



Antidumping Legislation Training Workshop

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INTERNATIONAL LAWYERS



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 - Resident in Singapore since 1997
 - 2010-11 Visiting Associate Professor, NUS Law School
 - Over 170 trade remedy cases handled since 1991 conducted by China, Malaysia, Singapore, Indonesia, India, Thailand, the Philippines, Korea, Canada, Mexico, South Africa, Turkey, Russia, Turkey, the United States and the European Union
 - Antifriction Bearings from Singapore (US)
 - Stainless Steel Fasteners from Singapore (EU)
 - Electric Smoothing Irons from Singapore (Korea)
 - Ethyl Acetate from Singapore (Korea)

Agenda

I. Introduction

II. Substantive Overview

III. Procedural Overview

IV. Comparative Analysis

V. Singapore Scenarios

VI. Conclusion

Introduction

Antidumping History

First antidumping law dates back to late 1800's

- Imperial Germany exporting goods for industrialization
 - Fears that low priced goods would destroy competition
 - Then German exporters would enjoy monopoly and raise prices
 - Problem is that if monopoly condition exists, new competitors can arise
- British government enacted antidumping laws
 - Similar laws enacted within the Commonwealth and United States
 - EU adopted antidumping law
 - Few antidumping laws outside the developed world

Antidumping Theory (1)

Economic Theory # 1 – if exporter destroys domestic competition, then it can use monopoly power to raise prices to hurt local consumers

Fallacy – if the exporter could easily enter the domestic market, what is to keep new domestic industries from entering and causing prices to fall again?

Antidumping Theory (2)

Economic Theory # 2 – basic management theory is that manufacturer should sell in domestic market to cover full costs and export at prices that cover variable costs only in order to maximize profit

Fallacy – this is the definition of dumping

Antidumping Theory (3)

Economic Theory # 3 – if the exporter does not intend to cause economic damage or otherwise dump, then no action should be taken

Fallacy – antidumping law does not care about intent

Pre-WTO Era: Developed World

United States, Canada, Australia,
European Union were the most frequent
users of trade remedies

- Antidumping
- Countervailing duty (anti-subsidy)
- Safeguards



GENERAL PREFERENCE TO LITIGATE DISPUTES



Pre-WTO Era: Asia

Asian countries resolved trade disputes through diplomatic means

- Negotiations
- Informal and political means
- Consensual approaches
- Governments could impose measures by decree

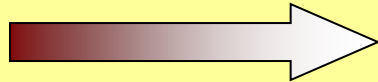


**GENERAL PREFERENCE TO NEGOTIATE
SOLUTIONS AND IMPLEMENT THEM QUICKLY**



WTO Uruguay Round

1994 GATT Uruguay Round agreements



Creation of WTO

- All WTO members, including most Asian countries follow WTO trade remedy agreements
 - Antidumping (AD)
 - Countervailing duties (CVD)
 - Safeguards

Proliferation of Trade Remedies

- Asian countries more willing to use trade remedies
- All major Asian countries have trade remedy laws
- WTO restricted use of non-transparent measures (decrees, quotas, informal bans)
- Asian governments under pressure to protect industries
- Asian industries more experienced after years of trade litigation with US, EU, Australia, Canada
- Greater relaxation of sovereignty (AD teams conduct crossborder verifications everyday without notice)
- More comfort with privatization of trade policy

