

# WTO Rules Negotiations: Implications for India

By

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# Rules negotiations: Doha mandate

- In the [light of experience](#) and of the [increasing application](#) of these instruments by Members, we agree to negotiations aimed at [clarifying and improving disciplines](#) under the Agreements 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. In the context of these negotiations, participants shall also aim to clarify and improve WTO disciplines on fisheries subsidies, taking into account the importance of this sector to developing countries. We note that fisheries subsidies are also referred to in paragraph 31.

# Rules Negotiations: What is cooking

- Procedural improvements in anti-dumping investigation
- More precision in dumping margin determination
- Improvements in injury analysis and causality
- Tightening of disciplines on reviews
- Expeditious dispute resolution
- Expand prohibited subsidies
- Acceptance of specific methodologies for determination of benefit
- Harmonise anti-dumping and cvd investigation procedures
- Improvements in cvd investigation procedure
- Improvements in definition of de facto export subsidy
- Disciplines on fisheries subsidies
- **Will the final dish be delicious for all or even for any one country?**



# Outline of the presentation

- Anti-Dumping Agreement

- ADA basic concepts and statistics on AD

- Key negotiating issues in AD

- Agreement on Subsidies and Countervailing Measures

- Basic concepts and statistics on cvd

- India's experience in cvd investigations

- Key negotiating issues in ASCM

**ANTI-DUMPING  
AGREEMENT:  
BASICS AND  
SOME NEGOTIATING  
ISSUES**

## **AD INVESTIGATION**

Examination of  
past behaviour  
of  
exporters  
and  
domestic industry

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## DUMPING DETERMINATION

- Exporter specific
- “Fair comparison” of Export Price and Normal Value
- Normal Value – Usually the price of the product in the domestic market of the exporter
- Normal Value – Other options for determination
- Dumping exists if  $\text{Export Price} < \text{Normal Value}$

