Contents

Table of cases xiii
Table of international instruments xvii

PART I  ANTI-DUMPING

1  General introduction 3
   A. Dumping: an unfair (?) trade practice 7
      1. Dumping is price discrimination 7
      2. Price discrimination in antitrust statutes 8
      3. Price discrimination in economic theory: three stories 10
         (a) Predation 11
         (b) Discriminatory pricing 13
         (c) Strategic dumping 17
      4. Anti-dumping enforcement: lessons from an economic perspective 18
         (a) Determinants of anti-dumping complaints 19
         (b) Determinants of anti-dumping investigations 20
         (c) The direct costs of anti-dumping measures 23
         (d) The magnified costs of anti-dumping protection 24
   B. Thou shall not discourage dumping (other than through duties) 25

2  Section I: dumping 30
   A. Normal Value (NV) 30
      1. Ordinary course of trade 31
         (a) Sales below cost 32
         (b) Sales otherwise outside the ordinary course of trade 34
      2. No sales or insufficient volume of sales 40
      3. Constructing NV 41
         (a) Constructing the cost of production 41
         (b) Constructing SG&A and profits 45
      4. Determining the normal value in the case of imports from non-market economies 51
   B. Export price 52
   C. Establishing the dumping margin 55
      1. The duty to perform a fair comparison 58
2. Three alternative methods for comparing NV and export price

D. Zeroing and its discontents
1. Zeroing – the practice
2. Overview of the case-law
   (i) The original cases: EC – Bed Linen and US – Softwood Lumber V: establishing the principle
3. Conclusion
4. Commentary

3 Section II: injury and causality analysis

A. General introduction
B. Findings of injury must be based on positive evidence and involve an objective examination
   1. Positive evidence
   2. Objective examination
C. Substance of an injury determination
   1. Volume of dumped imports
      (a) No increased dumped imports, no injury?
      (b) An increase in ‘dumped imports’
   2. Price effect of dumped imports
   3. Factors evidencing the impact of the dumped imports (injury indicators)
      (a) All factors reflected in Art. 3.4 AD must be examined
      (b) The need to evaluate all relevant factors
      (c) No need for a causation analysis under Article 3.4
   4. Threat of injury
   5. Cumulation
D. The causation requirement
   1. Causation and non-attribute
   2. Other known factors must be examined as well
E. The domestic industry producing the like product
Section III: procedural obligations – the tasks of the domestic investigating authority

A. The overarching obligation: an objective and unbiased investigation with respect for due process
   1. The need to conduct an objective and active investigation
   2. Respect for due process

B. Initiating the investigation process
   1. Two tracks: ex officio, upon request
   2. A proper application for initiation
   3. Standing requirements
   4. Sufficient accurate and adequate evidence to justify initiation
      (a) Sufficient evidence of what?
      (b) What is sufficient as evidence?

C. The investigation – choosing the period of investigation (POI)
   1. General
   2. POI-related questions
      (a) The need for an accurate and unbiased picture
      (b) The end of the POI – the recent past?

D. The investigation: defining the subject product and the like product

E. The investigation: information gathering and due process
   (a) The information gathering process
   (b) Publication and notification requirements
   (c) Specific aspects of the investigation: recourse to best information available (BIA)
      (i) The conditions for recourse to best information available (‘BIA’)
      (ii) Necessary information
      (iii) Submitted within a reasonable period of time
      (iv) Which information to use as best information available
   (d) The need for a company-specific margin calculation – and the sampling exception
      (i) An individual margin of dumping – collapsing
      (ii) The exception to the rule – sampling

F. The investigation – the end
   1. Termination for reason of de minimis margin or negligible volume of dumped imports
   2. Price undertakings
3. Imposing and monitoring AD duties 207
   (a) Imposing duties is a right, not an obligation 207
   (b) Non-discrimination 208
   (c) Ad valorem, fixed or variable duties 208
   (d) The level of the duty 209
   (e) Prospective and retrospective imposition of duties 225
   (f) No retroactive AD duties 227
   (g) Provisional duties 230
4. Duration and review of AD duties 231
   (a) The necessity principle 231
   (b) Sunset clause 231
5. Administrative review of AD duties 251
G. Remedies against illegally imposed AD duties 258
   1. Reimbursing definitive duties? 258
   2. Alternative ways of implementation 260
   3. Which AD measures can be challenged before Panels 262
   4. The standard of review that WTO adjudicating bodies will adopt in disputes under the AD Agreement 265
      (a) The relationship between the generic and the specific standard 265
      (b) No *de novo* review 268
      (c) Reviewing an investigating authority’s determination – neither *de novo* review, nor total deference 272
      (d) Proper establishment of facts 274
      (e) Permissible interpretations 277
H. Provisions specific to developing countries 280
   1. What are constructive remedies? 280
   2. The obligation to explore possibilities of constructive remedies in Article 15 282
5 Conclusions 286
   A. Actions in the short term 287
   B. Action in the medium run 288
   C. Anti-dumping as a safeguard 288

PART II SUBSIDIES

6 General introduction to the agreement on subsidies and countervailing measures: ‘thou shall not subsidize’ 293
   A. Export subsidies 293
   B. Production and other subsidies 294
   C. From the GATT to the WTO 297
D. Unilateral and multilateral avenues for counteracting subsidies

