THE UTILITY OF NON-ATTRIBUTION ANALYSIS UNDER INJURY EXAMINATION CONCERNING ANTI-DUMPING INVESTIGATION

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1.Introduction

While free and fair trade is what WTO is expected to be all about. WTO member countries are expected to allow free market access to other members, having said that, free trade does not mean unfair trade. Though multilateral trade enables others to walk into one's market, WTO framework allow its members to invoke actions and take measures in case goods are exported at dumped prices causing injury to the domestic industry of the importing country. However, the imposition of antidumping measures requires the fulfilment of three criteria, i.e., a positive finding of "dumping", a positive finding of "injury" and a causal link between dumping and injury, that is to say, that the dumped imports have caused the alleged injury.

The causal link analysis is governed by **Article 3.5** of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (hereinafter Antidumping Agreement)* [3] and a provision of a similar nature has been enunciated under *Annexure II of the Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995*[4], where it has been stated that during the causal analysis, the relationship between the dumped products and the injury that has been caused to the domestic industry should be based on the positive evidences.

During such determination, the authorities also have the right to examine **any other known factors** as well, though the process of separating the 'known factors' is possible in the theoretical aspect, the same is not true practically. Therefore, the appellate body in the case ***of US – Hot rolled Steel***[5] was of the opinion that, Article 3.5 of the Antidumping Agreement had to be followed mandatorily but the method in which non- attribution analyses is to be conducted

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[3] GATT 1994: General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994).
[4] Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 (India).
[5] WTO Panel Report, United States — Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, WTO (Jan.31,2022, 7:00PM), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds184_e.htm.

is silent, hence the obligation to fulfil Article 3.5 would be obliged, if the authorities undertook the required examination.

2. Parameters under WTO framework for Determination of Injury

Article 3.1 of the *Article VI of the GATT 1994* deals with the provision of determination of injury, where it states that the determination of the injury will be based on the positive evidence as well as an examination of the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products along with impact of these imports on domestic producers of such products on a consequent basis.

There are two key factors that the investing authority has to consider for the determination; (a) the volume of imports (b) the effect on prices due to number of imports which have been dumped.

With regard to the volume of the imports which have been dumped, the investigating authorities have to consider if there has been a sufficient increase in the number of imports that have been dumped in either absolute or relative terms with regard to the production or the consumption rate of the member which is importing. The investigating authority must consider the following factors to determine the effect of the imports which are dumped on the prices and these factors are whether there has been a significant price undercutting by the dumped imports, or whether the effect of the imports has been to significantly depress prices or prevent price increases that otherwise would have occurred. The words of this article are worded in a broad manner, as the nature of injury is never stagnant and keeps on fluctuating on a case-to-case basis, making it not so clear all the time.

Article 3.4 provides for the examination of the impact which was caused due to the imports being dumped on to the domestic industry, where it has been stated that during the examination, all factors have to been seen. There are fifteen factors that have been enlisted which are actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investment, however it is also crucial to note that the list is neither exhaustive nor absolute in nature, hence no factor should be considered as decisive.

There have been four cases till present which dealt with the how these factors play a hand in the examination of the injury, and the Appellate Body in all these cases were of the same

opinion as that of the ***Thailand-H-b Case***[6], the examination and evaluation of the fifteen factors that have been enlisted are mandatory to be followed and they must be clear from the documents that have been published.

In matters where a threat to domestic injury has occurred and is not yet suffering from any material injury, the following factors is to be considered in addition to above stated economic factors:

(a) There has been an exponential increase in the imports that have been dumped, which is a clear indication of the fact that, there has been an increase in the number of imports
(b) There has been an increase in the capacity of the exporter, which likely shows that, there has been an increase in the exports which have been dumped to the importing member's market, where it is taken into account that the other export markets will absorb any additional exports which will occur
(c) If the imports are having prices that either suppresses or depresses the effect of prices in the domestic market, and thereby increase the demand for the additional imports
(d) If the product inventories are being investigated

3. Legislative and Procedural Framework for Injury Determination in Indian Anti-Dumping Investigations

For India, the legislative framework which govern the determination of injury for the Indian Anti-Dumping investigations is the *Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 read with Customs Tariff Act, 1975*, which states out how the procedure should be followed from start to finish.