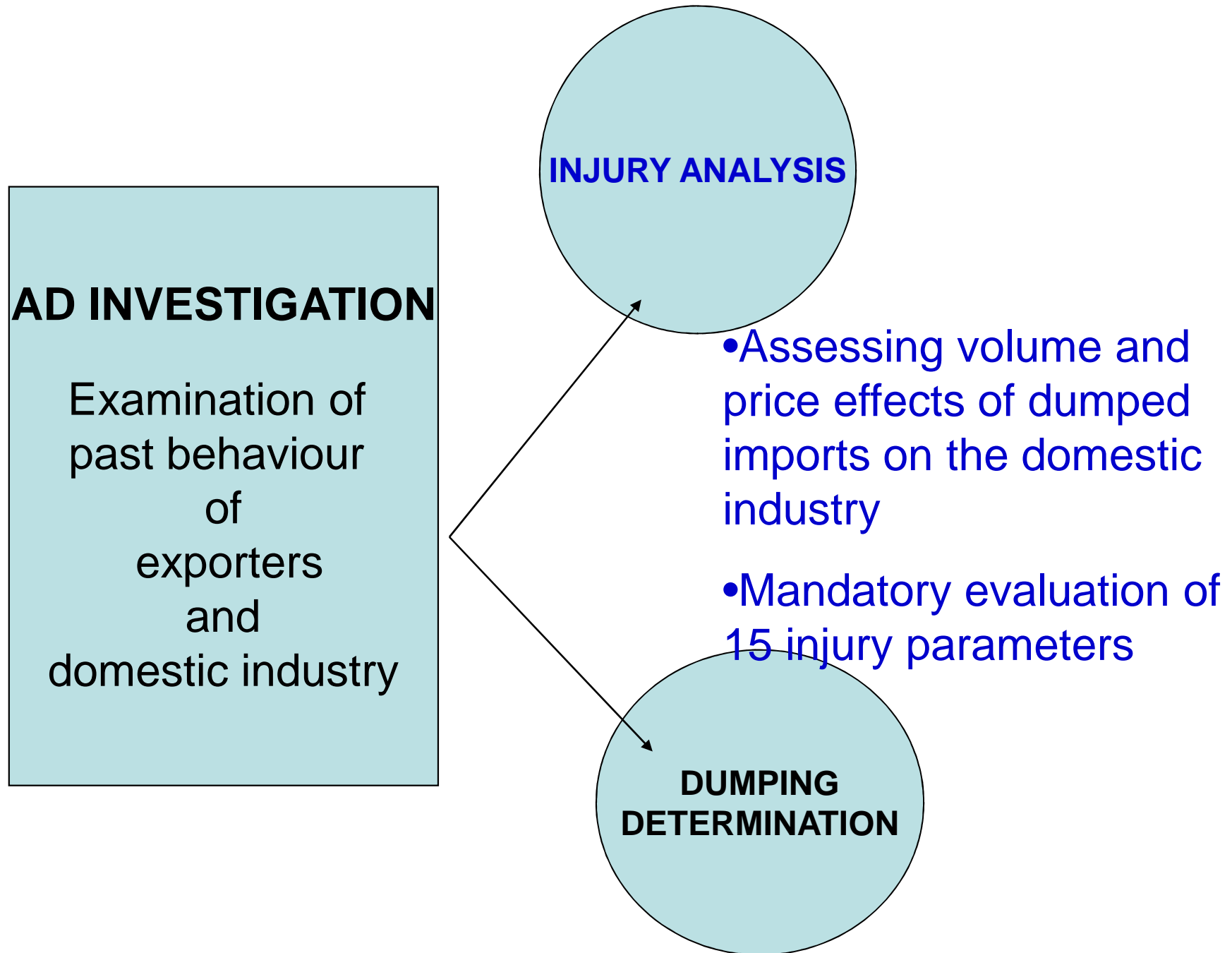
## **AD INVESTIGATION**

Examination of  
past behaviour  
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exporters  
and  
domestic industry

### **INJURY ANALYSIS**

- Assessing volume and price effects of dumped imports on the domestic industry
- Mandatory evaluation of 15 injury parameters

### **DUMPING DETERMINATION**





## AD INVESTIGATION

Examination of  
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**DUMPING  
DETERMINATION**

**CAUSAL LINK**

**INJURY ANALYSIS**

- Injury to the domestic industry caused by dumped imports
- Injury caused by “other factors” must not be attributed to dumped imports

## AD INVESTIGATION

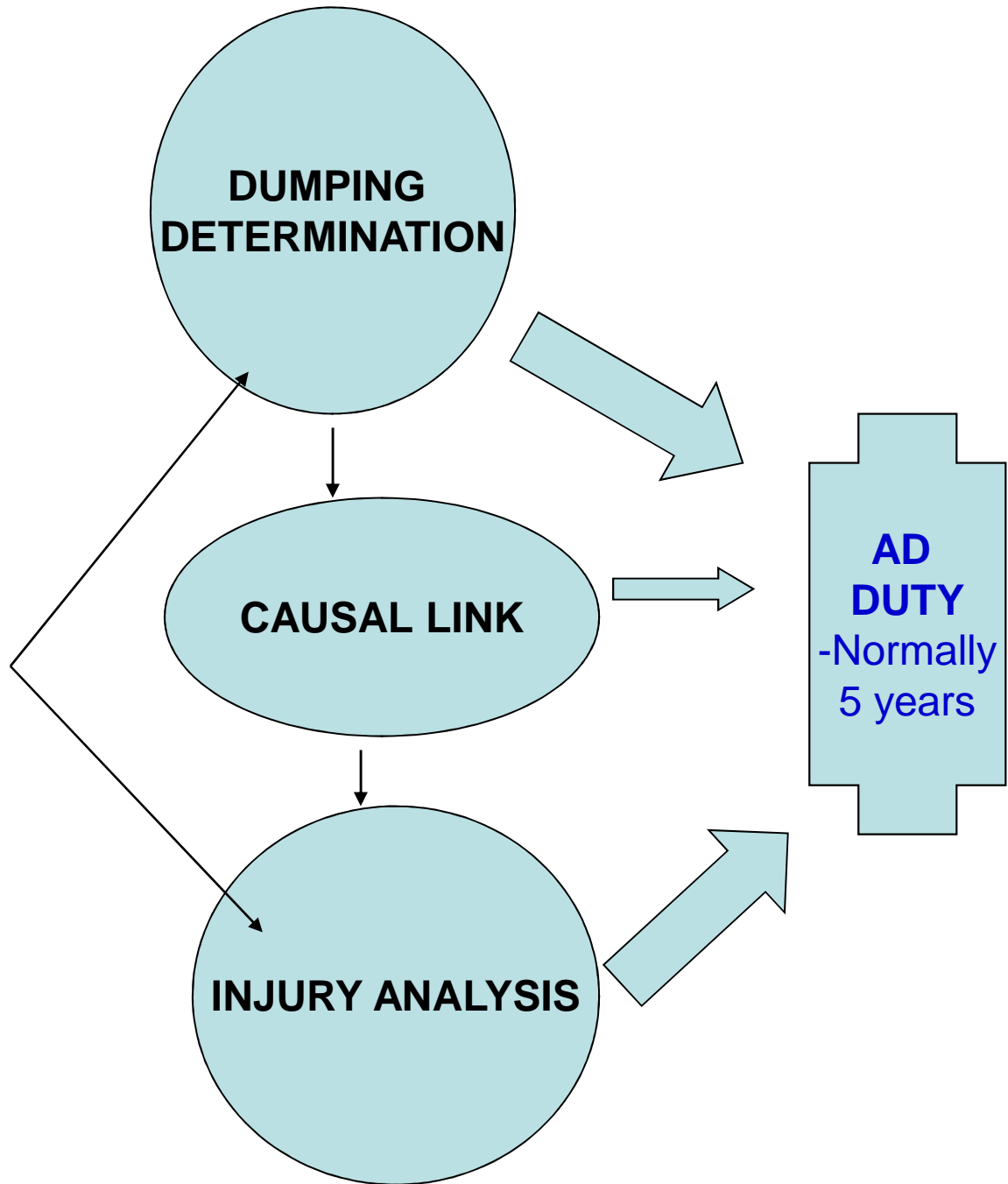
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**DUMPING  
DETERMINATION**