7 Conditions for imposition of countervailing measures

A. Subsidized imports

1. Financial contribution by a government or public body
   (a) Financial contribution \textit{sensu stricto} – direct or potential direct transfer of funds or liabilities
   (b) Financial contribution \textit{by omission} – forgoing government revenue otherwise due
   (c) Financial contribution ‘\textit{in kind}’ – government provision of goods or services other than general infrastructure
   (d) Financial contribution by the government or a public body

2. Any form of income or price support

3. Benefit
   (a) Benefit: the private investor benchmark
   (b) Benefit is not ‘cost to government’
   (c) Benefit in terms of cost of production – agricultural subsidies
   (d) Benefit \textit{to the recipient}
   (e) The market benchmark – but which market?
   (f) Distinguishing between the existence of a benefit and the calculation of the amount of benefit

4. Specificity
   (a) Specific to ‘certain enterprises’
   (b) \textit{De iure} and \textit{de facto} specificity

B. Injury and causation

1. Injury
   (a) An \textit{objective examination} based on \textit{positive evidence}
   (b) Volume of subsidized imports
   (c) Price effect of subsidized imports
   (d) Consequent impact on the state of the domestic industry

2. Causation and non-attribution

3. Threat of injury

C. The domestic industry producing the like product

8 Procedural requirements relevant to the countervailing duty investigation

1. Initiation
2. Evidence gathering/conduct of the investigation 375
   (a) Due process in the investigation 375
   (b) Facts available 378
   (c) Consultation requirement 380
3. Provisional measures 381
4. End of the investigation and imposition of measures 382
   (a) Undertakings 382
   (b) Imposition and collection of countervailing duties 383
5. Duration and review of countervailing measures 388
   (a) Sunset reviews 389
   (b) Administrative reviews or changed circumstances reviews 393

9 Counteracting subsidies – a two-track approach 399
   A. Countervail as a unilateral remedy 399
   B. Multilateral approach – using the WTO dispute settlement mechanism 400
      1. Multilateral disciplines on prohibited subsidies 401
         (a) Illustrative list of export subsidies – annex I 402
         (b) Prohibited subsidies (Article 3.1): contingency on export performance or import substitution 412
         (c) Remedies in case of prohibited subsidies 420
      2. Multilateral disciplines on actionable subsidies 430
         (a) Injury 430
         (b) Nullification or impairment 431
         (c) Serious prejudice 433
         (d) Remedies in case of actionable subsidies 451

10 Thou shall not be punished in any other way 453

11 Special and differential treatment 456
   A. Export subsidies 457
      1. Annex VII countries including least developed countries 457
      2. Other developing countries 457
   B. Import substitution subsidies 458
   C. Additional special and differential rules 458
      1. Serious prejudice 458
      2. De minimis levels of subsidization 459
      3. Privatization-related subsidies 459

12 Standard of review 460

13 Concluding remarks 462
PART III  SAFEGUARDS

14 The rationale for safeguards 465
   A. Safeguards as a ‘safety valve easing adjustment’? 466
   B. Safeguards as an insurance scheme 471
   C. Drawbacks 474
   D. Safeguards and voluntary export restraints (VERs) 476
   E. Safeguards and unfair trade 477
   F. Injury and causation in the safeguard context 478

15 The regulation of safeguards in the WTO 481
   A. A typology of safeguard measures 481
   B. Who can impose safeguards and against whom? 482
      1. Who can impose measures? 482
      2. Against whom are measures to be applied? 483
         (a) Application on an MFN basis 483
         (b) The special case of customs unions or free trade areas – the parallelism principle 483
      3. Exclusion of developing countries 489
   C. The conditions for a lawful imposition of safeguards 490
      1. Due process 490
         (a) Initiation 490
         (b) Article 3.1 and the general due process requirement 491
         (c) Publication and notification 494
      2. Distinguishing the right to safeguard action, and its application 498
      3. The right to impose safeguards – the conditions 500
         (a) Condition 1: unforeseen developments 500
         (b) Condition 2: increased quantities of imports 511
         (c) Condition 3: serious injury or threat of serious injury to the domestic industry 523
         (d) Condition 4: existence of a causal link between increased imports and serious injury 534
      4. A safeguard to protect the domestic industry producing the like or directly competitive product 547
         (a) Like or directly competitive products 547
         (b) Representativeness of the data concerning the ‘domestic industry’ 552
      5. Panel’s standard of review when evaluating injury and causation 554
   D. The application of safeguards 555
      1. Strictly to the extent necessary 555
Contents

2. Safeguard measures: the special case of quantitative restrictions 560
   (a) Minimum quantity of imports in case of QRs 560
   (b) Quota allocation and quota modulation 563
   (c) Measures other than quantitative restrictions 564
3. Provisional safeguards 564
4. The need ‘to pay’ for safeguards: maintaining an equivalent level of concessions 565
5. The duration of safeguards 567
6. Standard of review 569
7. Special safeguard regime with respect to China 572
   (a) China-specific transitional safeguards 573
   (b) Textile-specific safeguards 575

16 Conclusions 577

References 579
Index 587