RESULT: More trade disputes now litigated, not negotiated

Top 10 AD Users

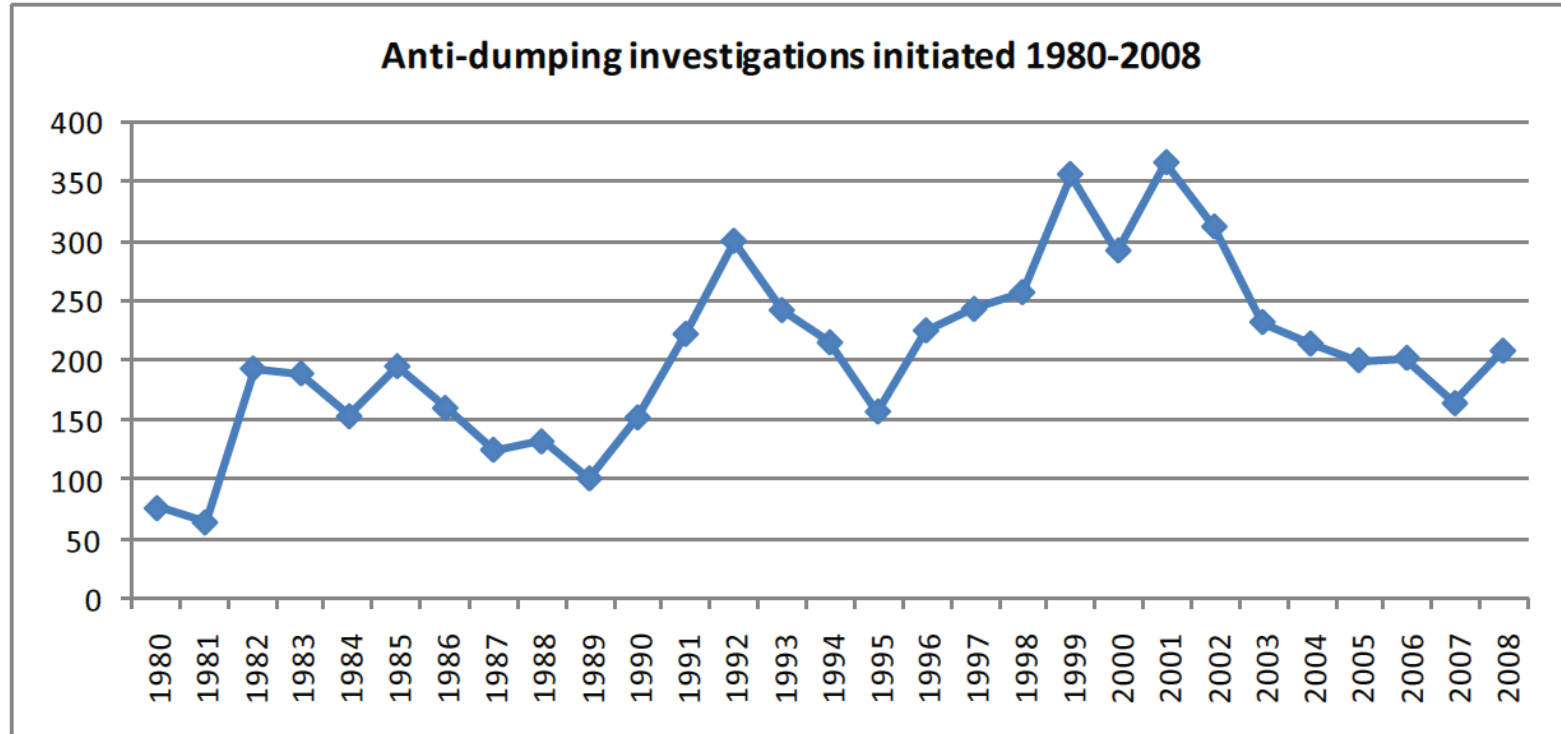
- Top 10 users of anti-dumping 1995-2008 (by initiations)
 - **India** **564**
 - US 418
 - EC 391
 - Argentina 241
 - South Africa 206
 - Australia 197
 - Brazil 170
 - **China** **151**
 - Canada 145
 - Turkey 137
- Source: www.antidumpingpublishing.com

Top 10 AD Targets

- Top 10 targets of AD investigations 1995-2008 (initiations)
 - **China** **677**
 - **Korea** **252**
 - US 189
 - **Taiwan** **187**
 - **Indonesia** **145**
 - **Japan** **144**
 - **Thailand** **142**
 - **India** **137**
 - Russia 109
 - Brazil 97
 - Singapore is ranked #17