**CAUSAL LINK**

**INJURY ANALYSIS**

**AD  
DUTY**  
-Normally  
5 years



# **SUN SET REVIEWS**

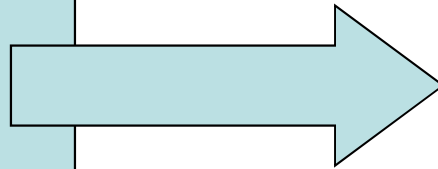
**To assesses  
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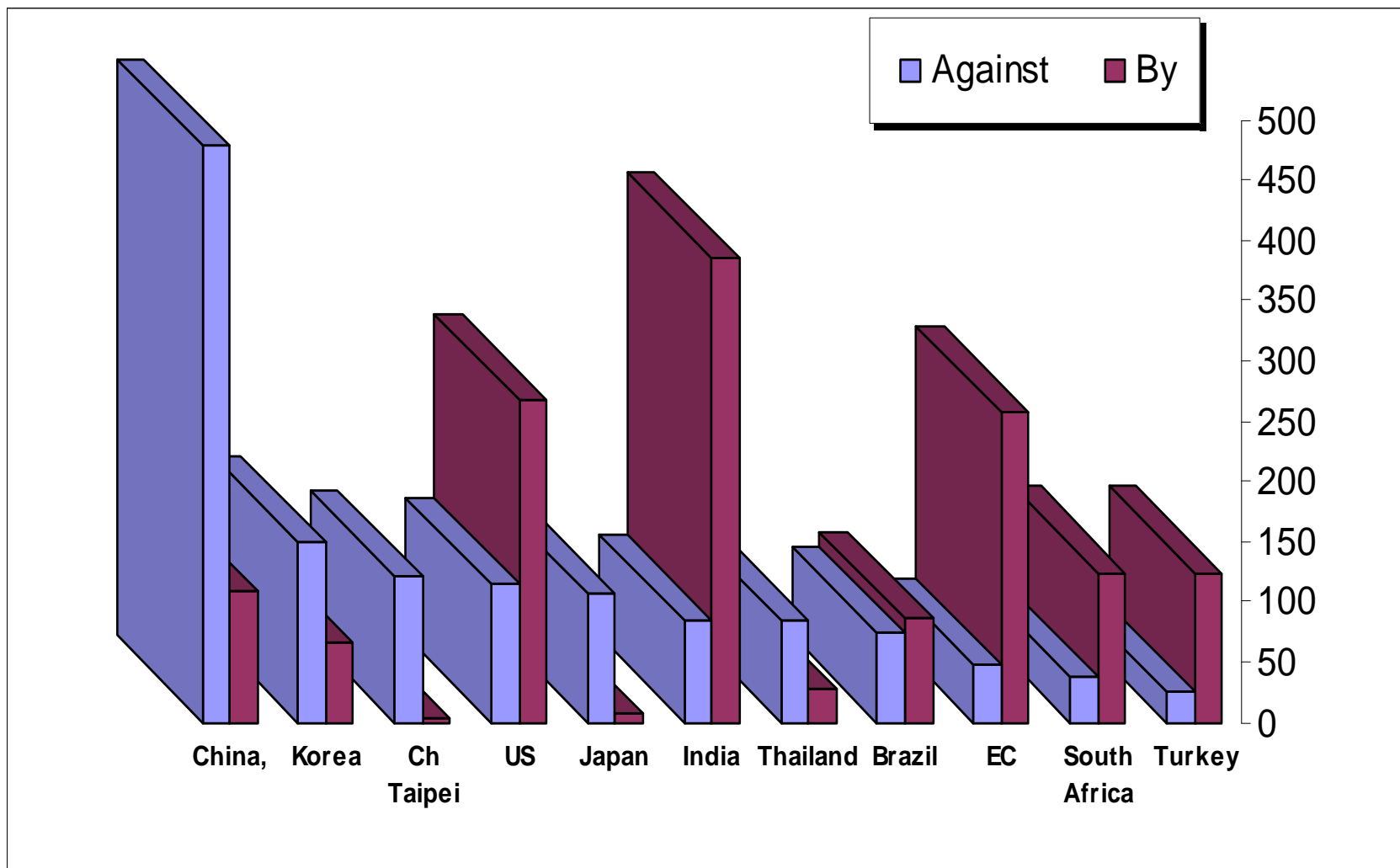
**AD DUTY  
extended  
by another  
5 years**

