“TRADE REMEDIES”: Introduction to WTO instruments for managing competition, and “market definition” issues

University of Modena

James Munro

(Nothing in this presentation reflects the views of any employer)

Overview of session on trade remedies

- Brief introduction to trade remedies
- Anti-dumping measures: Origins, rationale, legal steps, “market definition” issues
- Anti-subsidy measures: Origins, rationale, legal steps “market definition” issues

Basic definitions:

Safeguards: Beef imports surging into Vietnam because of "**unforeseen developments**"

Before trade

After trade liberalisation (e.g. WTO): tariff of 10%

Dumping: Australian beef exports to Vietnam **are cheaper than** the local Australian price

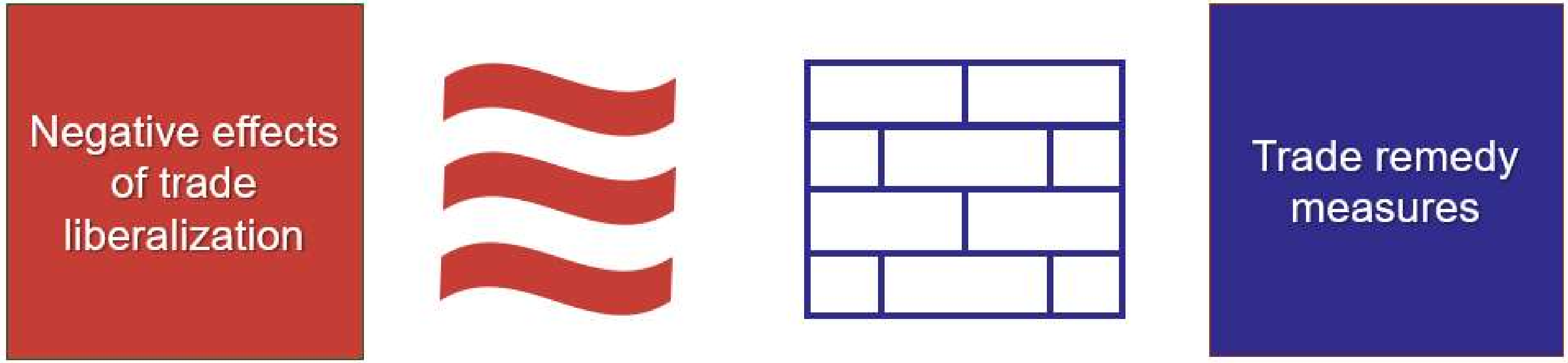
Subsidies: Australian beef exports to Vietnam are cheaper because the **Australian government is financially supporting** Australian beef

Australia: $10 per kilo of beef

Vietnam: $15 per kilo of beef

Why are the trade remedy tools needed?

- They function as exceptions to legally-binding commitments to liberalise trade



Why are the trade remedy tools needed?

Trade remedies allow for "exceptions" to WTO commitments (e.g. tariff bindings) in certain circumstances

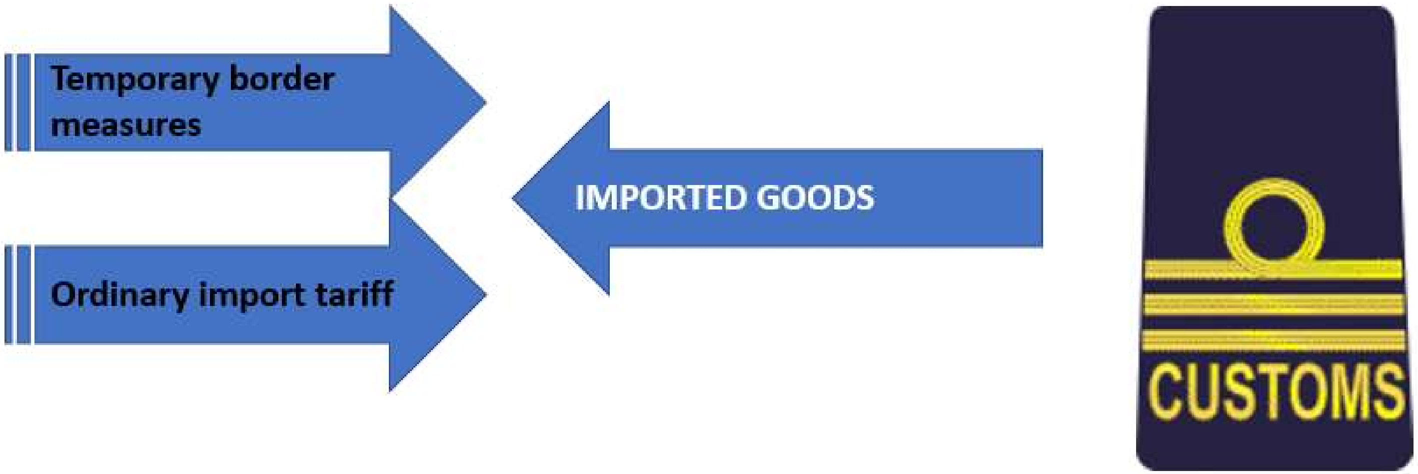
- Safeguard measures: Agreement on Safeguards
- Anti-Dumping measures: Agreement on Implementation of Article VI of GATT 1994, "Anti-Dumping Agreement"
- Countervailing measures: Agreement on Subsidies and Countervailing Measures, "Subsidies Agreement"

These specific agreements implement more general exceptions clauses in GATT

- Article VI of GATT for anti-dumping/countervailing measures
- Article XIX of GATT for safeguard measures

Similarities amongst “trade remedy” tools

They take the form of **border measures on imports**



Similarities amongst "trade remedy" tools

- All trade remedies instruments require "**injury**"
- Even if dumping/ subsidies/ increased imports proven to exist, a measure cannot be applied unless this causes **injury** to a domestic industry
- "**Material**" injury for dumping/subsidies", "**serious**" injury for safeguards

Existence of injury can only be determined in relation to a defined domestic industry

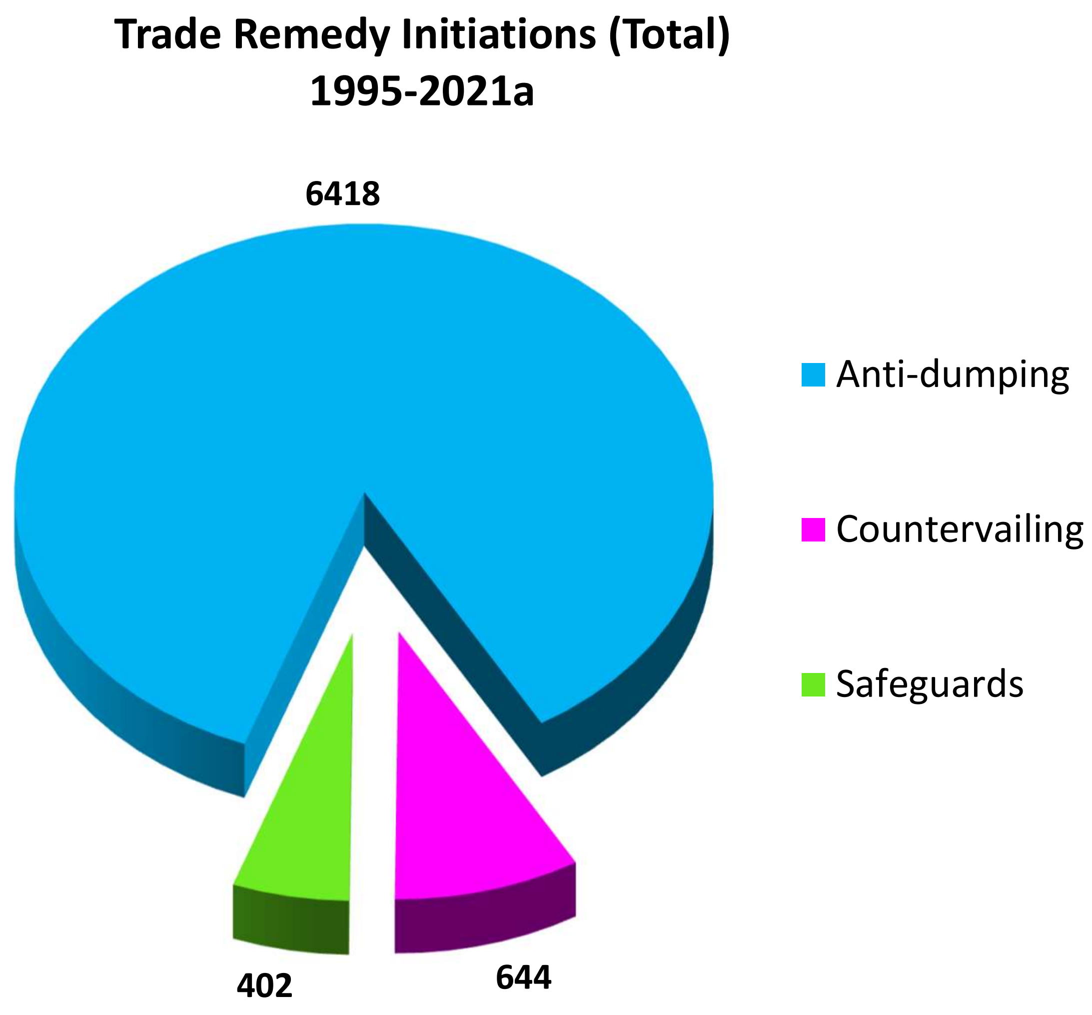
Similarities amongst “trade remedy” tools: investigations

- Legal instruments can only be adopted following **investigations**
- **Due process** requirements – opportunity to be heard, opportunity to defend interests
- **Disclosure** and **transparency** requirements
- Aim to generate **sufficie** **evidentiary basis** for fin

Differences amongst “trade remedy” tools

- Source of problem to be remediated/addressed
- Duration of measures
- Scope of measures (i.e. affected countries/exporters)
- Threshold (degree) of injury
- Ability for affected country to take compensatory response measures

Differences amongst "trade remedy" tools

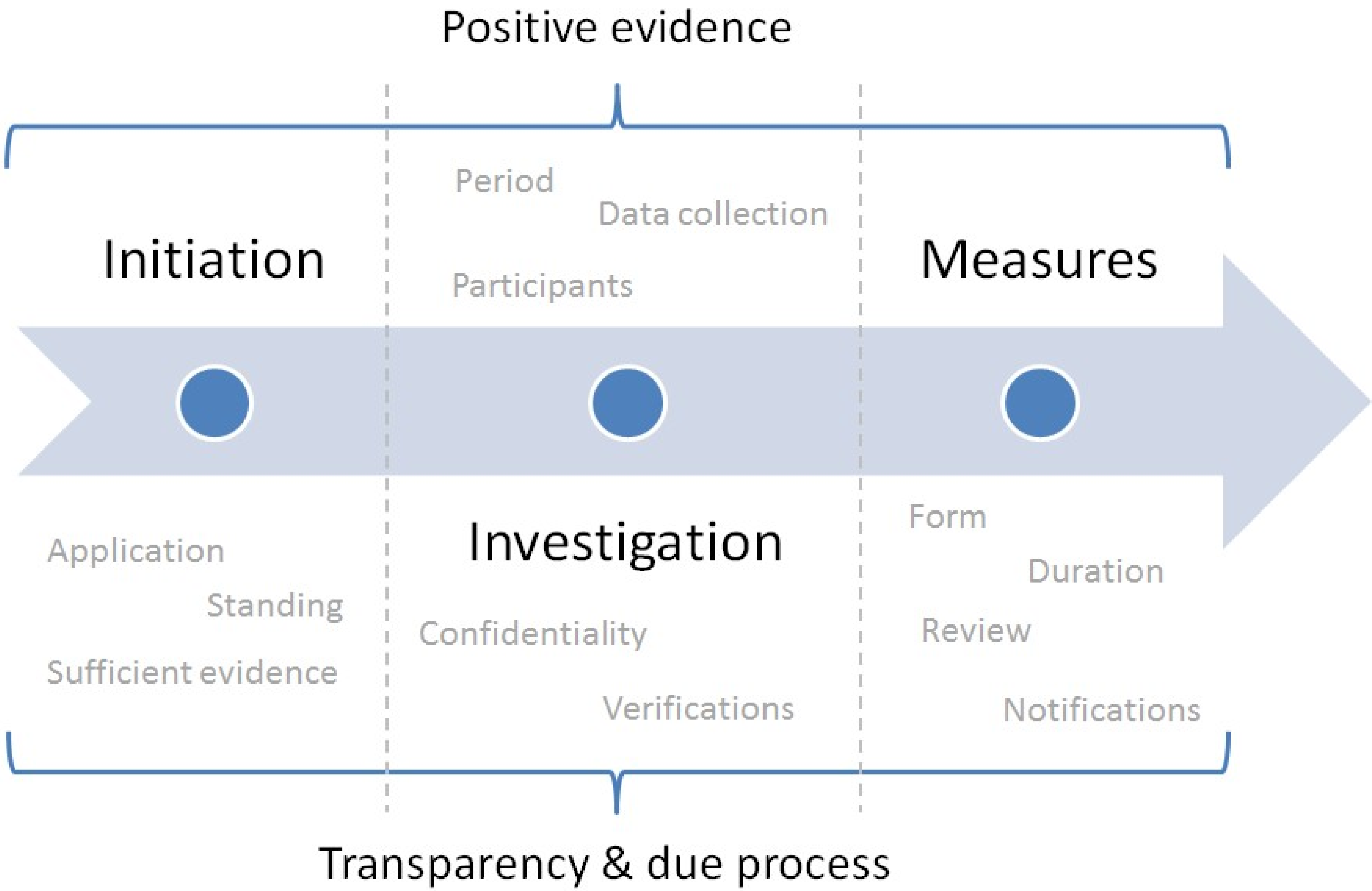


Investigations

- Main features of investigations
- Role of investigations in interpreting legal provisions
- Focus on investigations in WTO disputes

Investigations – Absent from GATT

- **Main innovation of Uruguay Round**: Avoid abuse/protectionist use of trade remedy instruments **by requiring investigations** that protect due process rights of investigated manufacturers and domestic industry
- **Article 1 Anti-Dumping Agreement, "Principles"**: An anti-dumping measure shall be applied **only** under the circumstances provided for in Article VI of GATT 1994 and **pursuant to investigations initiated and conducted in accordance with** the provisions of this Agreement.