The provisions regarding determination of injury have been dealt with in ***Section 11*** of the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995, which provides that:

(a) If the import is from certain countries, then there is a requirement that the authority which is designated find out further whether the import of such an article into India has caused any material injury or threatens to cause such to any industry which has already been established in India or any that would be established in India.

[6] Catherine E. Gascoigne, *The Role of Non-Attribution in Determining the Use of Trade Remedies,* SOCIETY OF INTERNATIONAL ECONOMIC LAW (Jan. 31,2021, 6:00PM), https://www.sielnet.org/wp-content/uploads/2019/12/Essay-GASCOIGNE-1.pdf.

(b) The authority who has been designated shall take into view the injury, threat and the material retardation that has been caused to the domestic industry and determine the causal link as well by taking factors such as the volume of dumped imports, their effect on price in the domestic market for like articles and the consequent effect of such imports on domestic producers of such articles etc, as per the principles which have been stated in Annexure II of the Rules.

(c) Annexure II states that there shall be an objective examination of the imports that have been dumped and the effect of these dumped imports on the prices in the domestic market for like products. The determination of the causal relationship should be based on relevant examination of evidence as well.

(d) The authority can also give a finding in extremely exceptional cases even when there was no injury that affected a substantial portion of the domestic injury. The cases where this can occur are when there are huge amounts of imports which are dumped into an isolated market or when injury is being caused to the producers or majority of the production due to the articles which have been dumped.

The existence of the causal link that the material injury caused to the Domestic Industry is due to the imports from subject country(ies) is an essential component for the imposition of anti-dumping measure.

4. The Utility of Non-Attribution Analysis

The non-attribution analyses are necessary to ensure that a determination of injury is based on objective examination of all the relevant factors. However, with regard to this analysis there are conflicting views among the different scholars and inconsistences in the practices of the different jurisdiction. Irwin has described non-attribution analysis to play no key role in the proceedings and cannot affect the final outcome and just requires the authorities involved to separate the sources of injury. This has been the opinion of majority of the scholars, hence non-attribution analysis is often compared with the multi factorial approach.

The multifactorial approach requires there to be a combination of the causal contribution of imports with that of the causal contribution of potentially confounding factors, whereas the non-attribution analysis requires the separation of these two. Though these two approaches are often at loggerheads with each other, they are only so if there has been an injury to the industry due to 100% of the imports.

Few methods to solve this issue is to have certain tolerance towards injuries in industries where it is the combination of the imports and the potential factors (De Minimis), due to the fact that it is not possible that only imports cause injury to the industry, as both imports and exports play a key role in causing of injury. This has been seen in the US Context as well, where the US Domestic Law states that, there is no requirement that, injury which is caused to the industry are the products of imports only in the matters of safeguards and countervailing duties[7].

In the event that, the WTO law allowed a combination of the causal contributions then non attribution analysis must have the following outcomes to separate the injury caused by the imports and the potential factors, and to allocate a percentage depending on the harm that has been caused reflecting the causal contribution to the injury, this same has been held by the Appellate Body in ***US- Wheat Gluten Case***[8]. The Panel in the ***EC-Countervailing Measures on DRAM Chips***[9], where it was held that just segregating the imports from the potential factors were not enough, but an inquiry also had to be done to level of causal contribution as well.

5. Practices in India and other Jurisdictions

In consonance with the Article 3.5 of the Antidumping Agreement and considering the very possibility that the domestic producers is suffering injury on account of various other factors than the dumped imports from the subject countries. Hence, it is critical for the investigating authorities to judiciously identify and analyses all other factors that may be contributing to the injury. Undoubtedly, the Non-Attribution Analysis is an uphill task for the investigating authorities firstly, because it is an indispensable part of the causality examination and secondly the indicators are not apparently relied upon. The Indian agency responsible for the conducting the trade remedial investigations take into consideration the following factors for such examination[10]:

(i) the volume and prices of imported like articles that are not dumped;
(ii) contractions in demand or changes in patterns of consumption;
(iii) restrictive trade practices of, and competition between, foreign and Indian producers of like articles;

[7] 19 US Code §1671(a)(2).
[8] *United States — Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WTO (Jan.31,2022, 6:19PM), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds166_e.htm.
[9] *European Communities — Countervailing Measures on Dynamic Random Access Memory Chips from Korea*, WTO (Jan.31,2022, 6:30PM), https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds299_e.htm.
[10] See "*Manual of Operating Practices for Trade Remedy Investigations*", Directorate General of Trade Remedies, Department of commerce, Ministry of Commerce & Industry, Government of India, at page 301-302

(iv) developments in technology; and

(v) the export performance and productivity of the DI.