Source: www.antidumpingpublishing.com

AD Investigations Increasing Again



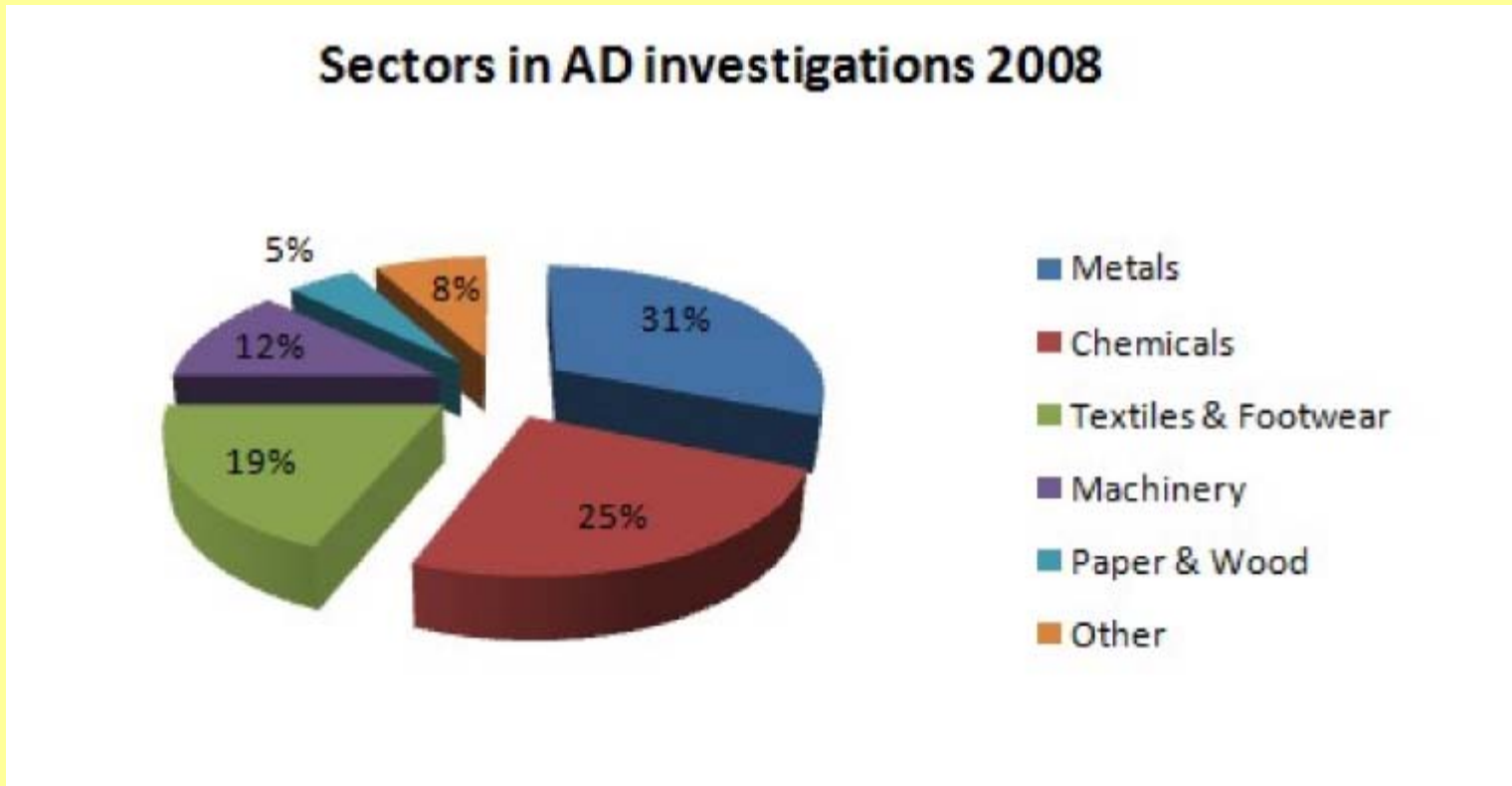
Source: www.antidumpingpublishing.com

China is the Big Target



→ Source: www.antidumpingpublishing.com

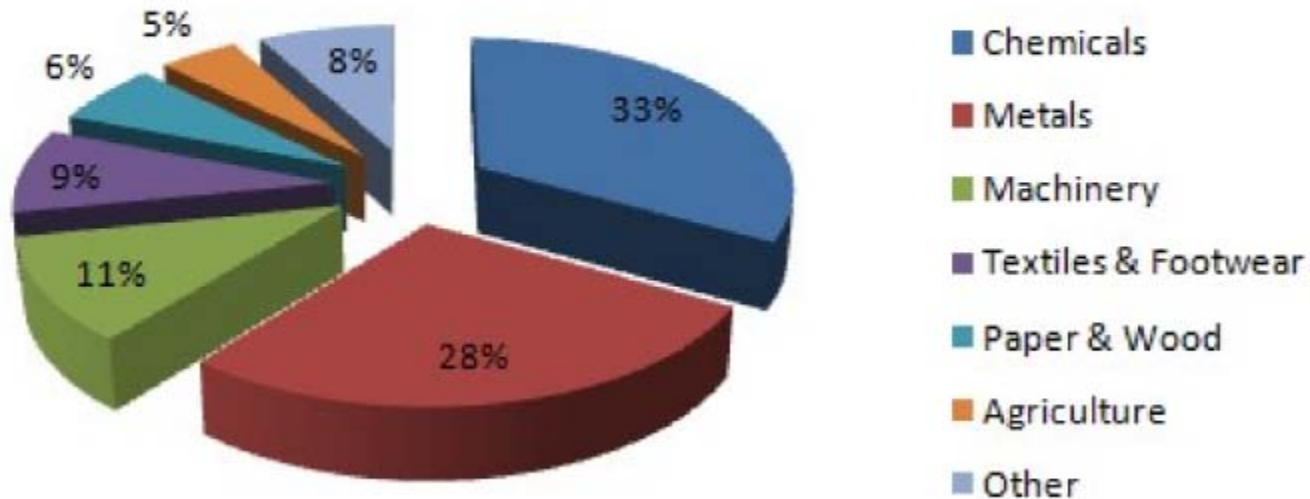
What Industries Are Involved?



- Source: www.antidumpingpublishing.com

What Industries Are Involved?

Sectors in AD investigations 1995-2008



- Source: www.antidumpingpublishing.com

Substantive Overview

What is an Antidumping Duty?

Import duty assessed to offset injurious dumping

A. THREE CRITERIA

1. Dumping

2. Material Injury or Threat of Material Injury or “Material Retardation”

3. Causal Link

What is Dumping?

B. DUMPING = EXPORT PRICE < NORMAL VALUE

1. Export Price

- Export Sales Price
- Constructed Export Price Sales

2. Normal Value

- Home-market Sales
- Third-country Sales
- Constructed Value

What is Dumping?

Dumping occurs if:

A firm sells at lower price in an export market than in its domestic (home) market

but 2% or less is considered de minimis

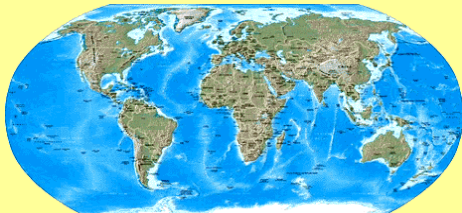


Home Price = \$20
(Normal Value)



Export Price = \$15

Dumping Margin
= \$5



What is Export Price?

Export Price - price at which product sold in importing country

- How to determine export price:
 - indication in export documentation (invoice, letter of credit, bill of lading)
 - export price may be constructed when no export price, or export price unreliable
- Solution: Construction of export price on basis of price at which imported products first sold to independent buyer

What is Normal Value?

Normal Value - price of like product, in ordinary course of trade, in home market

- Two hypotheses:
 - Data about domestic sales of like product available
 - Domestic sales made in ‘ordinary course of trade’ (e.g. profitable)

What is Normal Value?

- If
 - no domestic sales in ‘ordinary course of trade’; or
 - unrepresentative volume of trade
- Then 2 solutions provided:
 - Appropriate third country exports; or
 - Constructed value: 3 elements
 - > Cost of Production
 - > Administrative, selling and general costs
 - > Profits

What is a Non Market Economy?

- Country where it is impossible to distinguish between the State and the Private Sector:
 - China
 - Vietnam
 - Cuba
 - North Korea
 - Laos
- Market prices and costs are not usable, so must construct a comparison price – ie the entire country is not in “ordinary course of trade” (but see recent Indian AD case on Saudi Arabia)
- Dumping analysis based on hypothetical prices and costs from a country “like” the target country
- Calculated rates can vary wildly



What is Material Injury?