Positive evidence
Period
Data collection
Initiation
Participants
Measures
Application
Standing
Sufficient evidence
Investigation
Confidentiality
Verifications
Form
Duration
Review
Notifications
Transparency & due process

Investigations – Obtaining evidence

- Evidence-gathering by an investigating authority relies primarily on **voluntary cooperation** by domestic industry and exporters
  - Authorities have certain information sources at their disposal (e.g. import and customs statistics)
  - **Questionnaires** are issued to investigated exporters and to the domestic industry seeking information and evidence necessary for the investigation
- Investigating authorities **do not have subpoena powers to compel evidence** from exporters based in foreign jurisdictions, nor to compel their cooperation in verifying their questionnaire responses through on-site inspections
  - Designation of an exporter **as "uncooperative" and use of adverse facts and inferences** against that exporter is a tool to promote cooperation

Investigations – Evidence and non-cooperation

- When evidentiary gaps due to non-cooperation, overall requirement is to identify **reasonable replacements** from “facts available” with a view to an **accurate determination**
- **Procedural context** can play a role when selecting replacement facts
- **Non-cooperation** can be relevant **procedural context**, and **adverse inferences** can be legitimately drawn in certain instances to selecting replacement facts
- On the other hand, **genuine attempts** to submit information, or provision of verifiable/timely information by another interested party (e.g. an interested government) may militate against adverse facts

Investigations – Outcome and measures: Dumping/Subsidies

- If **negative** for certain exporters (e.g. no dumping), investigation terminated
- If **affirmative** for some/all exporters:
  - Anti-dumping/countervailing duty in form of tariff collected at border
  - Tariff rate reflects margin of dumping/subsidisation (unless lesser duty rule applied)
  - Individual exporter tariff rates for cooperating exporters (unless non-sampled)
  - If sampling used, rate for non-sampled exporters (often an average)
- For uncooperative exporters (and unknown exporters), a country-wide ("catch-all") rate often reflecting highest margins
- **Safeguards**: applicable to all imports, flexibility as to "form"…

Investigations – Central to interpretation

"The interpretation of any provision of the SCM Agreement must leave intact an investigating authority's ability to arrive at a negative or affirmative determination. A legal interpretation that ***imposes an evidentiary burden on an investigating authority that is impossible to satisfy in practice would not be consonant*** *with the text and structure of the SCM Agreement"* (Panel Report, DS436 – 21.5)

Investigations – Central to interpretation

WTO litigation over trade remedies

- As international treaties, the legal provisions are interpreted in accordance with customary international law
- A special rule of interpretation applies to the Anti-Dumping Agreement – Article 17.6(ii):

  "the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement ***admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations****"*

- *Space to adapt to particular investigation or specific means of implementation in domestic law*

Conduct of investigations – central to disputes

- **Conduct of the investigation** is typically the main focus of WTO litigation over trade remedies
- WTO adjudicators do not consider the evidence afresh, but rather focus on whether the investigating authorities acted fairly, e.g. Art 17.6(i) of Anti-Dumping Agreement:

  "in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was ***unbiased and objective****. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned"*

Conduct of investigations – central to disputes

What qualifies as not "unbiased and objective" in the conduct of an investigation?

- Must show the authorities somehow "*favour[ed] the interests of any interested party, or group of interested parties, in the investigation*", e.g:
  - the failure of an authority to address a directly-relevant and substantiated point that conflicts with its factual finding;
  - the adoption by the authority of one side's evidence without addressing the other side's evidence; or
  - the presence of meaningful inconsistencies in the authority's own reasoning on the facts

Conduct of investigations – central to disputes

- **How to prove that an authority was not "unbiased and objective"?**
- Often, a question of competing burdens
- **Burden on interested parties:** If an interested party does not raise a matter at all, or raises a matter without substantiating evidence or only piecemeal evidence, it would not be expected to appear in the published report – ignoring such matters will often not impugn "unbiased and objective" standard
- **Burden on authorities – the "duty to investigate"**: If an authority is put on notice of a significant matter, it cannot ignore it: "*in conducting its investigation, an investigating authority must actively seek out pertinent information and may not remain passive in the face of possible shortcomings in the evidence submitted*" (AB, EU – PET)

Anti-dumping in WTO framework

Overview of this session

1. The what/why of “dumping” in international trade
2. Nature of multilateral rules on “dumping”
3. Overview of legal steps/precepts on adopting anti-dumping measures

What is “dumping”

A manufacturer sells its goods in an export market for a lower price than sold in its own market

Basic concept of dumping

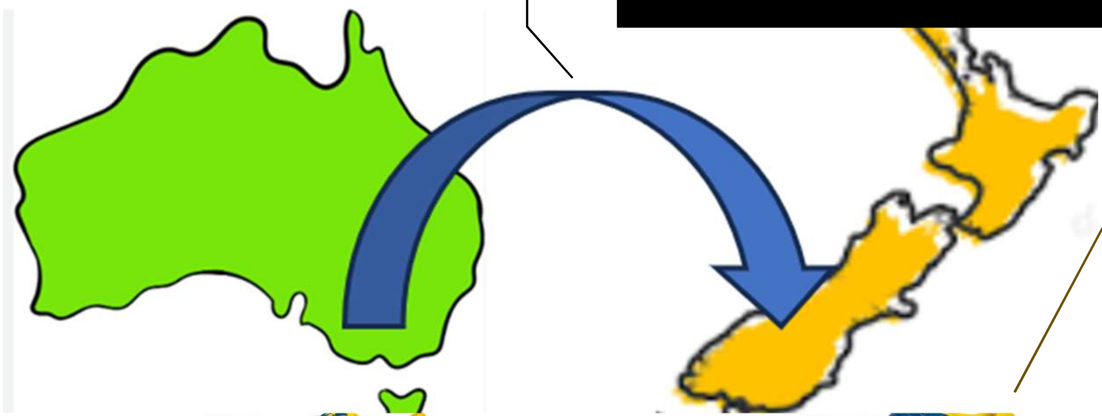
Key notion

Introducing a product in… B (the importing country) at le… in country A (the exporting…

Comparability between the context in which the prices are formed in respective markets

Country A

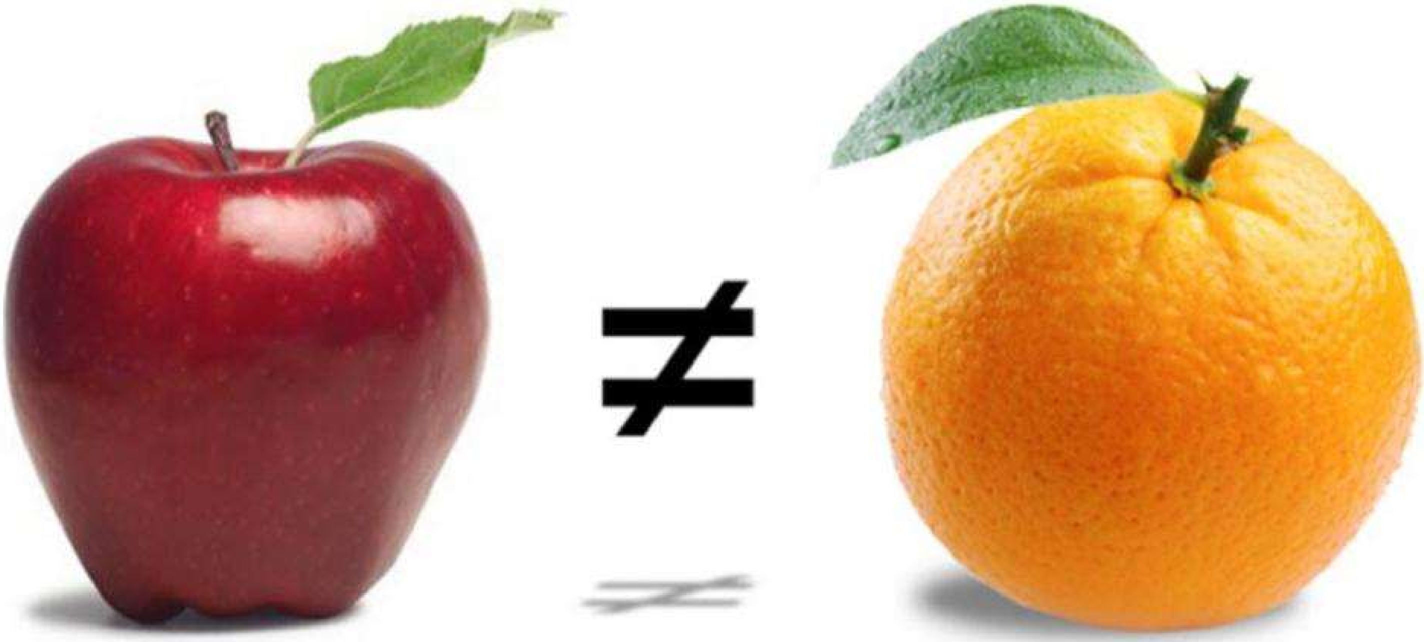
Comparison between prices is at heart of "dumping"



= $100

= $90

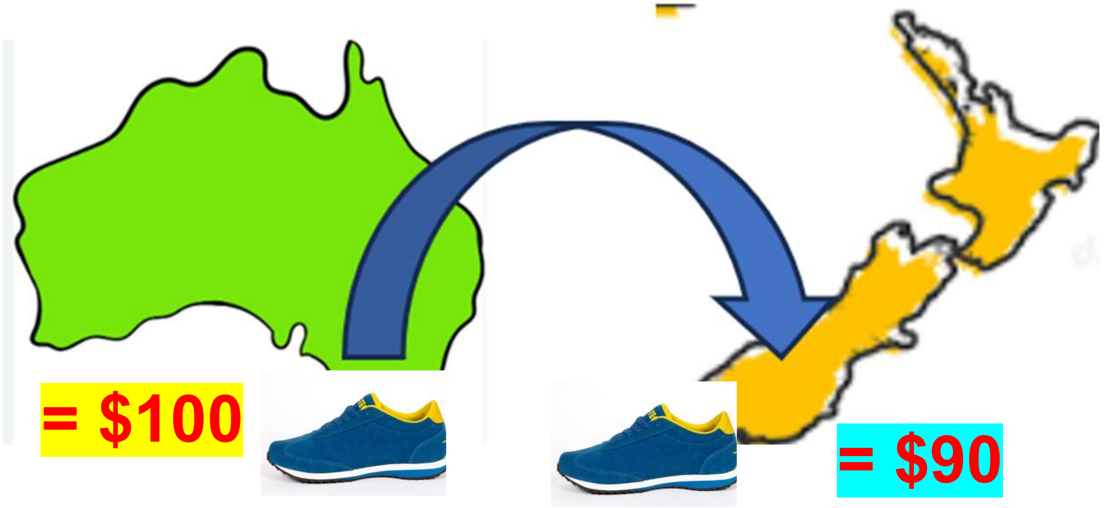
Comparability between the shoes and their sales transactions



Comparability issues can arise from differences in either:

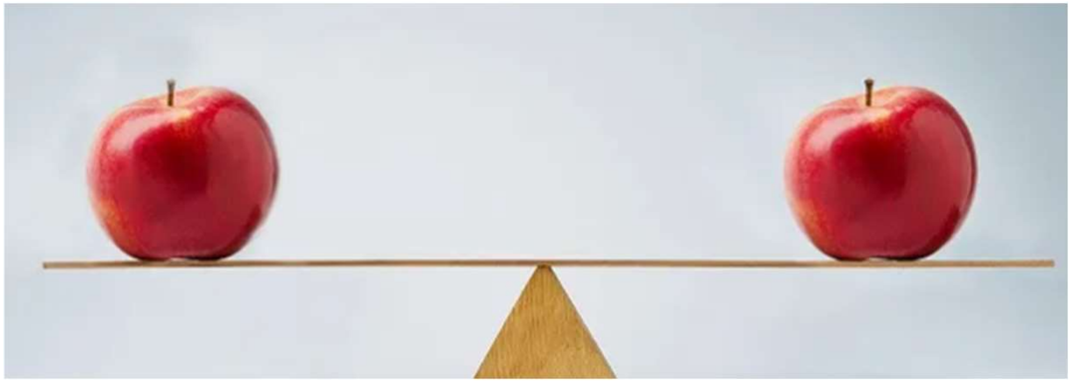
- The **domestic and export <u>transactions</u> themselves** (e.g. different tax, freight, physical aspects
- The **context of in which the export vs domestic prices <u>are formed</u>** (e.g. market conditions vs distorted economic conditions)

Basic concept of dumping



Adjustments may be warranted to e.g. domestic prices to ensure an "**apples**-to-**apples**" comparison with export prices.

Adjustments / ensuring **price comparability** can be critical to "dumping" in some cases



What is the purpose of anti-dumping measures?