(vi) some other factors that may be relevant for examination include:

(a) force majeure (Act of God) events (such as a natural disaster);

(b) labour strike or acute shortage of labour;

(c) difficulties in the Indian economy and/or financial market in India;

(d) shortage of raw materials/inputs in India required for the production of the like article by the DI;

(e) Inter-se competition between domestic producers;

(f) change in the management leading to focus on other products;

(g) a sudden change in economic policies of the government;

(h) other operations of the DI that have affected/are affecting/likely to affect the DI, for instance, investment in a new facility;

(i) vulnerability to dumped imports may be confined to a specific region and Injury may be occurring in that region. In such cases, it is still possible to take account of such regional injury which is analysed to determine such injury to be material to the industry as a whole; and

(j) any adverse impact due to related party transactions that need to be segregated.

The above list is not exhaustive and is only indicative in nature.

In the United States, the countervailing duties can be imposed when an industry is materially injured due to the dumping of imports but the USITC need not examine whether the imports were the principal reason that the harm was caused, therefore in the American jurisdiction, it is not mandatory that injury is caused due to imports alone for countervailing duties and safeguards.

In the EU law, Article 3.7 of EU Basic AD Regulation provides as follows:

> "*Known factors, other than the dumped imports, which at the same time are injuring the Union industry* ***shall also be examined to ensure that the injury caused by those other factors is not attributed to the dumped imports under paragraph 6****. Factors which may be considered in that respect shall include: the volume and prices of imports not sold at dumping prices; contraction in demand or changes in the patterns of consumption; restrictive trade practices of, and competition between, third country and Union producers;*

developments in technology and the export performance; and productivity of the Union industry."

The use of word "shall" in the legislative framework clearly transpires that above condition is not suggestive in nature and on the contrary in a critical factor for the Commission to analyze that whether there is a genuine and substantial causal relationship between the dumped imports from subject countries and the material injury suffered by the Union industry or the injury caused to the Union industry is due to confounding factors.

However, in the EU domestic law, the scenario is quite different, there is some allowance to the factors which cause an injury in the context of antidumping[11], there are two tests to be followed in EU which is the positive and negative test. The positive test means that the injury does not necessarily have to be caused by an effect of dumping. The negative causality test is that known factors apart from the dumped imports shall also be examined, hence the EU allows for an amount of non-attribution analysis and creates a causal link between the injury and the import, even if the confounding factors were the ones which caused the injury.

6.Conclusion

Before an investigating authority decide regarding the imposition of an anti-dumping measures, three factors have to be adhered to; that dumping occurred, an injury has been caused and that there is a causal relation between the dumping and injury which has been caused. Non-attribution analysis seeks to segregate the causative impact of the imports from the potential factors. The causation analysis is an attempt to create a link between the import and the injury which has been caused to the industry.

There have been various thoughts by scholars that are of the opinion that the non-attribution analysis is inconsistent in nature, as there is separation of the imports from the confounding factors but later, it is combined again. To remove the inconsistencies in this approach there have been methods such as the De Minimis method which has been introduced, as it is not logically possible that only imports have a part to play in the event of an injury being caused to an industry, hence taking into account only imports does not serve the purpose, this can be seen through example of the EU and the US jurisdictions.

[11] Catherine E. Gascoigne, The Role of Non-Attribution in Determining the Use of Trade Remedies, SOCIETY OF INTERNATIONAL ECONOMIC LAW (Jan. 31,2021, 6:00PM), https://www.sielnet.org/wp-content/uploads/2019/12/Essay-GASCOIGNE-1.pdf.

Needless to mention, WTO Trade remedies are an exception to the free trade and market access principles enshrined under the WTO framework, owing to this, the process of non-attribution analyses should be followed in a bonafide manner so that the objective of invocation of trade remedial measures shall continue to remain as providing level-playing field to the domestic producers and should not be used as a protectionist tool. Hence, the non-attribution analysis can be said to be an inalienable part of the examination of injury in an antidumping investigation and should be considered as such as well, the different jurisdictions stated above justifies this.

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