- Investigating authority considers the following:
 - Sales
 - Market Share
 - Profits
 - Return on Investment
 - Capacity Utilization
 - Production
 - Investment
 - Employment
 - Prices

What is Causal Link?

- Investigating authority considers the following:
 - Volume of Imports
 - Lost Sales
 - Price Suppression or Depression
 - Import Penetration Levels
 - Relationship of the Dumping Margins to the Margin of Underselling
 - Import penetration of 3% or less is considered negligible
 - But if total of those below 3% add up to 7%, then can still be viewed as a cause of injury

What is a Antisubsidy (CVD) Duty?

Import duty assessed to offset injurious subsidization

A. THREE CRITERIA

1. Subsidization
2. Material Injury or Threat of Material Injury or “Material Retardation” (SAME AS DUMPING)
3. Causal Link (SAME AS DUMPING)

What is a Subsidy?

Three criteria:

1. Financial contribution by government
2. Financial benefit to recipient
3. Financial benefit is “specific”

What is a Subsidy?

Types of subsidies:

Government loans

Tax holidays

Tax deductions

Duty exemptions for machinery

Excessive duty drawback

Government supplied goods and services

All involve provision of benefit by government, received by exporter/manufacturer

What is “Specific”?

Means targeted at a specific group of companies or region:

1. Exporters
2. Strategic industries
3. Regions and municipalities

What is a “Safeguard” Measure?

- Temporary measure to give “breathing room” to industry
 - A. Increased quantities of imports (absolute or relative)
 - B. Serious threat of injury or threat of serious injury
 - No need to prove any unfair trade
 - Measures are temporary but can be flexible in application (duties, quotas, grants, etc.)
 - Can be global or country-specific (FTA or China/VN WTO accession based)

Serious Injury or Threat Thereof

- Serious injury means a significant overall impairment of the position of a domestic industry
- Threat of serious injury means a serious injury that is clearly imminent
- Determinations of the existence of threat must be based on facts and not on conjecture or remote possibility

Procedural Overview

General Procedure in AD Case

Importing Country

- 1st step: domestic industry will complain that dumped imports are causing injury
- 2nd step: AD authorities will examine domestic industry's complaint
- 3rd step: if sufficient *prima facie* evidence in complaint, authorities will initiate AD investigation

General Procedure in an AD Case

investigation will verify 3 key elements of dumping, injury and causation before AD measures imposed

Exporting Country now involved

- 4th step: when investigation is initiated, notification made to (i) government of exporting country, (ii) named exporters known to be dumping
- 5th step: detailed information on price, costs etc. requested from the exporter, in order to determine dumping margin.
(all subject to on-site inspection by importing country govt)

General Procedure in AD Case

- 6th step: assuming dumping, injury and causation found, AD measures imposed; can be in form of (i) AD duty; or (ii) price undertaking

(Pts of note:
 - AD duty: co-operative exporter's rate vs 'all others' rate
 - Findings: Preliminary vs Final
 - Opportunity for interested parties to present views)
- 7th step: opportunity for independent judicial review of authorities' findings

Comparative Analysis



“American” Style of Litigation

- Substantial documentation of all steps of process
- More legalistic and less political influence
- Compromise results are not encouraged
- AD/CVD duties applied retroactively in most cases (importer not certain of actual amount of duties assessed until 1-2 years later)
- AD/CVD duties based on actual extent of dumping/subsidization
- AD/CVD duties applied indefinitely
- Process is costly for agency and parties
- “Common law” approach – but see Australia



“European” Style of Litigation

- Little or no documentation of process (less transparent)
- More prone to political influence, legal reasoning less accepted
- Political compromise more likely
- AD/CVD duties based on underselling of import compared to domestic product, not extent of dumping/subsidization
- AD/CVD duties are prospective (duties are set at the time of importation)
- AD/CVD duties end after 5 years (but with potential extension)
- “Civil law” approach but see China

Asian Implementation



European

Indonesia

Malaysia

Singapore

Japan

India



American

Taiwan

Philippines




Korea

China






(mix of both EU and US)

Procedural

-  • European style tends to use a single agency (e.g., European Commission)
-  • American style tends to separate injury and dumping/subsidization determinations
-  • China uses single agency (MOFCOM) with separate divisions (they were formerly separate agencies)