- No singular policy rationale
- AD measures can manage uneven levels of trade liberalisation (and relatedly, monopolistic profit leveraging in protected/less competitive markets)
- AD measures can manage predatory pricing strategies
- AD measures can manage below-cost sales
- AD measures can address differences in economic models/regulatory frameworks
- According to some economists, AD measures “punish” legitimate price differentiation amongst different markets

Why do manufacturers “dump” in international trade

- A company that enjoys a protected domestic market may leverage high domestic profits to sell its product for cheap in export markets
  - In sectors with economies of scale, **dumping reduces the firm’s average production cost** and allows it to achieve competitive advantage
  - *Steel/aluminium, Glass, Chemicals and plastics*

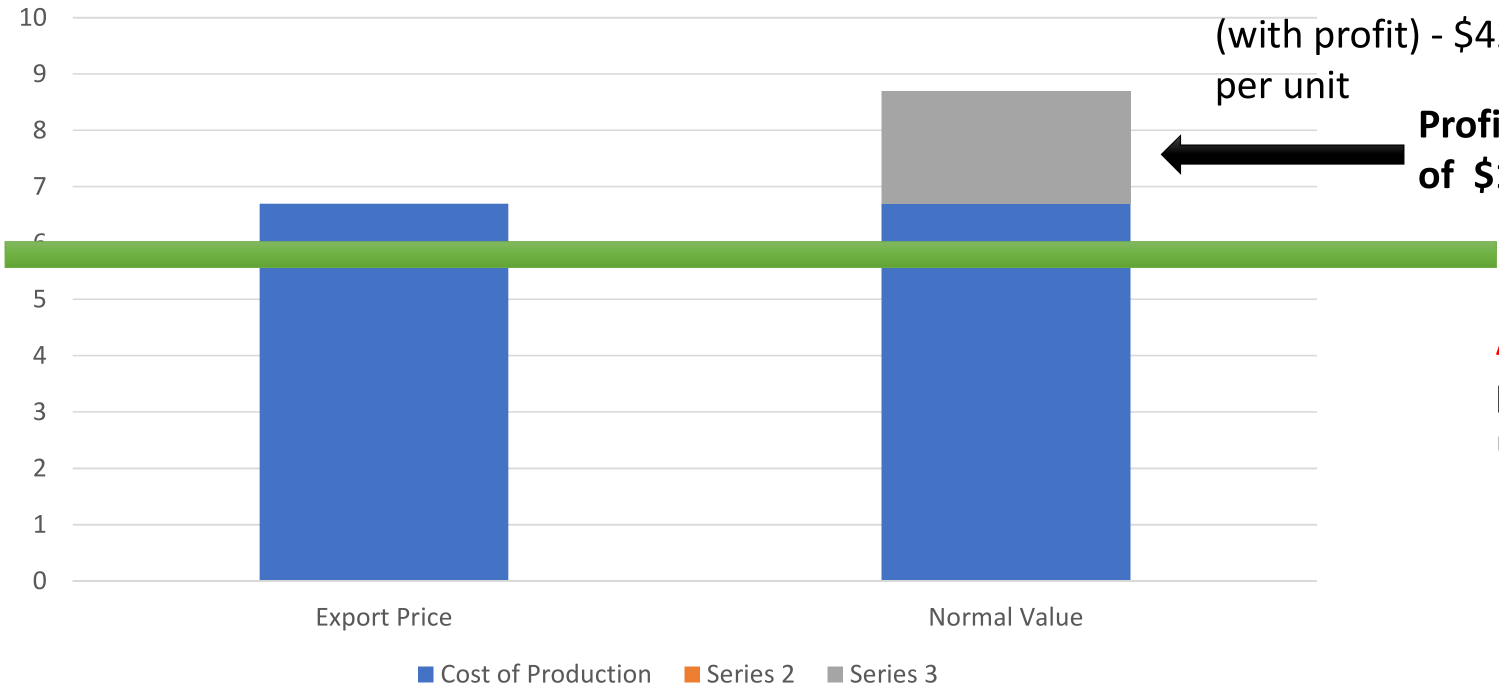
- A company may try to **monopolize** a market by temporarily selling its product below the production cost and thus drive other firms out of business.
  - Once a monopoly status is achieved the firm can (more than) recoup its losses by increasing the price.
  - “Predatory dumping”

Below cost-recovery sales and dumping

“Dumping” despite identical export/domestic price

“Normal value” (with profit) - $42 per unit

Profit component of $10 per unit



Actual price: Below cost

Actual export price - $30 per unit (below cost)

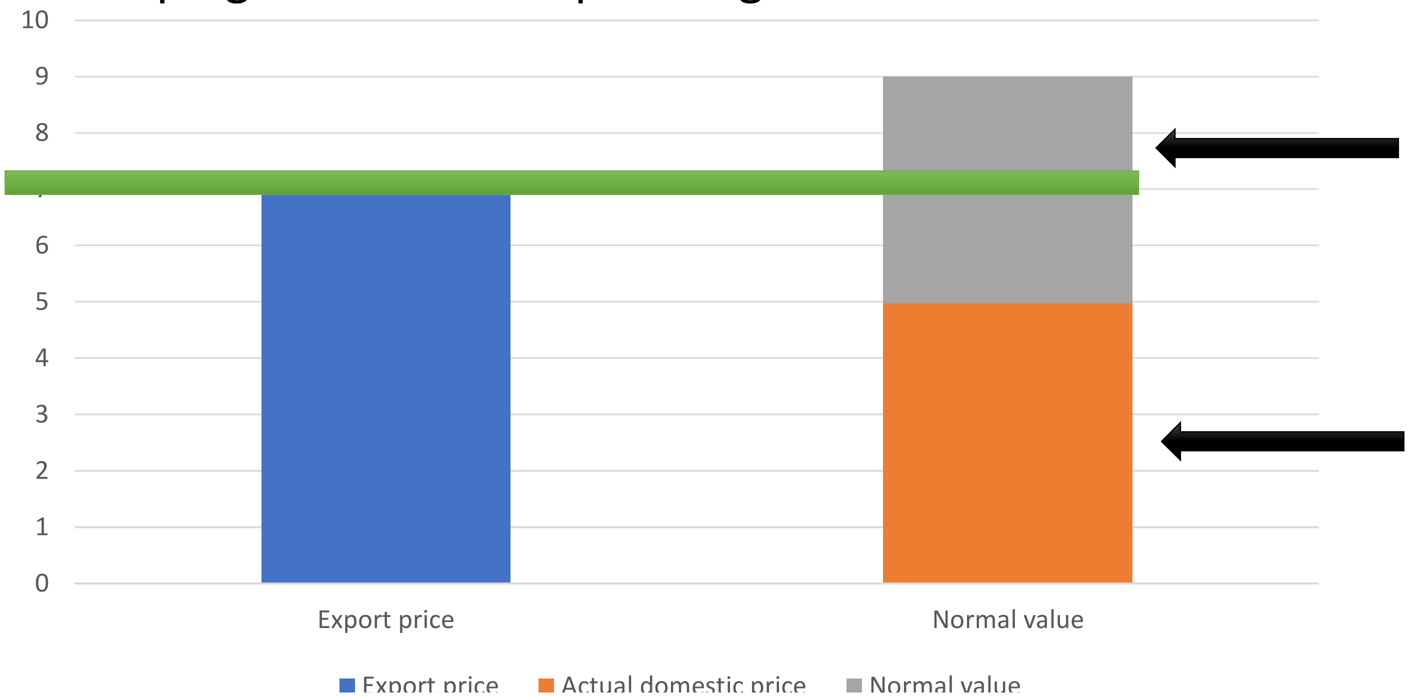
Actual domestic price - $30 per unit (below cost)

Dumping – different economic models

- Replacing the actual domestic price with a different normal value that removes the effect of governmental intervention adds $4 per unit
- "Undistorted" normal value becomes $9, now **exceeds** export price
- Finding of dumping arises from impact of governmental intervention

Export price: Below normal value

Export price - $7 per unit



"Undistorted" component of production cost - adds $4 per unit **= dumping**

Actual domestic price - $5 per unit (below export price, **no dumping**)

Anti-Dumping in WTO framework

General Agreement on Tariffs and Trade (GATT)

- Injurious dumping "**condemned**" but not prohibited (Art VI GATT):
  - The dumping firm gains market share even if *a priori* it did not have competitive advantage
  - Perceived unfairness when exporters offload production in other markets at lower prices or below-cost rates
  - Anti-dumping measures only apply when they cause injury to domestic industries
  - Typically associated with pricing strategies of individual manufacturers (as distinct from governmental policies)

Anti-Dumping in WTO framework

Anti-Dumping Agreement: A framework for investigations/due process

- Focus on States' response to dumping: <u>**investigations**</u>
- <u>**Key concern**</u>: AD measures not used for veiled protectionist purposes. Balance between prescribing "rules" and need for investigative discretion
- <u>**WTO litigation**</u>: "unbiased and objective" conduct by authorities

Dumping – Legal Steps

Equation: Export Price < Normal Value = Dumping

- Determine "**normal value**" – manufacturer's price in its own market
- Determine "**export price**" – manufacturer's price in the market of the aggrieved country/competitors
- **Make a comparison** between the export price and normal value to see if the normal value is higher

Dumping – Normal Value

Basic elements of "normal value" (Article 2.1)

- The price of the like product when sold in the exporting country (the country of the investigated manufacturer)
- More specifically, NV is *normally*
  - the *comparable* price
  - in the *ordinary course of trade*
  - for the *like product*
  - when destined for consumption in the exporting country, i.e. the market of the investigated manufacturer

D... Normal Value

Le... n... ...2)

- There a... the
  - E.g. sales ... ices – *Art 2.*...

OR

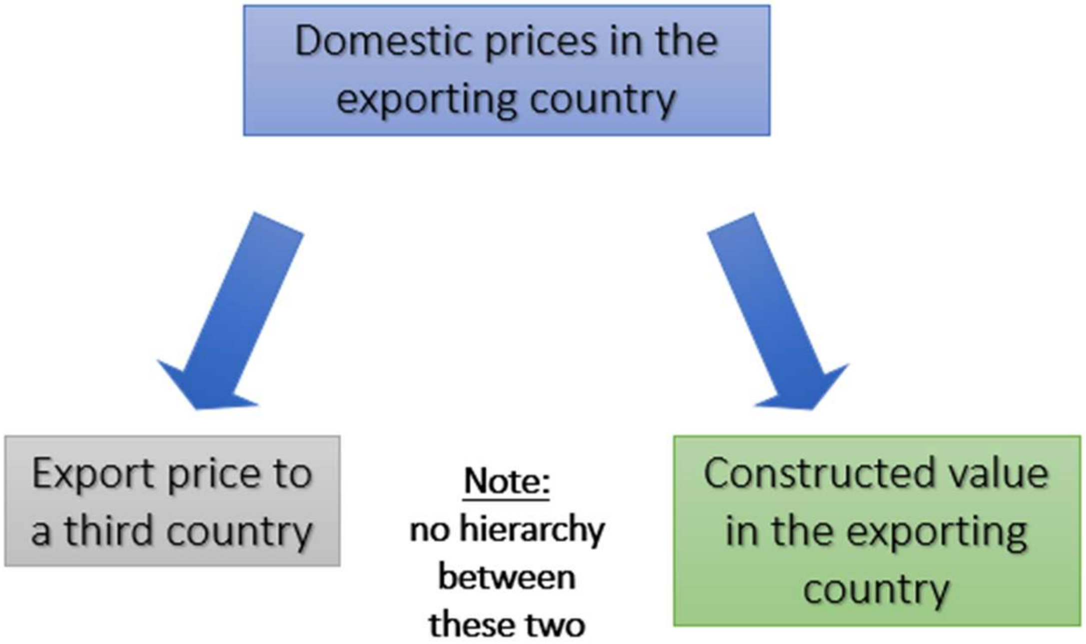
- Home market *sales do not permit a proper comparison* because of:
  - *low volume* of sales in the domestic market of the exporting country, i.e, less than 5% of investigated imports
  - a *particular market situation*

We will look at these "context"-based differences after the general rules: "particular market situation"

Difference in context of price formation which implicates price comparability

Dumping – Normal Value

If home sales rejected, alternatives for normal value



Dumping – Normal Value

“Constructing” the normal value (Article 2.2)

- Constructed value refers to the construction of a substitute for the domestic market price in the exporting country
- Constructed value calculated as:
  - Cost of production in country of origin – (**comparative advantage**)
  - ***plus*** reasonable amount for administrative, selling and general costs
  - and reasonable amount for profits

Dumping – Export price

Typical case –

- The price of the exported product in the market of the importing country

But, can **use an alternative**:

- If there is no export price

OR

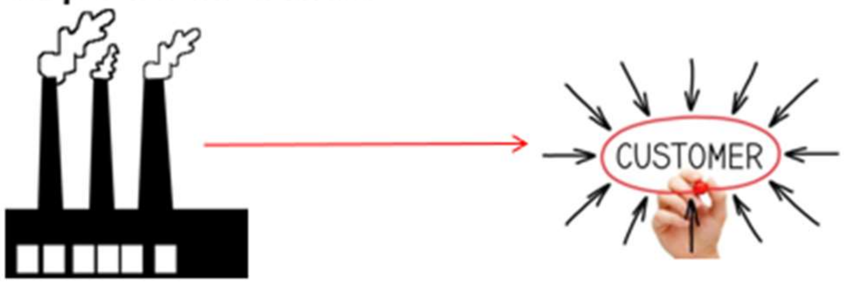
- Where it appears that the export price is unreliable because of association, or compensatory arrangement between the exporter and the importer

Dumping – Price comparability

Comparison must be "fair"

- The comparison must be made with respect to sales
  - at the same level of trade,
    - *normally ex-factory level,*

    and
  - as nearly as possible the same time

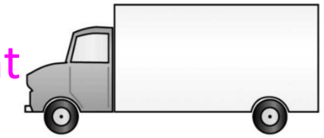


Dumping – Price comparability

- *Due allowance* must be made for differences which affect price comparability, including differences in
    - conditions and terms of sale, e.g. discounts