# AD measures imposed by countries during 1995- 2008

<i>India</i>	<b>386</b>
<i>United States</i>	<b>268</b>
<i>European Community</i>	<b>258</b>
<i>Argentina</i>	<b>167</b>
<i>South Africa</i>	<b>124</b>
<i>Turkey</i>	<b>124</b>
<i>China, P.R.</i>	<b>108</b>
<i>Canada</i>	<b>90</b>
<i>Brazil</i>	<b>86</b>
<i>Mexico</i>	<b>81</b>
<i>Australia</i>	<b>75</b>

# AD measures imposed on countries during 1995- 2008

<i>China, P.R.</i>	<b>479</b>
<i>Korea, Rep. of</i>	<b>150</b>
<i>Chinese Taipei</i>	<b>120</b>
<i>United States</i>	<b>115</b>
<i>Japan</i>	<b>106</b>
<i>Russia</i>	<b>90</b>
<i>India</i>	<b>84</b>
<i>Thailand</i>	<b>84</b>
<i>Indonesia</i>	<b>82</b>



**ADA:  
IMPORTANT  
NEGOTIATING ISSUES**



# Zeroing

- Zeroing – In dumping determination, not fully taking into account all export transactions with negative dumping
  - Inflates dumping margin
- In *EC Bed Linen* and other disputes WTO Panels and Appellate Body have repeatedly ruled against “zeroing”
- Most countries want explicit prohibition on zeroing
- US wants zeroing to be specifically authorised

# Causal Link

- In *US Wheat Gluten* and *US HR Steel* Appellate Body has specified the need to
  - assess appropriately and
  - separate and distinguish injurious effects of dumped imports from injury caused by “other factors”
- Divergent views on
  - need to separate and distinguish the effects of dumped imports and other factors
  - quantitative vs. qualitative analysis of non-attribution
  - Weighing injurious effects of dumped imports against effects of other factors
- As a practical matter, may not be easy to abide by the finding of AB

# Lesser Duty Rule

- Many support the need for a mandatory LDR
  - would reduce the level of AD duty in many cases
- Detailed submission by India
- Varying views
  - countries want to preserve their existing practice
  - appropriate degree of specificity for new rules
  - US totally opposed

# LDR: Way Forward

- Limit mandatory application of LDR to original investigation
- Provide flexibility to the country to notify a preferred methodology to be followed, with reasoned explanations in cases of deviation
- If need be, expand the category of permitted methodology to include other practices not covered

# Sunset Reviews – Age of AD Measures 31 Dec 2008

Age of Measures	No. of Measures	Percentage (%)
Data not correctly given	5	0.4
Less than 5 years	707	58
5 - 10 years	358	29.3
10 - 15 years	71	5.8
15 - 20 years	41	3.4
> 20 years	38	3.1
TOTAL	1220	---

# Sunset Reviews – Age of AD measures by importing country

Country	< 5 yrs.	> 5 yrs.	% > 5 yrs.
USA	61	173	74
South Africa	16	40	71
Canada	18	21	54
Brazil	30	24	44
India	106	72	40
Turkey	70	37	35
China PR	73	26	26
EC	105	23	18

