent impact on domestic producers (Art 3.4 ADA mandatory minimum list)
- Threat of material injury (Arts 3.7-3.8 ADA)
  - Based on facts + situation in which dumping would cause injury is clearly foreseen and imminent
- Material retardation of establishment of a domestic industry (no guidance)

- **Domestic industry**

- Domestic producers of the like product as a whole, or whose output is a major portion of domestic production (Art 4.1 ADA)
- ‘Like product’ = identical or with closely resembling characteristics (Art 2.6 ADA)



# Causal Link and Non-Attribution

- **Causal Link**

- Based on examination of all relevant evidence (illustrative list of ‘other’ factors that ‘may be relevant’) (Art 3.5 ADA)
- Genuine and substantial cause

- **Non-Attribution**

- Applies solely in situations where dumped imports and other known factors are causing injury to the domestic industry at the same time.
- Must separate and distinguish the injuries caused by ‘other factors’ from those caused by the dumped imports (Art 3.5 ADA)

- **Cumulation**

- Permitted when there are effects of dumped imports coming from more than one country (Art 3.3 ADA)

# Dumping Investigations

- **Initiation (Art 5 ADA)**
  - by or on behalf of domestic industry (Art 4 ADA)
  - ‘reasonably available’ information
- **Conduct (Arts 6 and 12 ADA)**
  - ‘notice and opportunity to present’
  - preservation of confidential information
- **Timeframe (Art 5.10 ADA)**
  - one year to 18 months
- **Judicial Review (Art 13 ADA)**

# Anti-Dumping Duties

- Three permissible responses to injurious dumping (Arts 7-9 and 18.1 ADA):
  - Provisional measures (following preliminary affirmative determination)
  - Price undertakings (following preliminary affirmative determination)
  - Definitive AD duties (following final affirmative determination)
- Imposition of AD duties (Arts 6.10 and 9-10 ADA):
  - Optional
  - Never exceed margin of dumping, and ‘lesser duty rule’
  - Export/producer-specific dumping margin and AD, as general rule
  - MFN basis
- Termination and review of AD duties (Art 11 ADA):
  - Periodic review to assess continued need
  - Terminated no later than 5 years from imposition
  - Unless, affirmative ‘sunset review’ (expiry of duty = continuation/recurrence of dumping and injury)

# Special Issues

- **Special and differential treatment for developing-countries**
  - It is recognized that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under this Agreement. Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members. (Art. 15 ADA)
- **Non-market economy status**
  - It is recognized that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purposes of [calculating the dumping margin], and in such cases importing [WTO members] may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate. (Ad Note Article VI:1 GATT)
- **Zeroing**

# Zeroing

Sale Home market (EU)	Export market (US)	Difference (dumping)
\$100	\$90	\$10
\$100	\$110	-\$10
\$100	\$100	\$0

# Subsidies

- **What is a subsidy?**

- A financial contribution by a government or public body, which confers a benefit (Art. 1 SCM)

- **WTO rules on subsidies**

- Discipline use of subsidies – when is subsidisation ‘unfair’? (Art. XVI GATT and Parts II-IV SCM Agreement)
- Regulate responses to ‘unfair’ subsidisation – how may WTO members react? (Art. VI GATT; Arts 4,7 and Part V SCM Agreement)
- Specific rules on agricultural subsidies (Agreement on Agriculture, Arts 3, 6, 9, 10, 13, 21 and Annex 2)

- **Difference with treatment of dumping?**

- Dumping not by a government but private company - WTO law only regulates responses by WTO members to injurious dumping

# Meaning of a Subsidy

- **A Financial Contribution**
- **By a government or public body**
- **Conferring a benefit**
- **That is specific**

# Financial Contribution

- **Art 1.1 SCM Exhaustive list**

- Government practice involving direct transfer of funds (and potential direct transfer of funds or liabilities)
- Government revenue, otherwise due, is foregone/not collected
- Government provision of goods and services, other than general infrastructure; and government purchase of goods
- Government makes payments to funding mechanism, or entrusts/directs a private body to carry out one or more of the listed actions
- Purchase of goods



# Government or Public Body

- **Financial contribution granted by a government** (e.g. Federal, Regional or Municipal Government)
- OR
- **Financial contribution by a public body** (e.g. National Bank, National Power Company, etc.)
  - Public body = entity that possesses, exercises or is vested with governmental authority (AB in *US – ADA and CVD China (2011)*)
- Within the territory of a Member
- OR
- **Government entrusts or directs a private body to make the financial contribution**

# A Benefit

- **Benefit = Advantage (to recipient), not cost to Government:**
  - “Whether the financial contribution places the recipient in a more advantageous position than would have been the case, but for the financial contribution”
- **Basis for comparison = Market (Art 14 SCM):**
  - Is the financial contribution “provided on terms which are more advantageous than those that would have been available to the recipient on the market” (loan guarantees, provision of goods or services, etc.).

# A Benefit

- **Loan guarantees**

- do not confer a benefit unless: there is a difference between the amount the firm receiving the guarantee pays on a loan guaranteed by the Government and the amount the firm would pay on comparable commercial loan absent the Government guarantee.

- **Government provision of goods or services**

- does not confer a benefit unless it is for less than adequate remuneration based on prevailing market conditions

- **Government purchase of goods**

- does not confer a benefit unless it is for more than adequate remuneration based on prevailing market conditions.