    - taxation
    - quantities

freight

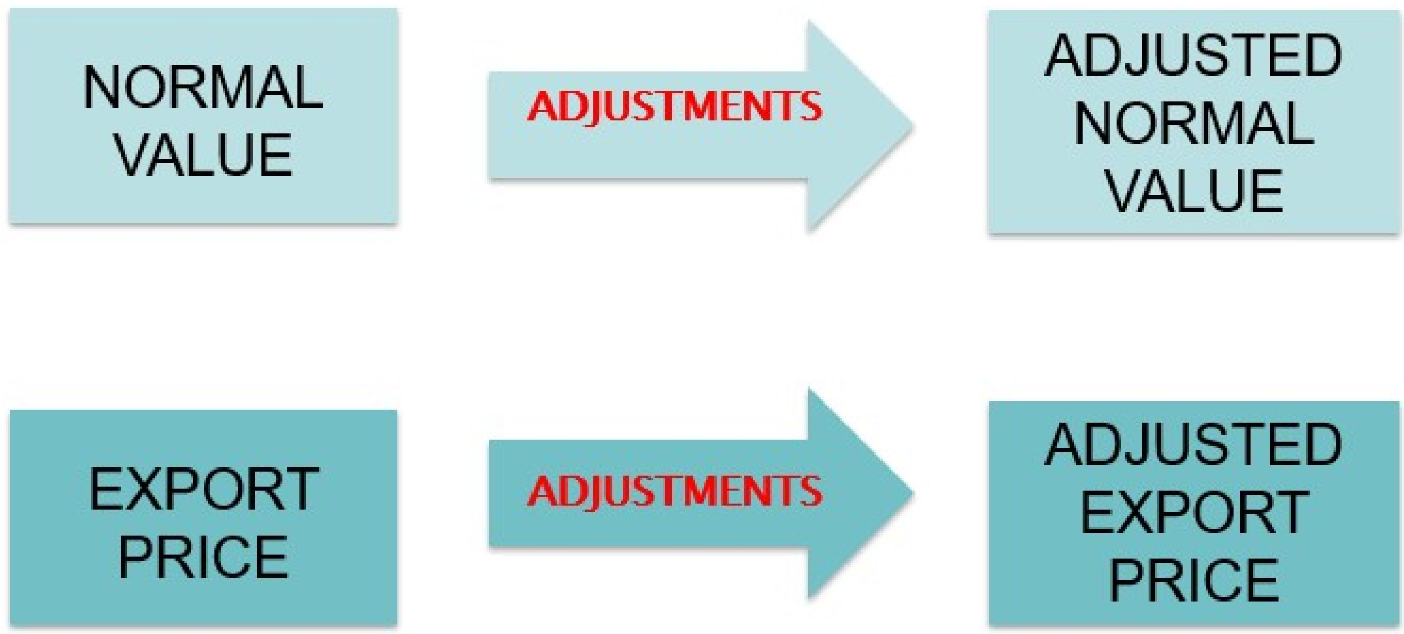


    - physical characteristics

packing

    - levels of trade, and
    - any other differences which are demonstrated to affect price comparability

Dumping – Price comparability



Example

Like product in the exporter's domestic market

$1

Exported product

$1.20

No dumping?

Example

Assume a cost to peel of $0.5

+

=

$1 $0.50 $1.50

Adjustment

Example

Like product in the exporter's
domestic market (adjusted)

Exported product

Dumping = $0.30

$1.50

$1.20

SUMMARY: HOW TO DETERMINE DUMPING

"**Normal value**" – establishing the manufacturer's home market sales

"**Export price**" – establishing the manufacturer's sales into the market of the investigating country

"**Comparison**" – ensuring that the comparison between the normal value and export price is **fair**

DUMPING: “Context” of price formation and the law of anti-dumping measures

Dumping – Price comparability

CONCEPTUAL BACKGROUND

<u>Context</u> in which prices are formed can be a relevant consideration

- If the export price and the domestic price are formed in wholly <u>different contexts</u>, this could lead to an apples-to-oranges comparison
- Referred to as "***special difficulties*** *may exist in determining* ***price comparability***" in some WTO rules (GATT Ad note; see also Accession Protocol of certain Members, etc)
- Some authorities seek to make adjustments to the domestic price to generate **equivalent contexts** for price formation, and ensure an apples-to-apples comparison

Dumping – Price comparability

BACKGROUND – “Non-Market Economies”

- Focus of the Anti-Dumping Agreement on the pricing behaviour of private actors contrasted with the focus of the Subsidies Agreement by price-distorting interventions by States.
- But costs/prices in centrally planned economies set by State, not supply/demand/price signals, therefore not reliable for assessing dumping
- Investigating authorities allowed to use a so-called “**non-market economy**” (NME) methodologies and determine normal value by reference to **costs of production/prices occurring in a third country / constructed NV**.
- **Rationale**: certain countries (China, Vietnam) with legacy of communist economic system considered (by some) not to have fully become market economies

Czechoslovakia proposal - 1958

7. In commercial relations between countries with different economic systems account should be taken of the different functions of individual economic notions in these two systems. One of these differences brings about the incomparability of export and internal prices the last mentioned being subject to different economic laws in the two different systems. The fact that an export price of a product of a country which has a monopoly of foreign trade and where all domestic prices are fixed by the State is lower than the price of a similar product when sold on the internal market, does not mean that there is a case of dumping. The provision in Article VI, paragraph 1, provides for due allewance to be made for differences affecting price comparability. This provision, however, needs to be further elaborated to meet the above-mentioned case.

Ad Note to Article VI of GATT

*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 paragraph 1, and in such cases importing contracting parties 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.*

Section 15 of China's Accession Protocol

Introductory text of Section 15(a) – option of "alternative methodology"

> *In determining **price comparability** under Article VI of the GATT 1994 and the Anti-Dumping Agreement, the importing WTO Member shall use either Chinese prices or **costs for the industry under investigation or a methodology that is not based on a strict comparison with domestic prices or costs in China <u>based on the following rules</u>**:* ....

Section 15 of China's Accession Protocol

Subparagraphs (i) and (ii) of Section 15(a) – the "rules"

(i) If the producers under investigation can clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product, the importing WTO Member shall use Chinese prices or costs for the industry under investigation in determining price comparability;

(ii) The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product.

WTO dispute over Section 15(a)

China launches case at against EU on 12 December 2016

EU's argument -

Negotiators for the existing Members were only able to accept the expiry of Section 15(a)(ii) safe in the knowledge that Section 15(a)(i) would continue to apply. They took steps to ensure that the remainder of Section 15(a) would remain applicable because they could not be certain that, after 15 years, China would have completed its transition to a market economy

China's argument

The expiry of Section 15(a)(ii) means that the rest of Section 15(a) has no purpose or meaning. The additional "precision" in specifying subparagraph (ii) was introduced in order to "isolate" what is the "sole" provision that "deviated from" (that is, conflicted with) the generally applicable rules.

(Published EU first written submission)

Bloomberg

Asia Edition

Subscriber Only

Politics

China Loses Landmark WTO Dispute Against EU

- Retreat provides greater legal certainty for EU, U.S. tariffs
- Bolsters U.S. claim that China has not become a market economy

“Particular Market Situation”

Article 2.2 of the Anti-Dumping Agreement:

When … because of **the particular market situation** … in the domestic market of the exporting country, such **sales do not permit a proper comparison** [*i.e. sales otherwise in OCOT*], the margin of dumping shall be determined by comparison … with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.

Examples of some domestic approaches to PMS / governmental involvement in markets

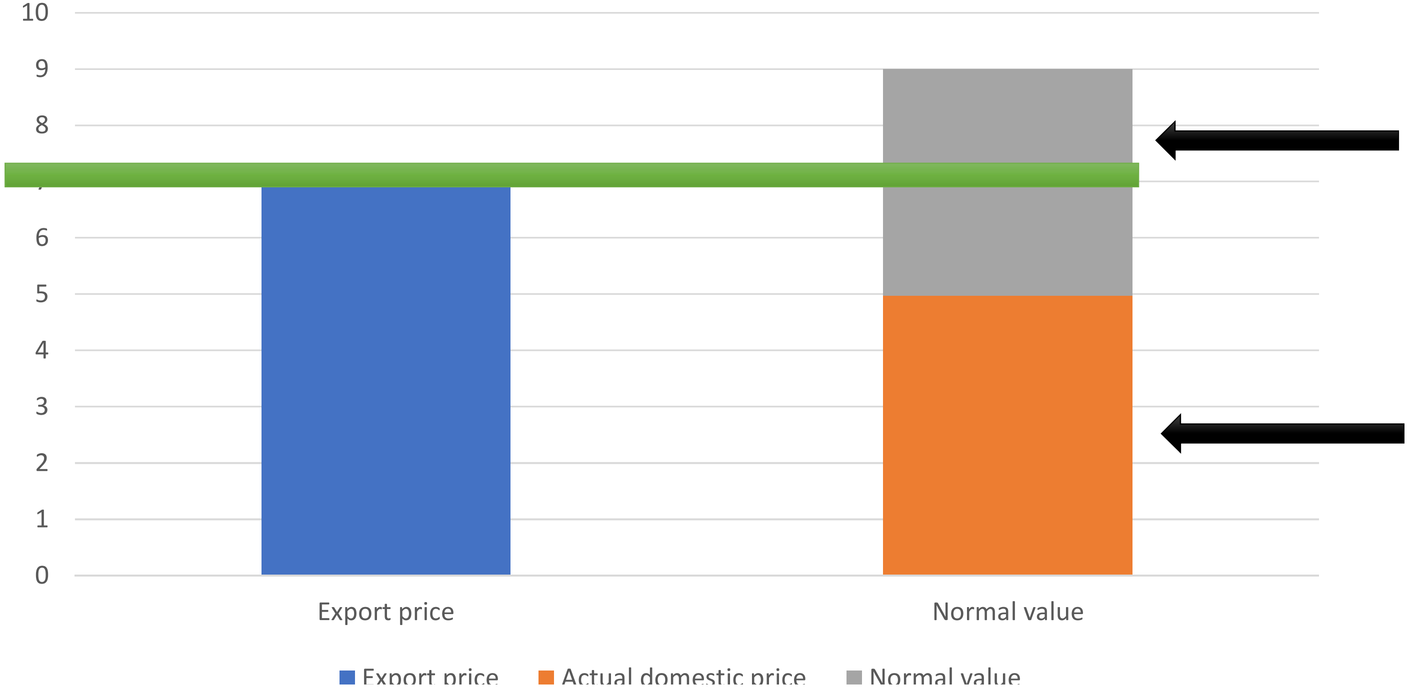
- **China** (*ethylene propylene diene monomer from US*): Rejected domestic prices due to government policies that affected supply/demand in petroleum, natural gas, coal, electric power, hydrogen, ethylene and syngas markets.
- **USA** (*oil country tubular goods from Korea*): Rejected domestic prices due to governmental subsidisation of major input costs (HRC) as “particular market situation)
- **UK** (*aluminium extrusions from China*): Rejected domestic prices due to “particular market situation” from governmental distortions in key input costs (unwrought aluminium; energy) for aluminium extrusions.
- **Australia** (*wire rope from South Africa*): No “particular market situation” because government distortions in inputs did not affect price comparability

Dumping through PMS methodology

- Replacing the actual domestic price with a different normal value that removes the effect of governmental intervention adds $4 per unit
- “Undistorted” normal value becomes $9, now **exceeds** export price
- Finding of dumping arises from impact of governmental intervention

Export price: Below normal value

Export price - $7 per unit



“Undistorted” component of production cost - adds $4 per unit **= dumping**

Actual domestic price - $5 per unit (below export price, **no dumping**)

Examples of governmental involvement and dumping in WTO litigation

- *Export taxes* – e.g. Argentinian **export tax** on **soybeans** → competitive advantage for Argentinian **biodiesel** manufacturers
- *Export bans* – e.g. Indonesian **ban on export** of **logs** → competitive advantage for Indonesian **paper**
- *Governmental price-fixing of raw materials at cheap rates* – e.g. Russian **price-fixing** of **gas** → competitive advantage for Russian **fertilizer** producers
- *Overcapacity through government-directed support* – e.g. **steel markets** in China

WTO panel ruling (*A4 Copy Paper*): no exclusion on governmental distortions

- **Indonesia**: "*there is a general principle that under … the Anti-Dumping Agreement the anti-dumping remedy is not concerned with government action*"
- **Australia**: "*government action is not exclusively covered by the [Subsidies] Agreement*" – could also be covered by the Anti-Dumping Agreement
- **Finding of panel**: "*We are not persuaded of the existence of the general principle that Indonesia proposes. … [W]e find it implausible that such a general principle with preclusive effect on the scope of application of the Anti-Dumping Agreement would exist without an express basis in the text of either the Anti-Dumping Agreement or the [Subsidies] Agreement*."

Same export/domestic price and dumping

- Governmental interventions that lower a manufacturer's production costs **do not discriminate** between export/domestic prices of manufactured goods
- Dumping requires the normal value (domestic sales price) **to be higher** than the export price
- Ordinarily, the Anti-Dumping Agreement requires the manufacturer's **actual domestic sales prices** to be used for "normal value"

“Particular market situation” methodology

- Compatibility of this pathway with WTO rules rests on three assumptions:
  - Can **governmental interventions** that artificially lower a manufacturer’s production costs (e.g. raw materials) constitute a “particular market situation”?
  - Do governmental interventions that artificially lower a manufacturer’s production costs **preclude a “proper comparison”** between the domestic and export prices of the investigated product?
  - Does the “**normally**” flexibility allow an authority to reject a manufacturer’s recorded raw material costs **if distortions in those costs are the basis** for the particular market situation?