# Sunset Reviews – Age of AD measures by exporting country

<b>Exporting Countries on Whom Measures Imposed</b>	<b>No. of Measures Beyond 5 yrs.</b>
China P.R.	125
Korea	43
Chinese Taipei	36
Japan	34
India	25
United States	22
Thailand	20

# Sunset Reviews – Divergent views

- Automatic termination after 5/ x years
  - would prevent misuse
  - would encourage dumping in the last phase of the AD duty
- Need for standards and criteria for the likelihood determination
  - would introduce only a limited degree of objectivity in the analysis



# Anti- Circumvention

- Circumvention of AD duty through
  - minor alteration in the product
  - replacement of trade in the product by trade in its sub-components which are assembled in the importing country or in a third country
- US proposal – impose anti-dumping duty / cvd on a product not subject to original investigation if any of the above two situations of anti-circumvention arises
- Address circumvention through a new investigation
- Circumvention is a reality requiring harmonisation of rules for addressing it
- Possibility of misuse of an anti-circumvention provision

**SUBSIDIES AGREEMENT:  
BASICS,  
INDIA'S EXPERIENCE  
AND NEGOTIATING ISSUES**

# When Does a Subsidy Exist- Art 1

## ***Financial contribution***

- Direct / potential direct transfer of funds
- Revenue otherwise due foregone
- Provision of goods or services – excluding general infrastructure
- Entrustment by Government of above functions

## ***Or Income / price support***

***AND***

***Benefit thereby conferred.***

# Specific Subsidies

- Article 1.2 provides that a subsidy shall be actionable only if such a subsidy is specific
- Criteria for specificity
  - ❖ Prohibited subsidies
  - ❖ Enterprise specificity
  - ❖ Industry specificity
  - ❖ Regional specificity – focus on jurisdiction of the granting authority

# Subsidies: Categorisation

- Prohibited Subsidy – Art. 3
  - Local content subsidies
  - Export subsidies-***Illustrative*** List in Annex I
    - ❖ S& D for Annex VII countries – export subsidies not prohibited till export competitiveness reached
- Actionable subsidies
  - Specific subsidies causing adverse effects (e.g. injury, serious prejudice) are actionable
- Non-actionable subsidies

# Non-actionable subsidy

- No action can be taken against subsidies that are non-specific - determined on the basis of
  - ❖ Eligibility based on objective criteria or conditions
  - ❖ Eligibility automatic, criteria strictly adhered to
  - ❖ Criteria are neutral, economic in nature and horizontal in application
  - ❖ No predominant use by certain enterprises
- Up to 1999 specific given for R &D, assistance to disadvantaged regions and for environmental purposes were non-actionable. Now lapsed

# Fiscal incentives: treatment under ASCM

- Full or partial remission of direct taxes related to exports – treated as export subsidy.
- RED of prior-stage cumulative indirect taxes treated as an export subsidy only if it is in excess of amount levied on inputs consumed in the production of the exported product.
- Remission or drawback of import charges in excess of those levied on inputs consumed in production of the exported product treated as export subsidy.

# Conditions for RED of Cumulative Indirect Taxes/ import charges

- Inputs must have been consumed in the production process
  - ❖ Physically incorporated inputs
  - ❖ Energy, fuel, oil and catalysts
- There must be a reasonable and effective verification system in place to confirm which inputs are consumed and in what amounts.



# Remedies against subsidies

- Prohibited subsidies
  - Remedy through DSU
  - Defaulting member required to ***withdraw the subsidy without delay*** or face counter- measures
- Actionable subsidies
  - removal of adverse effects of the subsidy or
  - withdrawal of subsidy or
  - imposition of countervailing duty on imports

# CVD measures by importing countries: 1995-2009 (June)

<i>United States</i>	<b>57</b>
<i>European Community</i>	<b>23</b>
<i>Canada</i>	<b>15</b>
<i>Mexico</i>	<b>8</b>
<i>Brazil</i>	<b>7</b>

# CVD measures on exporting countries: 1995-2009 (June)

<i>India</i>	28
<i>China, P.R.</i>	17
<i>European Community</i>	9
<i>Italy</i>	9
<i>Brazil</i>	8
<i>Korea, Rep. of</i>	8
<i>Indonesia</i>	7

# CVD investigations: India's experience

- Most of the duty concession schemes countervailed
  - DEPB
  - Duty drawback
  - EPCG
  - Income tax benefits
  - Advance License and its variants
- In certain cases appropriate benchmark not used for determining the benefit
- Problem of excess countervailing of benefits
- About 3% -5% of exports face cvd