# A Specific Subsidy (Art 1.2 SCM)

- **Enterprise/industry/group/regional/prohibited subsidy specificity (Art 2 SCM)**
- **De jure specificity (Art 2.1(a))**
  - If access to the subsidy explicitly limited to certain enterprises
  - If access is limited based on ‘objective criteria’ governing eligibility then it would not be a specific subsidy
  - To be determined with reference to the jurisdiction of the granting authority
- **De facto specificity (Art. 2.1(c))**
  - Notwithstanding any appearance of non- specificity, the subsidy may in fact be specific.
  - Following factors may be considered:
    - Use by a limited number of enterprises
    - Predominant use by certain enterprises
    - Granting of disproportionately large amounts to certain enterprises
    - Manner in which discretion has been exercised

# Subsidy Types

- **Prohibited Subsidies**

- Certain subsidies are regarded as outright trade distortive – hence prohibited
  - Export subsidies – subsidies that are contingent on export performance, except as provided in the Agreement on Agriculture
  - Import substitution subsidies – contingent on use of domestic over imported goods

- **Actionable Subsidies**

- Subsidy is actionable if:
  - It is specific
  - Causes adverse effects (**material injury, serious prejudice, nullification and impairment**)

- **Non-actionable Subsidies**

- No action can be taken against subsidies that are non- specific – determined on the basis of:
  - Criteria are neutral, economic in nature and horizontal in application
  - No predominant use by certain enterprises
  - Eligibility based on objective criteria or conditions
  - Eligibility automatic, criteria strictly adhered to

# Prohibited Subsidies

- **Export subsidies (Art 3.1 SCM)**

- Subsidies contingent, in law or in fact, whether wholly or as one of several other conditions, upon export performance are called export subsidies
- Examples (set out in Annex-I):
  - provision of goods or services for use in the production of exported goods in terms more favorable than those for the production of goods for domestic consumption;
  - export related exemption, remission or deferral of direct taxes; excess exemption, remission, or deferral of indirect taxes or import duties;
  - provision of export credit guarantee or insurance programmes at premium rates which are inadequate to cover the operating costs and losses of the programmes

- **Import substitution subsidies (Art 3.1(b) SCM)**

- Payments made to users of domestic goods but not imported goods

# Remedies against prohibited subsidies

- Remedy through DSU
- It can be challenged in WTO on the basis of special accelerated procedures
- Complaining Member not obliged to show trade effects as these are regarded as trade distorting subsidies
- Defaulting member required to withdraw the subsidy without delay or face counter-measures

# Special and differential provisions

- No derogation for import substitution subsidies except for fixed transition periods which is already over (2003)
- For Annex VII countries i.e. LDCs and 21 listed developing countries whose GNP per capita is below \$1000 per annum, prohibition on export subsidies not applicable – India one of them (others include Bolivia, Egypt, Indonesia, Kenya, Nigeria, Pakistan, Philippines, Sri Lanka etc.)



# Actionable subsidies – adverse effects

- Serious prejudice (or threat thereof) (Art 5(c) SCM)
  - **Outward looking – adverse effects on trade interests/third countries or world market**
  - Imports displaced or impeded in the market of the subsidizing member
  - Exports displaced or impeded in third country market
  - Significant price undertaking, price suppression, price depression or lost sales of another Member
  - Increase in world market share of the subsidizing country<sup>▫</sup>
  - Serious prejudice claim cannot be invoked against developing country Members
  - Must be ‘significant’ (Art 6.3(c) SCM)

# Actionable subsidies – adverse effects

- **Nullification or Impairment (Art 5(b) SCM)**
  - This arises where the improved access to a market that is presumed to flow from a bound tariff reduction is undercut by subsidization in that market
  - This can serve as a basis for a complaint related to harm to a Member's exporting interests in an importing country market

# Actionable subsidies – adverse effects

- Material injury (Art 5(a) SCM)
  - **Inward looking – adverse effects on domestic production**
  - This arises where there is a material injury to the domestic industry producing the ‘like’ product
    - Current Material Injury
    - Threat of Material Injury
    - Material retardation of the establishment of the domestic industry
  - What is the relevant domestic industry (Art 16.1 SCM)
  - What are like products
  - There must be a causal link and non-attribution requirement (Art 15.5 SCM)
  - How is material injury established?
    - Its determination is to be based on positive evidence
    - There should be objective examination of both the volume of subsidized imports and the effect of these imports on prices in the domestic market for like product
    - Consequent impact of such imports on the domestic producers of such products

# Remedies against actionable subsidies

- Subsidy that causes injury can be challenged at two levels:
  - Unilateral level through **countervailing duties**;
  - Multilateral level through the DSU - **countermeasures**
- Countervailing duties can be taken only where there is material injury
  - Serious prejudice and nullification or impairment can be challenged at the multilateral level only - countermeasures

# Countervailing Duties

- **Special and Differential Treatment**
  - De minimis if overall subsidy level by a developing country does not exceed 2%(3%) – 1% all others – of the value of the product, countervailing investigation to be terminated immediately
  - If volume of subsidized imports from a developing country is less than 4% of the total imports of the like product in the importing Member, countervailing investigation has to be terminated