“Particular market situation”

- Panel, *A4 Copy Paper*: Government distortions in raw material costs can constitute a “particular market situation”
- “Particular market situation” not defined
  - “*a fact-specific and case-by-case analysis of the particular market situation is necessarily called for*”
  - “*we are also not persuaded that ‘the particular market situation’ referenced in this provision necessarily excludes any situation that arises from a subsidy or other governmental action*”
  - Held that governmental interventions that distort input costs can potentially comprise a “particular market situation”

Assumption: True ☺

"Permit a proper comparison"

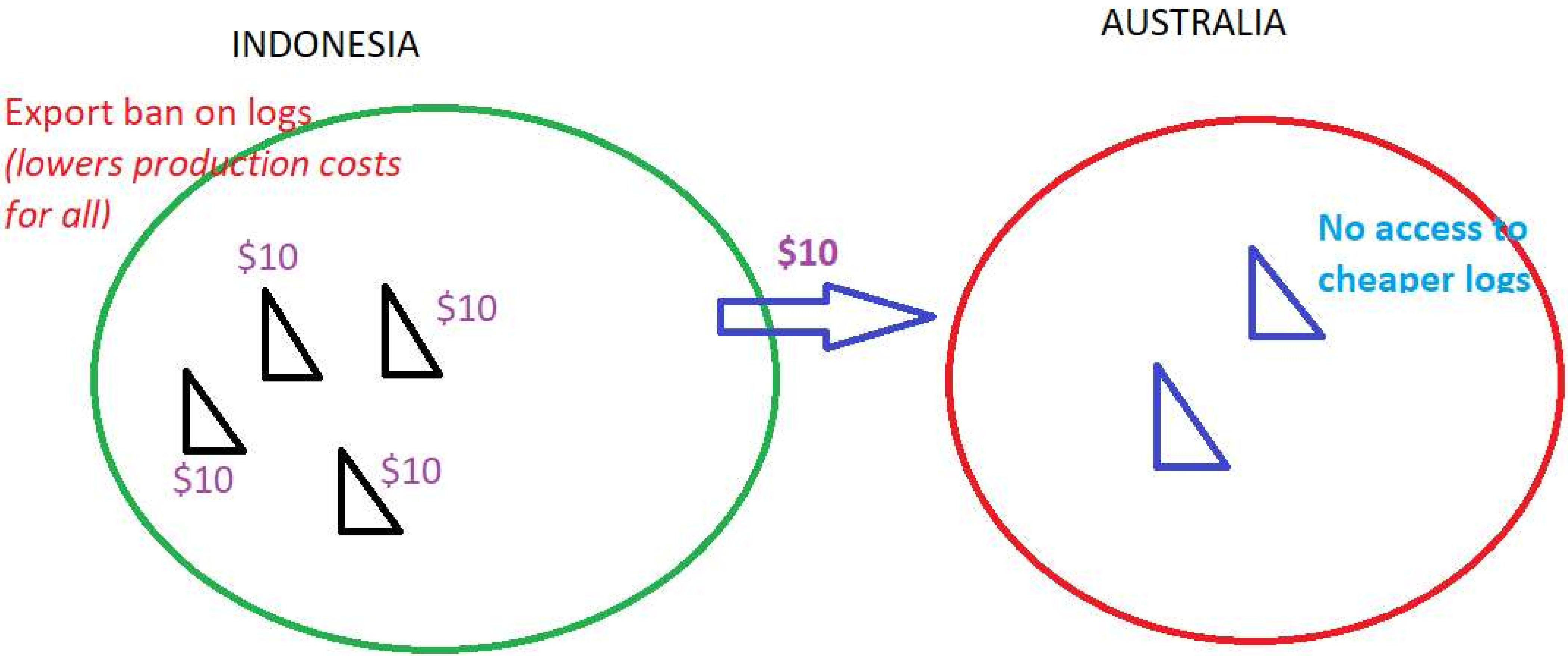
Assumption:
… Unclear?

- Article 2.2: "**because of** the particular market situation …, [domestic] sales **do not permit a proper comparison**…"
- Indonesia: This requires comparison between domestic and export sales, and a governmental intervention that affects both prices equally does not preclude a proper comparison
- Australia: Need only consider the PMS on domestic sales
- Panel: "*The function of the "permit a proper comparison" test is to determine whether the domestic price can or cannot be used as a basis for comparison with the export price to identify the existence of dumping*." Australia had considered only the impact on domestic sales, not comparability

“Permit a proper comparison”

Australia – A4 Copy Paper, further remarks on “proper comparison”:

- *“the "proper comparison" language calls for an assessment of the* ***relative effect*** *of the particular market situation on* ***domestic and export prices****.”*
- *“a* ***purely numerical comparison*** *between the two prices may* ***not*** *reveal anything”*
- *“how domestic prices and export prices of an individual exporter are affected* ***notwithstanding an equal decrease in input costs*** *is likely to depend significantly upon a number of factors, including the prevailing* ***conditions of competition in each market*** *and the existing relationship between price and cost. We consider that an exporter may find itself with* ***different options in respect of how to take advantage of an input cost decrease depending on market conditions in each market****.”*


INDONESIA
AUSTRALIA
Export ban on logs
(lowers production costs
for all)
$10
$10
$10
$10
$10
No access to
cheaper logs

"Normally"? – *Ammonium Nitrate* case

2.2.1.1 For the purpose of paragraph 2, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration. Authorities shall

Appellate Body, Ukraine – Ammonium Nitrate: *The term "shall" in this first sentence of Article 2.2.1.1 indicates that it establishes a mandatory rule in this respect, whereas the term "normally" suggests that this rule may be derogated from under certain conditions.*

“Normally”? – *Ammonium Nitrate* case

Is there necessarily a tension between arriving at a “cost of production in the country of origin” and using cost data that strips out the “market situation” affecting actual costs in that country?

- If a feature of an economy can be characterised as an element of comparative advantage – i.e., part of the economic landscape of a country – it may be difficult to envisage how it could be characterised as **“situational”** and hence a PMS
- Conversely, if a circumstance is “situational”, it may lack the **structural character** that would be associated with an element of comparative advantage that connotates “cost of production in country of origin”
- Often there may be **no tension** between a PMS-based cost replacement on one hand, and deriving a "cost of production in the country of origin"

Summary on legal pathway for dumping/government interventions

- "**Particular market situation**" **can** encompass governmental interventions that artificially lower raw material/input costs
- "**permit a proper comparison**" – **even if** the governmental intervention affects production costs equally of both domestic and export sales, **key point** is how this relates to market conditions
- "**normally**" – the potential of reintroducing a distortion that was permissibly the basis for constructing normal value is a permissible reason to disregard the distorted raw material/input costs (?)(**analogous case**)

Replacement value under Art 2.2

Appellate Body, *Ukraine – Ammonium Nitrate*:

- *"With regard to the construction of normal value, the fact that "the cost of production" is that "in the country of origin" defines the parameters of that inquiry. This phrase indicates that **whatever information or evidence is used to determine the "cost of production", it must be apt to yield or capable of yielding a cost of production "in the country of origin"**."*

Appellate Body, *EU – Biodiesel*:

- *"When relying on **any out-of-country information** to determine the "cost of production in the country of origin" under Article 2.2, an investigating authority has to ensure that such information is used to arrive at the "cost of production in the country of origin", and this **may require the investigating authority to adapt that information**"*

Summary: Government interventions & dumping

- <u>Underlying concern</u>: governmental interventions that artificially depress raw material costs confer a competitive advantage on manufacturers
  - Export taxes, export bans, price-fixing, other forms of support
  - International competitors do not have access to same low-priced raw materials, thus have higher manufacturing costs and less competitive
- Dumping traditionally concerned with "<u>private</u>" pricing behaviour
- Anti-Dumping Agreement <u>silent</u> on competitive advantages from governmental interventions – no express prohibition/permission
- Legal flexibilities <u>may allow this</u> in some cases – <u>uncertainty/disputes</u>

Environment and labour standards

Is there a role for weak, unenforced, or absent environmental and labour standards in anti-dumping investigations? – domestic approaches

- **UK – aluminum extrusions investigation:**
  - UK industry alleged “particular market situation” based on labour conditions in China:
  - Allegations that workers unable to unionise in China; collective bargaining not available; “hukou” household registration system disrupts labour; Chinese government interferes with hiring/dismissal
- **UK authorities’ finding:**
  - Rejected claim on facts, finding Chinese law maintains a minimum wage; there have been increases in manufacturing wages; although strikes are banned, workers still strike

Environment and labour standards

Is there a role for weak, unenforced, or absent environmental and labour standards in anti-dumping investigations? – domestic approaches

- **US approach – new regulation adopted March 2024:**
  - **A "particular market situation"** can encompass: *"[g]overnment inaction and failure to enforce … human rights, labor, and environmental protections lowers the cost of production for firms in their jurisdiction"*
  - **Rationale:** "*when governments take little or no action to implement or enforce such laws, policies, and standards, benefits may accrue to a company in a way that provides the company with a financial advantage over its competitors*".
    - *"[t]his is because such firms are not paying a "cost of compliance" for which firms operating in other jurisdictions are responsible to meet regulatory standards*".

Environment and labour standards

Is there a role for weak, unenforced, or absent environmental and labour standards in anti-dumping investigations? – domestic approaches

- **EU approach:**
  - Must consider application of ILO Conventions, multilateral environment agreements, when considering "significant distortions"
  - "distorted wage costs" is a factor in "significant distortions"
  - "significant distortions" can justify rejecting domestic prices as "normal value"
- **When identifying a replacement for "normal value":**
  - "where there is more than one such country, preference shall be given, where appropriate, to countries with *an adequate level of social and environmental protection*"

Subsidies and Countervailing Measures – Basic Legal Steps

1. **WHAT**: Transaction of a particular nature that **transfers resources** to the manufacturer
2. **WHO**: The transaction must involve a particular kind of **entity** (e.g. governmental) providing the resources
3. **HOW (…much):** The transaction must confer a "**benefit**" on the manufacturer
4. **WHEN:** The transaction must be "**specific**" in nature (not general)

Step 1: What types of transactions qualify as a subsidy?

Defining "*financial contribution*" under the Subsidies Agreement

Types of transactions covered by Subsidies Agreement

Article 1.1 of Subsidies Agreement:

(i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);

(ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits)[1];

(iii) a government provides goods or services other than general infrastructure, or purchases goods;

(iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments;

or

(a)(2) there is any form of income or price support in the sense of Article XVI of GATT 1994;

TYPES OF TRANSACTIONS - FINANCIAL CONTRIBUTION (ARTICLE 1.1)

- 1. <u>Direct transfer</u> of funds
  - for example, grants, loans, equity infusions
- 2. <u>Potential</u> direct transfer of funds
  - for example, loan guarantees
- 3. Government revenue that is otherwise due is <u>foregone or not collected</u>
  - for example, tax credits or import duty exemption

TYPES OF TRANSACTIONS - FINANCIAL CONTRIBUTION (ARTICLE 1.1)

4. Provision of goods or services other than general infrastructure

5. Purchase of goods

6. Income or price support

Step 2: “Who” What entity is providing the subsidy?

Identifying whether the *entity channelling resources* to a manufacturer qualifies as a provider of a “subsidy”

Types of entities covered by Subsidies Agreement

Article 1.1 of Subsidies Agreement:

Article 1

Definition of a Subsidy

1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:

(a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:

(iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments;

ENTITIES PROVIDING THE SUBSIDY (ARTICLE 1.1)

- Financial contribution granted by **a** Gov't (e.g. Federal, Regional, or Municipal Gov't)

  OR by a **public body** (e.g. National Bank, National Power Company, etc.)

- Or Gov't **entrusts or directs** a private body to make the financial contribution

- Within the territory of a Member

Step 3: Does the subsidy confer a “benefit”?

Identifying whether the manufacturer receiving the financial contribution has obtained a competitive advantage

Types of “benefits” arising from financial contributions

Article 1.1(b) and 14 of Subsidies Agreement:

<u>“Relative” comparison (with baseline of marketplace)</u>

- If a government provides a manufacturer with raw material inputs (goods or services) for less than “adequate” remuneration
- If a government purchases a manufacturer’s products for more than “adequate” remuneration
- If a government provides finance or loans in a way that deviates from normal investment practices (on risk) or for concessional interest rates

<u>“Absolute” comparison (with baseline of zero)</u>

- If a government provides grants or cash payments
- If a government exempts a manufacturer from financial liabilities

"CONFERRING A BENEFIT" (ARTICLE 1.1(a))

Identifying comparator for "benefit"

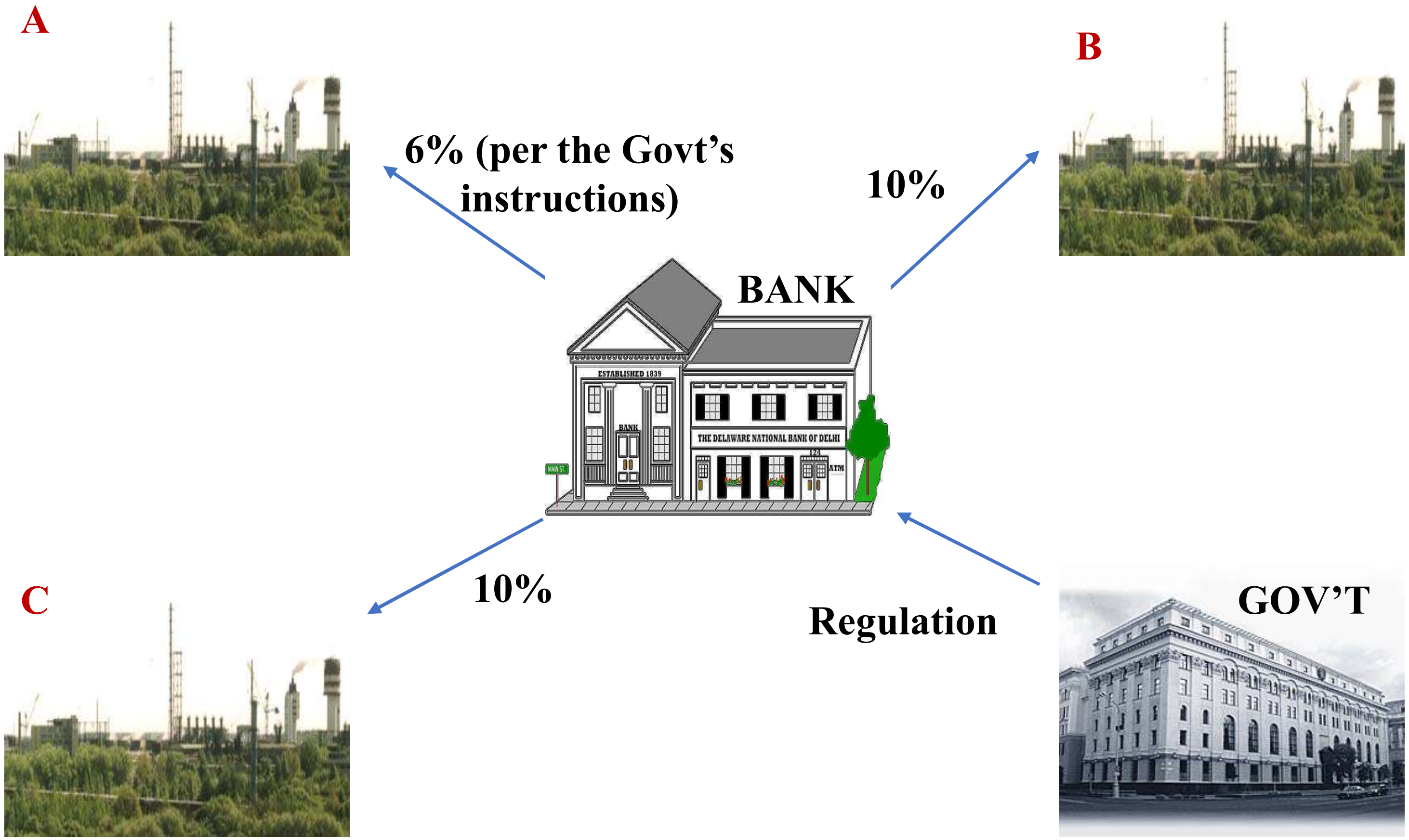
- **Legal principle**: market-determined prices for the same goods/loan (etc) in the economy of the investigated Member
- **Evidentiary principle**: Starting point should be to look to in-country private prices/rates at arms-length