# Some grounds for countervailing

- No link between imported products and inputs consumed
- No reasonable and effective system for verifying what inputs consumed and in what amounts
- Capital goods not included in the definition of inputs consumed

# ASCM: SOME NEGOTIATING ISSUES

# Issues of India's interest: Lost in the negotiating din ?

- Inclusion of capital goods in the definition of “inputs consumed”
- Treating SION as a reasonable and effective verification system for consumption of inputs
- Limiting excess countervailing of benefits
- Benchmark for govt. loans

# SION as a verification system

- A reasonable and effective verification system shall be deemed to be in place and applied wherever standard input-output norms or similar averaging procedures are:
  - (i) **developed fairly and systematically** for determining the **average amount** of various **inputs consumed** in the production of one unit of the exported product; and (ii) used to determine the exemption, remission or deferral of prior stage cumulative indirect taxes or remission or drawback of import charges levied on inputs consumed in the production of the exported product.



# SION as a verification system: Response

- Questions on whether averaging system generates accurate results
- Impact of changes to production technology over time
- Unintended benefit to efficient producers??

# Limiting excess countervailing

- Principle underlying India's proposal - in a CVD context, only the excess amount of rebate should be countervailed, rather than the whole scheme
- Many countries have supported the principle ....
- but raised questions as to whether the existing language in the Agreement could address the problem
- Some questioned certain practical aspects of the calculations

# Limiting excess countervailing: precedent

- *"... Countervailing duties should not be imposed on a product by reason of the exemption of such product from duties or taxes imposed on the like product when destined for consumption in the country of origin or exportation, or by reason of the refund of such duties or taxes. If, however, it were established that the exemption or the reimbursement exceeded the real charge which the product would have to pay in the exporting country, the difference could be considered as constituting a subsidy" (underline added).*

# Benchmark for govt. loans

- Footnote to Article 14(b)
  - In the case of countervailing duty investigation in respect of exports from developing countries the rate of interest on a comparable commercial loan in the currency of the exporting country may be based on the benchmark of **annual average government securities yields** of nearest maturity corresponding to the tenor of export credit **plus the fixed margin of 100 basis points.**

# Issue of India's interest still alive

- Export competitiveness
- Calculating share in global trade on the basis of moving averages
- 'stop-the-clock' if export competitiveness lost during the 8-year phase out period.
- In principle support for clarifying the provisions, but views differ considerably as to the best way to do this,
  - changing the period and/or methodology for calculating share of world trade in a product,
  - clarifying the definition of a "product"
  - whether reintroduction of export subsidies should be allowed if export competitiveness is lost
  - if so on what basis and for how long

# Specificity

- In the case of subsidies conferred through the provision of goods or services at regulated prices, factors that may be considered include the exclusion of firms within the country in question from access to the goods or services at the regulated prices.
- Targeted at dual pricing, particularly of natural resources
- Force convergence between domestic and export prices of natural resources
- Some countries opposed – would deny them comparative advantage arising out of resource endowments

# Govt. provision of goods etc.:

## Adequacy of remuneration

- Where the price level of goods or services provided by a government is regulated, the adequacy of remuneration shall be determined
  - in relation to prevailing market conditions for the goods or services in the country of provision when sold at unregulated prices
  - when there is no unregulated price, or such unregulated price is distorted because of the predominant role of the government in the market as a provider of the same or similar goods or services, the adequacy of remuneration may be determined by reference to
    - ❖ the export price for these goods or services,
    - ❖ or to a market-determined price outside the country of provision,

# Export credits: successor undertakings

- Item (k) Annex I provide a safe haven for export credits granted in conformity with OECD Export Credit Arrangements of 1979 or a successor undertaking.
- Some countries consider that only amendments not objected to by any Member should have legal effect under the second paragraph of item (k)
- Some countries consider that Members should not have any basis to veto decisions taken by Participants to the Arrangement.



# Rules Negotiations: Conclusions

- No overall winner
- No major change envisaged in either ADA or ASCM except anti-circumvention or disciplines on natural resources
- Balance in negotiations can be achieved through results on Fish subsidy negotiations
- Most countries would have to give up some issues of their crucial interest
- India needs to find suitable solution to its problem in cvd investigations

# Rules Negotiations: Conclusions

- Domestic industry and DGAD need to be prepared to implement improved procedural and transparency requirements
- There could be some surprises towards the end.
- Need to visualise end game and be adequately prepared for it

*THANK YOU*