Transparency

-  American favors exchange of information among parties
 - APO
 - Website notice of cases
-   European favors no access to information of other parties (including government)
 - No exchange of data
 - Petitions and complaints kept confidential

Litigation Style

- American favors repeated and multiple submissions by lawyers

- 7-10 supplemental questionnaires common
- multiple copies, service copies

- European favors few and short submissions by lawyer

- few questionnaires
- no service copies, one copy of each version

Time Frame

- American style is like a marathon



- Initial AD questionnaire deadline 90-120 days after initiation, repeated extensions, verification 2-3 months after supplementals



- European style is like a sprint



- Initial AD questionnaire deadline 37 days after initiation, no extensions, verification within 3-4 weeks after response submission

Computer Analysis

- America uses SAS system



- The only jurisdiction to use such a complex system; necessary due to statutory complexity

- Europe and others use Excel



- Cheaper, easier to use



- More efficient?

- More accurate?



- Australia even provides export database

Verification (1)




- US style reflects common law approach
 - verifiers collect data for later consideration
 - many documents taken for support of record
 - officials need to bring back support for their decisions in case of litigation before court
- 5 days for sales, 5 days for cost
- Detailed summary report

Verification (2)




- European style reflects civil law approach
 - Verifiers are triers of law and fact
 - Can make on-the-spot decisions
 - Few documents taken
 - 2-3 days for cost and sales
 - No or short reports provided






Hearings and Briefs

-  America has hearings and briefs
 - Both parties participate
-   Europe has hearings
 - But confrontation hearings discouraged
 - But also see “hearing officer”
 - Pre and post hearing submissions




Respondent Participation

-  • US requires sends petition to all identified companies in petition (no registration)
 - All identified companies must respond
 - If identified company does not respond, penalty rate
 - If NME company does not respond, penalty rate
-  • Europe requires registration
-  • China requires registration




Sampling

-  • America uses largest volume exporters or random sampling
-  • Europe uses largest volume exporters, but reserves right to select exporters with viable home markets
-  • China uses largest volume exporters based on the registration data

Viability

-  • America uses 5% volume test once
 - Analysis is based on total market
 - But see Canadian “same volume” test
-  • Europe uses 5% volume test twice, by market and by product control number
-  • China applies 5% volume test thrice, by market, by product and then after cost analysis (makes CV very likely)

Comparison Market

-  • US has hierarchy of comparison markets
 - Home market
 - 3rd country
 - Constructed Value
-  • EU prefers home market, but if not viable,
 goes straight to constructed value

Export Sales

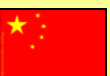


- US assumes sales for which company is aware of the final destination are export sales (based on documentation)
 - Means that producer most likely to be respondent







- EU assumes that sales shipped to EU are export sales

Dumping Calculation





- American approach applies duties to full extent of dumping, no exceptions
- European approach uses “lesser duty” rule (aka non injurious price)
 - Lesser of dumping % or adjusted underselling % used (adjusted for local profit)
 - Transparent? Where did local profit come from?

Product Characteristics

-  • US uses CONNUMs after consulting parties; difference in merchandise adjustments
-  • EU uses PCNs proposed by petitioner, no difference in merchandise adjustments
-  • Others use respondent's product codes, no difference in merchandise adjustments
- 

Zeroing

-  • American approach no longer uses zeroing
 - But see “targeted dumping”
 - But see administrative reviews
-  • European approach no longer uses zeroing

Imputed Adjustments



- US only jurisdiction to deduct inventory carrying costs, indirect selling expenses



- Other jurisdictions do not use imputed costs as an expense



- Selling expenses are part of cost test

Affiliation (1)

- Members of a family, including brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants;
- Any officer or director of an organization and such organization;
- Partners;
- Employer and employee;
- Any person directly or indirectly owning, controlling, or holding with power to vote, five percent or more of the voting stock or shares of any organization and such organization;
- Two or more persons directly or indirectly controlling, controlled by, or under common control with, any person;
- Any person who controls any other person and such other person

Affiliation (2)

- How affiliation affects the investigation
 - Cost of production (major input rule (highest of cost, open market price or transfer price))
 - Normal value
 - Sales by affiliates
 - Arm's length test
 - Export price (constructed export price)
 - Collapsing respondents' rates (ME and NME)
 - Petitioning companies and definition of industry