  Article 14 Subsidies Agreement guidelines:

  "the usual investment practice of private investors in the territory of that Member" in Art 14(a)

  "a comparable commercial loan which the firm could actually obtain on the market" in Arts 14(b) and (c)

  "prevailing market conditions for the good or service in question in the country of provision or purchase" in Art 14(d)



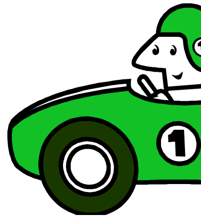
Benefit = difference in interest rates

PROVISION OF GOODS

A

Cars

10,000 USD/unit

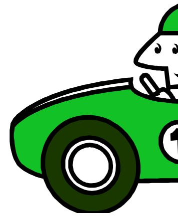


PRIVATE MOTORS Co.

A

Cars

8,000 USD/unit



GOV'T OWNED MOTORS Co.

Benefit = 2000 USD/unit

PURCHASE OF GOODS

A

SITUATION A
(price to private company)

10 USD/Unit

PAPER Co.

SITUATION B
(price to Gov't)

12 USD/Unit

PAPER Co.

Benefit = 2 USD/Unit

"CONFERRING A BENEFIT": Evidence for marketplace benchmark

Evidence/data on in-country private prices may be unsuitable

- Data itself may be **flawed**
  - E.g. "price offers" rather than concluded outcome of negotiated transaction
- Use of in-country private prices lead to **circular** comparison
  - E.g. investigated subsidy has influenced the prices of other market actors, e.g. because government is major supplier of raw materials or loans at issue
- In-country private prices **may not be "market-determined"**
  - E.g. government sets prices administratively for goods being sold by private actors
  - E.g. government is sole supplier of the goods/loans being provided
  - E.g. government has indirectly intervened in the market to such a degree that in-country prices cannot be said to be "market-determined"

"CONFERRING A BENEFIT": Evidence for marketplace benchmark

If in-country private prices are rejected, other data sources can be used

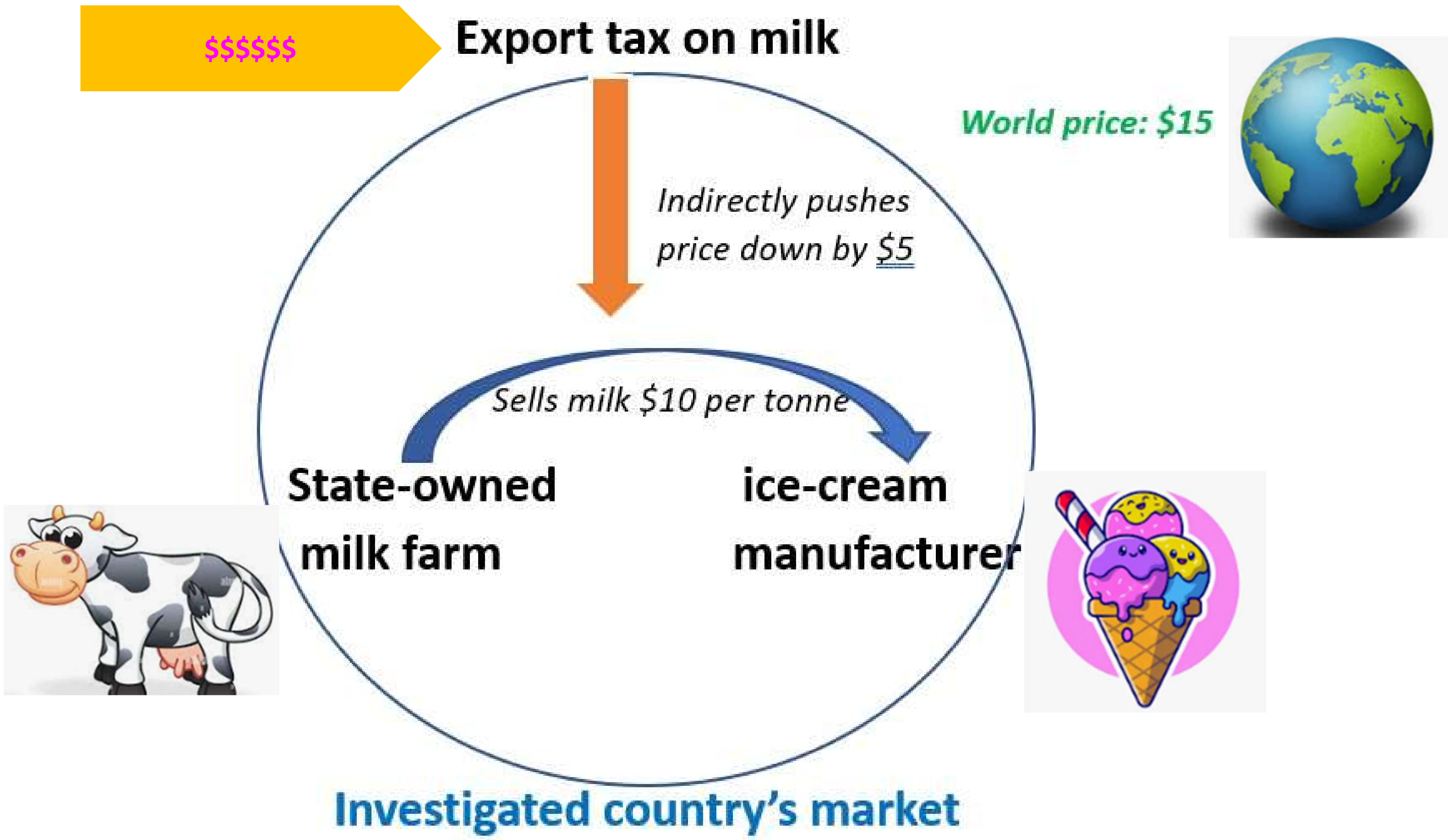
- Prices from other markets; world market prices
- Import prices or export prices from the investigated Member
- Proxy price based on costs of production

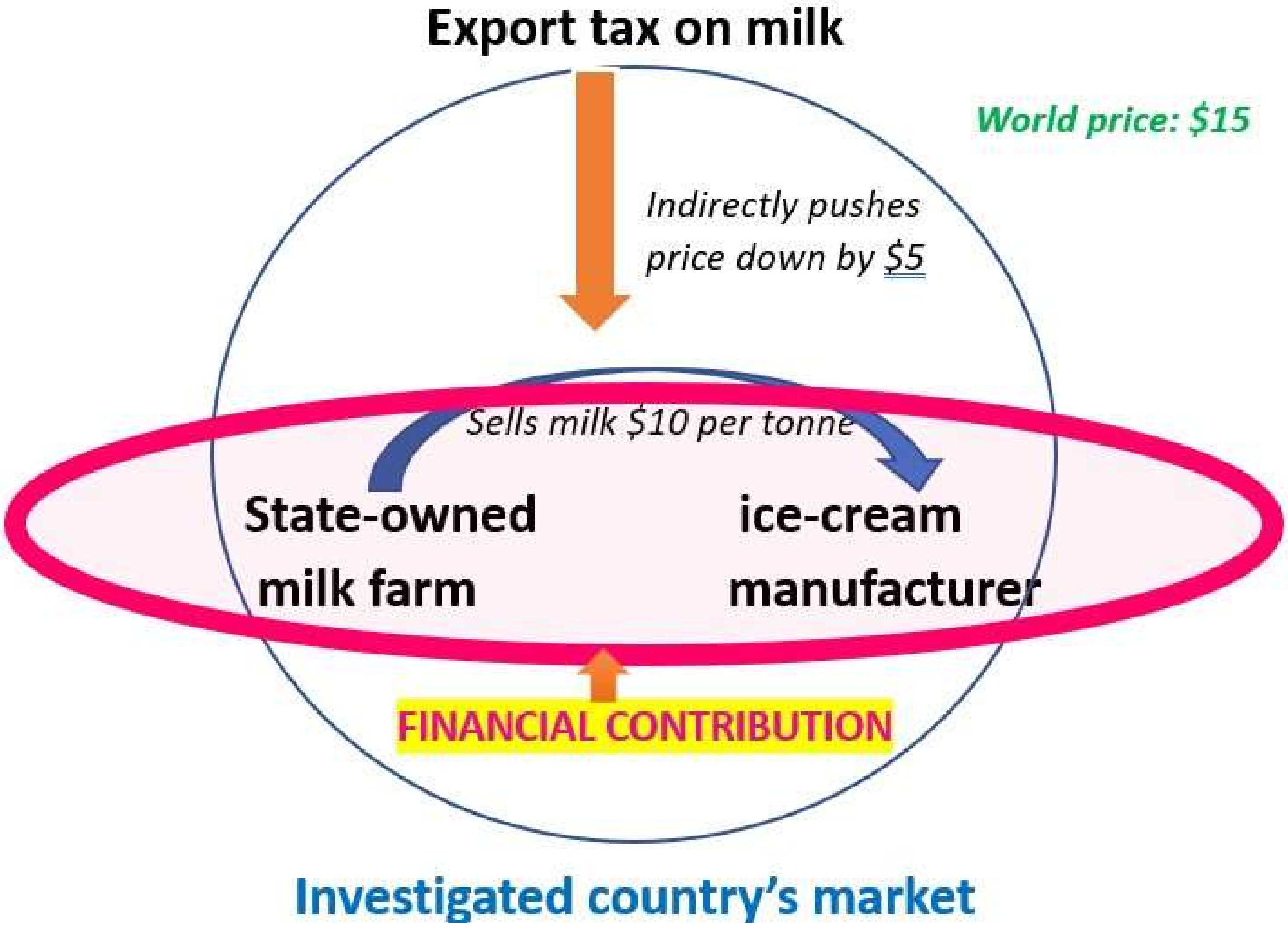
Replacement "benchmark" data should seek to approximate conditions for investigated economy

- This avoids inadvertently negating comparative advantage through anti-subsidy measures
- But what if those conditions are affected by governmental interventions/distortions that directly or indirect affect prices?

Article 14(d) – "Prevailing market conditions"

(d) the provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration, or the purchase is made for more than adequate remuneration. The adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).

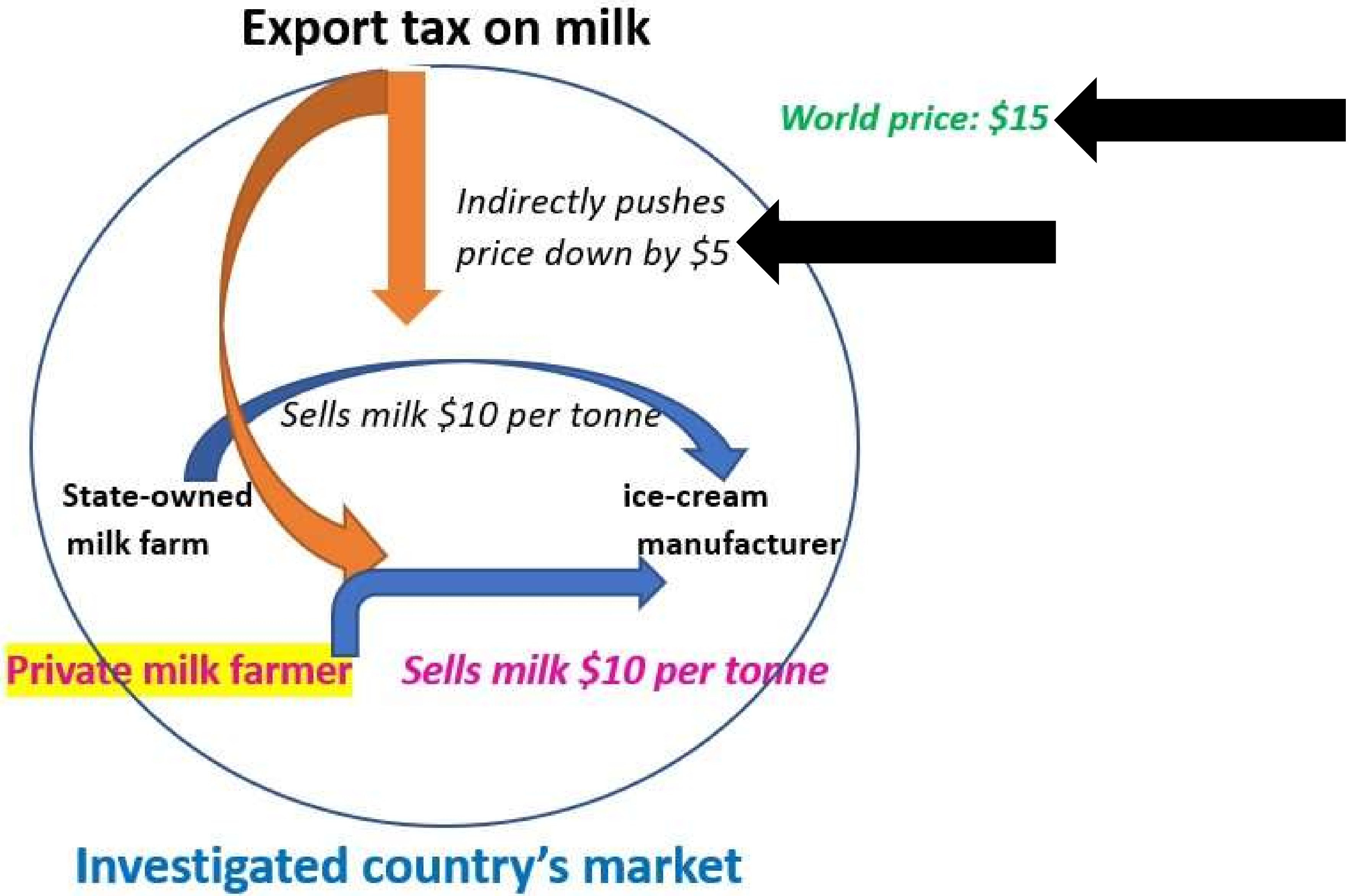

$$$$$$
Export tax on milk
World price: $15
Indirectly pushes
price down by $5
Sells milk $10 per tonne
State-owned
milk farm
ice-cream
manufacturer
Investigated country's market



- Should the state-owned milk farm's prices be compared with private prices that **are also affected by the export tax**?