Affiliation (3)



- US will cast a wide net
 - Very broad application of definition
 - All affiliates must respond to questionnaire
 - Refusal to comply can penalize company
 - Analysis of related companies' transaction



- Other jurisdictions are more narrow



- Major input rule followed



- Disregard affiliated transactions

Non Market Economies (1)




- US market economy test currently impossible to meet standard
 - Entire industry must be market oriented



- EU market economy standard looks at ownership of exporter and influence of the state
 - But any state influence can disqualify
 - CP membership, state university?
Consultative committees?

Non-Market Economies (2)

-  US gives separate rates
 - Examines central government control over export activities
 - Relatively consistent since CDIW Fittings
-  EU gives individual treatment
 - Examines any government control over all activities
 - Inconsistent application (e.g., Footwear)
 - But note EU Fasteners - Panel

Non-Market Economies (3)







- US uses comparable GDP countries with reliable (e.g. English language) data submitted by parties
 - India, Bangladesh, sometimes Indonesia



- EU uses analogue country questionnaires
 - Brazil, Indonesia, Thailand, USA
 - Impartiality of data?

Non-Market Economies (4)

-  • US and Canada can apply CVD against NMEs
-  • EU does not apply CVD against NMEs but considering this
 - Coated Paper from China
-  • China does not believe in NMEs
-  NOTE- ASEAN treats China as market economy

Injury Analysis (1)



- American style emphasizes injury analysis
 - Economic analysis, APO access, adversarial hearings
 - More balance between petitioner and respondent





- European style puts respondent on defensive



- Lack of access to data, more subjective?

Injury Analysis (2)

-  • US and EU do not include de minimis imports in injury analysis
 - De minimis imports are not dumped
-  • China does include de minimis imports in injury analysis

Exclusion of Products



- American style will exempt products
 - Exclusion by petitioner
 - Products not produced in US



- European approach less willing to exempt products



- China has exempted products not produced in China through no-injury findings

Assignment of Duty Rates



- **US assigns rate to corporate entity**

- Rates assigned to each entity
- Weighted average for non-sampled
- Penalty rate based on petition for non cooperative



- **EU assigns rate to producer**

- Rates assigned to each producer
- Weighted average for non-sampled
- Penalty rate for non cooperative, more discretion



- **China assigns rate to producer**

- Rates assigned to each producer
- Weighted average for non-sampled
- Penalty rate based on highest available rate

Application of Duties



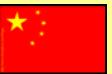
- US applies duties retroactively using deposits
 - Uncertainty for importers
 - Higher cost, more accurate?
 - Annual reviews



- Other jurisdictions use prospective system

- Less flexibility to revise duties?

- Duties not applied to “processing trade” or inputs for exports



- Duties included in value used for VAT

Settlements



- US traditionally reluctant to enter into suspension agreements



- Other jurisdictions (e.g., Korea) more likely to use price undertakings
 - Enforcement is major issue



Reviews



- US allows for annual reviews of AD rate
 - Importer, exporter and domestic industry have automatic right



- Other jurisdictions use discretionary system





- China requires applicant for review to submit fully completed AD questionnaire response

Circumvention (1)



- US has several regulations
 - Fictitious market
 - Monitoring
 - Assembly in US or 3rd country
 - Assembly process is insignificant
 - Investment, R&D, nature, extent, value of processing
 - Assembler is affiliated with producer
 - Value of parts is significant
 - Minor alterations
 - Later developed products
 - Customs ≠ AD

Circumvention (2)

-  EU Article 13 of basic regulation
 - Slight modification
 - Consignment through 3rd countries
 - Reorganization to trade to lower-rate companies
 - Assembly in EU or 3rd country
 - Operation started around time of initiation
 - Parts constitute 60% of total value
 - Prices undermine AD duties
-  China has no anticircumvention rules

Judicial Appeal

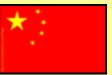


- US appeal to US Court of International Trade






- EU appeal to Court of First Instance

- Both are deferential to agencies








- China has “Administrative Reconsideration” procedure
- No one has appealed a Chinese AD decision to a Chinese court

Political Influence




-  • American style supposedly less political
 - More “legal”, less “political”
 - But see Fish Fillets AD case (heavy lobbying)
-  • European style very political
 - Lobbying of Council of Ministers
 - Community/public interest
-  • Chinese style – “guanxi”

Summary

-  • American approach is more legalistic, complex, transparent, expensive, predicable?
-  • European approach is more flexible, cheaper, policy-driven?
-  • American system becoming more EU-like?
-  • European system becoming more US-like?
-  • China having characteristics of both, but still US-like?