OR

- Should the state-owned milk farm's prices be compared with a price that **removes the effect of the export tax**

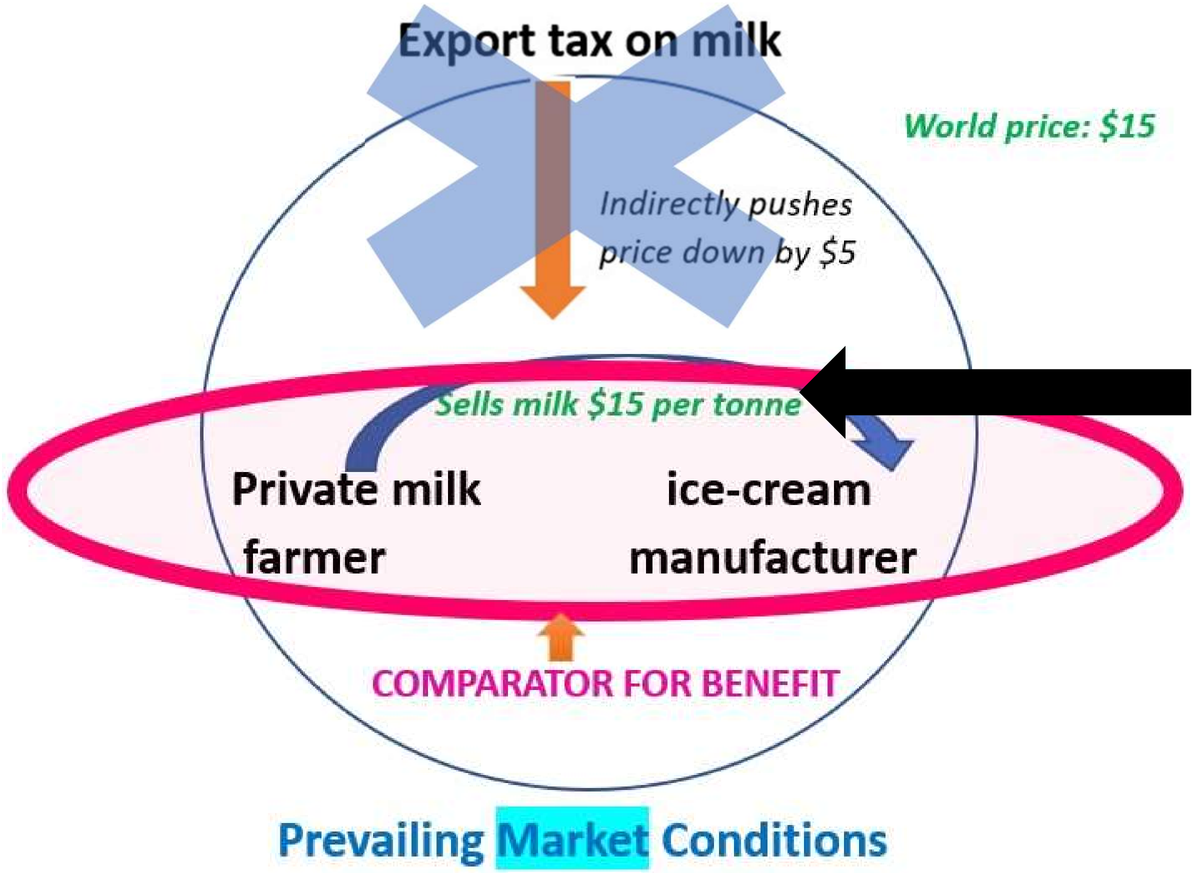

Export tax on milk
World price: $15
Indirectly pushes price down by $5
Sells milk $10 per tonne
State-owned milk farm
ice-cream manufacturer
Private milk farmer
Sells milk $10 per tonne
Investigated country's market

Appellate Body, *US – CVD (China – 21.5)*:

- Rejected China's argument that gov regulation must form part of "prevailing market conditions"
- Indirect impacts of gov regulations on prices <u>– if proven</u> – can be stripped out
- (Authority faulted for not proving link between gov interventions and specific prices of raw materials at issue)

Panel, *US – Softwood Lumber VII:*

- Canadian export quotas on logs could potentially be stripped out of "prevailing market conditions" for comparator
- But authority did not establish link between export quotas and logs (e.g. evidence of no impact)



Article 14(d) – "Prevailing market conditions"

Orthodox approach – government regulation stripped out

- <u>China</u>: "*government intervention is itself part of the prevailing conditions in any given market*"
- <u>USA</u>: "*forces of supply and demand can be distorted in a sector, even where direct control over pricing is not evident*", with the key inquiry being "*whether the distortions in the market were of such a magnitude … prices [not] determined by the 'forces of supply and demand*'"
- <u>Appellate Body</u>: "*governmental involvement in the market can take many forms, which may have distortive price effects, irrespective of whether the government directly regulates prices or indirectly affects them such that they are found to be distorted as a result.*"

Article 14(d) – “Prevailing market conditions”

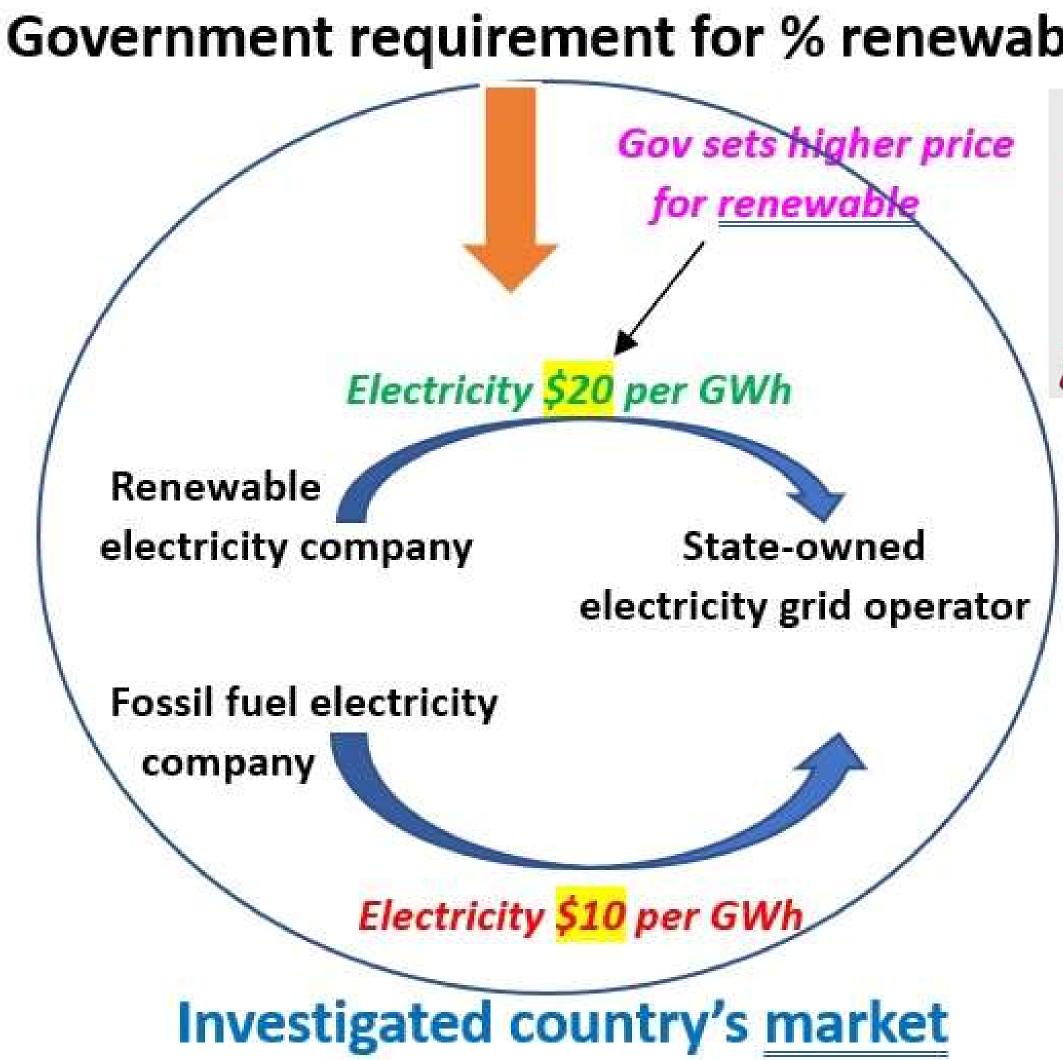
New approach(?) – environment-based regulation

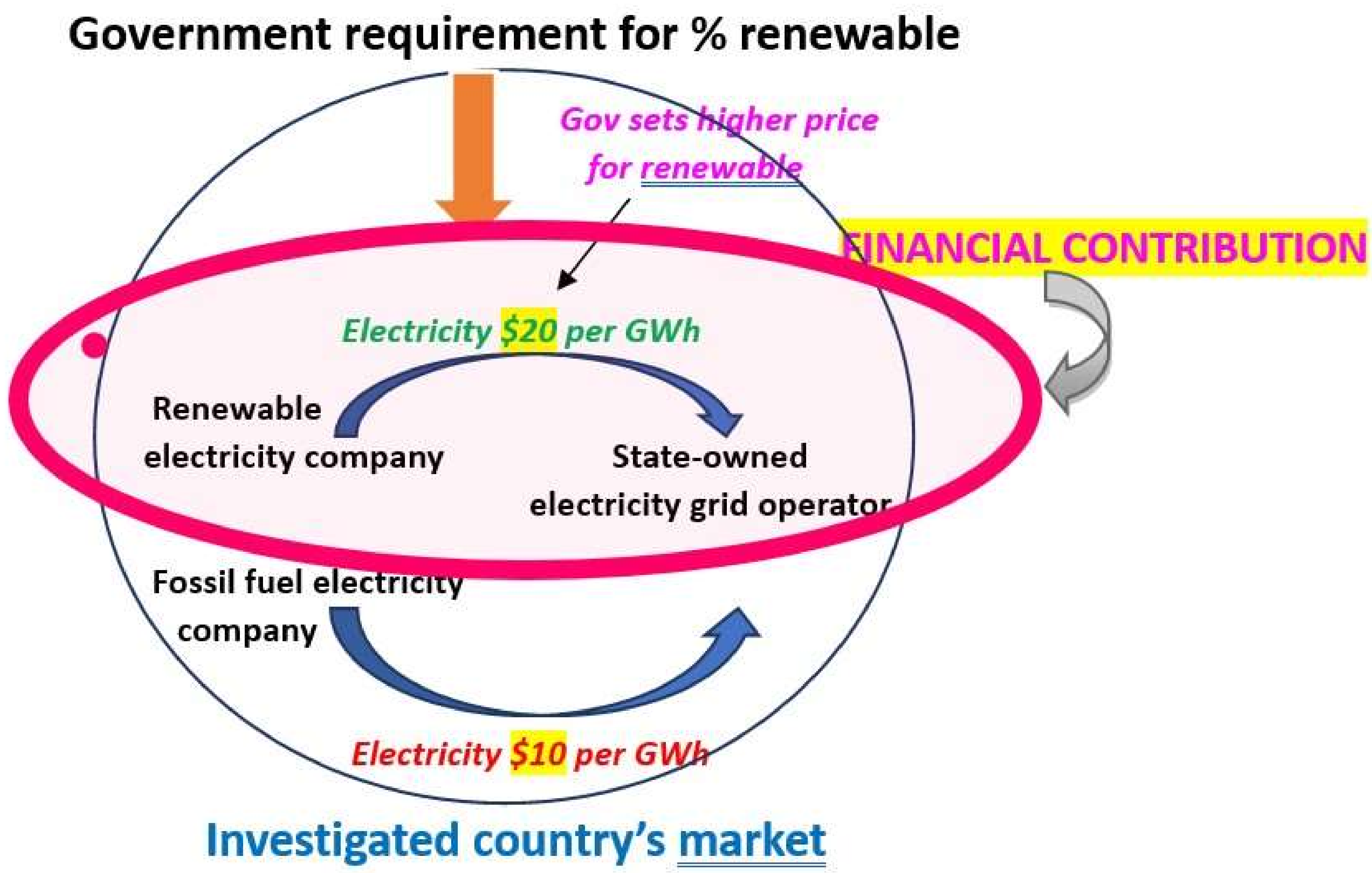
- *US – Softwood Lumber VII*, WTO panel:
  - The comparator should reflect the "*prevailing market conditions*" for electricity
  - "marketability" comprised one of the listed "prevailing market conditions" in Article 14(d)
  - "*the regulatory requirement for a certain amount of electricity generated from biomass concerns the 'marketability' of electricity*“