Role of WTO

- AD agreement provides minimum standards
- DSB provides relief for aggrieved parties
- Some harmonization of AD practices, such as on injury analysis
 - But see zeroing
-  – EU readily follows WTO agreement and DSB
-  – US fighting for zeroing at all costs
-  – China more keen to use WTO



Singapore Scenarios



Singapore FTAs and AD



ESFTA – use competition policy, not antidumping



ANZCEP – de minimis and negligible raised to 5%, term of AD lowered to 3 years



SAFTA – lesser duty rule



SJFTA -- de minimis and negligible raised to 5%, term of AD lowered to 3 years, no third party AD actions, lesser duty rule, weighted-average to weighted average or transaction to transaction, no AD on goods subject to safeguards



KSFTA – lesser duty rule, no zeroing

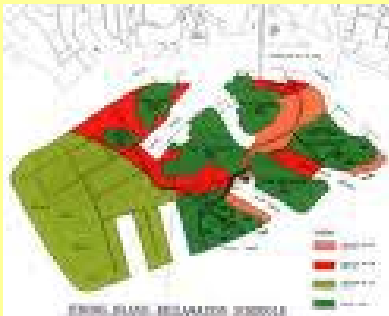
Most FTAs do not touch antidumping



Singapore Scenarios – “Jurong Island”

Chemical company on Jurong Island

- connected via pipe to other companies
- related to suppliers via common shareholding or JV
- related to customers via common shareholding or JV
- relatively small local market, just in time deliveries





Singapore Scenarios – “Jurong Island” Issues

- What is affiliation?
- Scope of investigation and information requirements
- Major input rule
- Home market sales
 - Downstream sales
 - Arm’s length test
- Combined duty rate



Singapore Scenarios – “Trading Company”

Trading company located in Singapore

- Goods manufactured elsewhere in Asia
- Only trading in goods
- Manufacturer may not know ultimate export destination
- Certificate of origin issue?



Singapore Scenarios – “Trading Company” Issues

- Who is the exporter? Who is the respondent?
- Who has knowledge of final destination?
- Can Singapore be brought into the case?
 - aka Indonesian AD on steel plate, PVC flooring
- What rate is applied to the company?



Singapore Scenarios – “Mixed Production”

Manufacturer located in Singapore

- Inputs from other countries in Asia
- Is Singapore country of origin?
 - 40% value-added rule?
 - substantial transformation or CTC?
- Product-specific or company wide application?





Singapore Scenarios – “Mixed Production” Issues

- Product not manufactured in Singapore, but COO from Singapore
- Product from outside, packed in Singapore
- 60% of product manufactured in Singapore, 40% from outside
- 60% of product input from Singapore, 40% from outside
 - FTA partner? ASEAN?
- Issues of participation in case, circumvention, etc.
 - Aka EU case on biodiesel from Singapore



Singapore Scenarios – “Offshore Ownership”

Parent company located in Singapore, manufacturing outside Singapore

- In FTA partner? Not in FTA partner?
- In market economy?
- In non-market economy?

The Economist



Singapore Scenarios – “Offshore Ownership” Issues

Will Singapore company have to participate in case?

- Trading company?
- Mere owner?
- Response submission and verification?

How will investigating authority determine dumping rate?

- NME methodology?
- MNC methodology (US only)?

Conclusion



What Should Government Do in AD Cases?

Sharing of intelligence

Information database

Public awareness and outreach

Legal defense center (China, Vietnam)

Subsidies for legal fees (China, Taiwan, Thailand)

Participate as interested party in case

WTO/FTA support and defense

Nothing



Washington
Brussels
Geneva
Warsaw

Singapore

Sao Paulo

THANK YOU!

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