Article 14(d) – “Prevailing market conditions”

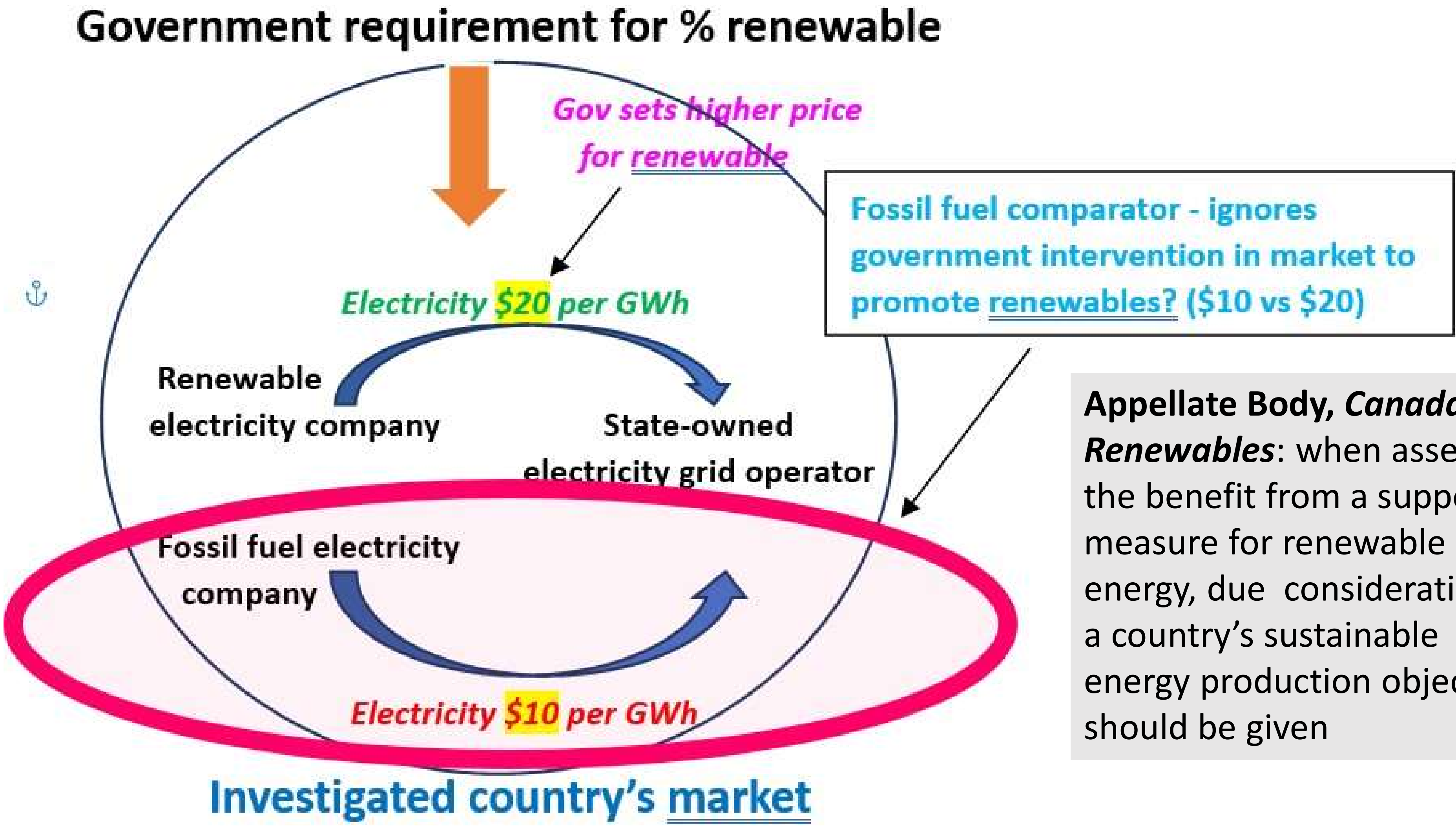
New approach(?) – environment-based regulation

- *Canada - Renewables*, Appellate Body:
  - a governmental intervention to achieve a certain proportion of electricity generated by wind and solar must form *part* of the market-based comparator to determine if a "benefit" was being conferred
  - intervention “created” a market for renewables; intervention intended to internalise social/environmental cost of emissions in electricity prices; intervention intended to ensure sustainable market by transitioning away from exhaustible fossil fuels.

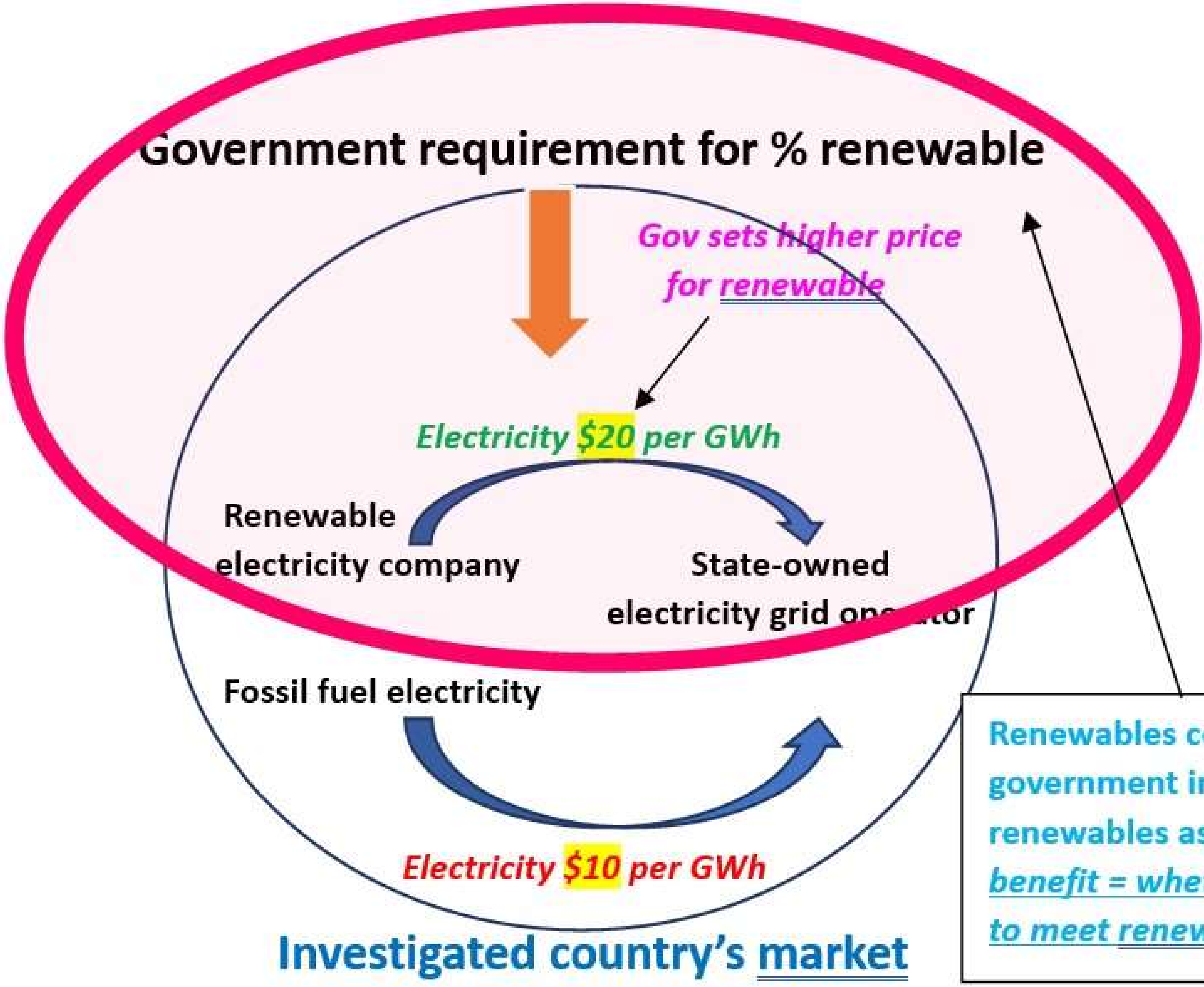

Government requirement for % renewable
Gov sets higher price
for renewable
Electricity $20 per GWh
Renewable
electricity company
State-owned
electricity grid operator
Fossil fuel electricity
company
Electricity $10 per GWh
Investigated country's market



Government requirement for % renewable
Gov sets higher price
for renewable
FINANCIAL CONTRIBUTION
Electricity $20 per GWh
Renewable
electricity company
State-owned
electricity grid operator
Fossil fuel electricity
company
Electricity $10 per GWh
Investigated country's market



Appellate Body, *Canada – Renewables*: when assessing the benefit from a support measure for renewable energy, due consideration of a country's sustainable energy production objectives should be given



Appellate Body, *Canada – Renewables*: when assessing the benefit from a support measure for renewable energy, due consideration of a country's sustainable energy production objectives should be given

Renewables comparator - accepts government intervention to promote renewables as "market" condition – *benefit = whether $20 is overpayment to meet renewables objective*

Article 14(d) – "Prevailing market conditions"

Usual approach – Appellate Body, US – CVD (Art 21.5 – China)

- Rejected China's argument that governmental policies/actions **are part of** "prevailing market conditions"
- Accepted that authorities can choose benchmarks which exclude price impacts from government policies/actions – both direct and indirect

New approach? – Renewable energy cases

- Rejected argument that authorities can **exclude** governmental policies/actions from "prevailing market conditions"
- Required authorities to incorporate governmental policies/actions on renewable energy into the "prevailing market conditions"

"CONFERRING A BENEFIT": Summary

- Financial contribution must confer a "benefit"
- Required comparison with market-determined benchmark
- Typically in-country private prices, but other sources of data (e.g. other markets) can be used if necessary
- If other data used, adjustments must be made to reflect in-country market conditions
- Governmental interventions to be excluded from market-determined benchmark, depending on regulatory purpose

Emerging issues: Factoring in environmental objectives?

What if a government gives manufacturers a competitive advantage by failing to **protect environmental objectives**?

Economics of lax/absent environmental regulation

Is there an economic rationale for treating non-regulation of environmental damage as a subsidy?

- Eventually, someone has to pay for environmental harm?
- If manufacturers are not required to internalise the environmental costs of their production, is this a "subsidy" from an economic perspective?

U.S. proposal for a new category of subsidy

Decides as follows:

1. The failure of a government to adopt, maintain, implement and effectively enforce laws and regulations that ensure environmental protections at or above a threshold of fundamental standards shall constitute an actionable subsidy under the ASCM.

2. If an industry disproportionately benefits from pollution controls or other environmental measures set below a threshold of fundamental standards, a Member may impose a countervailing duty equal to the benefit received by the industry when the goods from such an industry enter the Member's customs territory.

U.S. consideration of new regs to address environmental inaction by government

New regulations adopted March 2024

- "**Financial contribution**" – non-compliance with environmental laws, liabilities, or frameworks as a form of subsidy by non-payment of fee/penalty/liability
- "**Benefit**" – market-based price for comparator for subsidy based on supply of upstream raw materials/inputs to embed environmental compliance costs

EU approach: Mostly under “Dumping”

DUMPING

- Environmental issues in “significant distortions” methodology for normal value
- Environmental issues in selecting undistorted cost of production when constructing normal value (or selecting analogue country).

COUNTERVAIL – procedural/limited

- Initiate interim reviews if a country withdraws from environment treaty or EU industry faces higher environmental compliance costs
- Injury margin should account for future environmental compliance costs to EU industry
- Price undertakings not accepted where environmental protection issues raised

EU approach: Create a new type of instrument

- EU's "**Carbon Border Adjustment Mechanism" (CBAM)**
- **CBAM** aims to deter "carbon leakage," which could occur if EU firms shift carbon-intensive production out of Europe to facilities in countries that do not tax GHG emissions (or tax at a low rate) and then export the goods to Europe.
- Importers of certain products (steel, cement) must pay for the **carbon cost** associated with that product
- To be introduced **October 2023**, and phased in incrementally

EU approach: Create a new type of instrument

"Carbon Border Adjustment Mechanism" – Basic Design Features

- *Sectoral coverage*: iron and steel, cement, fertilisers, aluminium, electricity, and hydrogen
- *Emissions coverage and methodology*: CO2 (some others), "actual" emissions in manufacture + some indirect emissions. Verified emissions or default value.
- *Objective/methodology of price equivalence*: Must pay EU carbon price for each tonne emitted in manufacture of import. Deductions for carbon price already paid in country of manufacture
- *Mechanism for compliance*: 2023-26 = reporting obligations only. From 2026, only licenced importer may import CBAM goods, and must purchase and surrender a CBAM certificate by 31 May for emissions associated with imported CBAM goods

Step 4: Is the subsidy "specific"?

Identifying whether the subsidy reflects a distorted allocation of resources within the domestic economy of the subsidizing country

Article 1.2 and 2 of Subsidies Agreement:

Principles for determining whether a subsidy is "specific"

Specificity

2.1 In order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as "certain enterprises") within the jurisdiction of the granting authority, the following principles shall apply:

(a) Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific.

(b) Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions[2] governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification.

(c) If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy.[3] In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.

WHAT IS "SPECIFICITY"

Basic concept in Panel Report, *US – Cotton*:

- *"At some point which is not made precise in the text of the Agreement, and which may modulate according to the particular circumstances of a given case, a subsidy would cease to be specific because it is sufficiently broadly available throughout the economy*...."
- Underlying principle: distorted resource allocation