Lecture 10: Determination of Injury, Definition of Industry, Domestic Industry and Casual Link

Dear students, last class we were talking about this Anti-Dumping module and we talked about the Dumping and Anti-Dumping. What is Dumping and what is Anti-Dumping? And today we are going to discuss about what are the prerequisites which we already discussed.

CONCEPTS COVERED

Determination of Injury
Injury Factors
Domestic Industry
Deminimis level
Support of Industry
Causal Relationship

The first prerequisite is Dumping, and the second prerequisite is the determination of injury to the domestic industry and a causal link between Dumping and Injury. So, today, we are going to discuss the other two prerequisites, that is the determination of injury and also the causal relationship, along with the definition of industry.

Determination of Injury:
Article 3 of ADA

So, in this lecture we start with the determination of injury which is explained under Article 3 of the Anti-Dumping Agreement.

Injury

In order to impose anti-dumping measures, an authority must determine not only that dumping is occurring, but also that such dumping is causing material injury to the domestic industry producing the like product. Material injury in this context comprises present material injury, future injury (threat of material injury) and material retardation of the establishment of a domestic industry.

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So, what is this injury all about? So, the injury is the injury to the industry, economic injury. So, we will see what are the parameters of that injury to the domestic industry. So, here the provision very clearly says in order to impose Anti-Dumping measures and authority must determine not only whether Dumping has occurred, but such Dumping should be causing material injury to the domestic industry producing like product. In the last class we have discussed about what is meant by like product, or material injury. In this context present material injury or future injury. So, injury to the domestic industry may be the present injury or a future injury or threat of material injury or in short, we can say that the injury must be imminent or material retardation of the establishment of a domestic industry. So, there are so many components in the “injury”, in the injury factors or what constitutes an injury? So, other than Dumping, you have to prove an injury to the domestic industry that injury can be a material injury, present or future injury that is a threat of injury or material retardation of the industry. We will dissect this component separately.

Meaning of Injury

- **The term "injury" has three meanings:**
- **– Material injury to a domestic industry ("current injury")**
- **– Threat of material injury to a domestic industry ("future injury")**
- **– Material retardation of the establishment of a Domestic industry (Art. 3)**

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So, we talked about the current injury, we talked about the future injury, and we talked about the material retardation of the establishment of industry, which is mentioned under Article 3 of the Anti-Dumping Agreement.

Article 3.2 provides more details on the analysis of the volume factor and the price factor.

Article 3.3 establishes the conditions for cumulation.

Article 3.4 provides the list of injury factors that must be evaluated by the investigating authority.

Article 3.5 lays down the framework for the causation analysis, including a listing of possible 'other known factors.'

Article 3.6 contains the product line exception.

Articles 3.7 and 3.8 provide special rules for a determination of threat of material injury.

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So, Article 3 basically provides the injury factors. So, the details the volume factor, the price factor, and other economic factors of injury and also you can see that the list of injury factors. What the list of injury factors to be examined by the investigating authorities during Anti-Dumping investigations, and also the causation analysis: how the investigating authorities are going to analyze the causation analysis. So, the effect and cause analysis and how they will distinguish between these injury factors and other known factors or other factors. So, if other factors applicable, then it would not be taken into consideration as an injury under the Anti-Dumping Agreement and then if there is

any exceptions which are applicable to this particular rule and also the special rules for the determination of threat of material injury in certain cases and we will see we will analyze this separately.

Notion of Dumped Imports

Throughout Article 3, the notion of 'dumped imports' is used. However, many cases involve a mixture of dumped and non-dumped transactions. Furthermore, dumping determinations are normally made on a producer-by-producer basis and it is therefore possible that certain producers are found not to have dumped. A conceptual issue therefore is whether such non-dumped imports may be treated as dumped in the injury analysis. In the *EC-Bed Linen* case, India argued that non-dumped transactions ought to be excluded from the injury analysis.

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And also you can see that in every Anti-Dumping investigations, the investigating authorities will find dumped imports and non-dumped imports. In case of dumped imports, certain exporters may be found to be dumping may be from one country or may be from another country or may be from another company they may not be dumping their dumping margin may be 0 or minus. So, India always argued that this negative injury margin or non-dumped imports should be deleted from the injury analysis. So, it means that once the investigating authorities identify the first factor or evaluate the first factor of dumping, then the non-dumped companies or countries are to be excluded from the second factor, which is the injury analysis or injury to the domestic industry. So, this argument was put forward by India in the EC-India Bed linen case. So, how the injury analysis to be done the procedure to be done, definitely in the usual course of trade the non-dumped import should be excluded, but the practice of countries shows that they do not exclude this. So, if they do not exclude the non-dumped imports, it will be easy to find injury to the domestic industry. So, this practice of the WTO members are criticised and that is why India argued for the non-dumped import be excluded from the injury analysis in EC-India Bed linen case.

Basic Requirements for Injury Finding

- **Injury must be present**
- **Must be established based on specified criteria as to volume and/or price effects of imports**
- **Basis for injury determination:**
- **– "Objective examination" of relevant criteria**
- **- "Positive evidence"**

And what are the basic requirements of finding injury? So, injury means injury to the domestic industry, the economic injury to the domestic industry must be present and that must be established on specific criteria that criteria should be the basic should be volume or price effects on imports and not other matters volume effect and price effects. And also the investigating authorities must objectively examine the criteria based on positive evidence. It is not a subjective analysis of the relevant criteria but an objective examination. This means that the investigating authorities must take into consideration all relevant factors or circumstances of such kind of dumping and must base their decisions on positive evidence, not mere apprehension or mere conjuncture. So, it must be actual injury based on positive evidence to the domestic industry.

Injury Factors (Article 3.4)

- **• Actual and potential decline in:**
- **– Sales - Productivity**
- **–Profits - Return on investment**
- **– Output -Utilisation of capacity**
- **–Market share**
- **Factors affecting domestic prices**
- **The magnitude of the margin of dumping**
- **Actual and potential negative effects on:**
- **–**
- **Cash flow - Growth**
- **–Inventories -Ability to raise capital**
- **–Employment -Ability to raise investment**
- **–Wages**

So, we talked about these injury factors, the economic factors. There are 15 injury factors which you can find for the consideration of injury to the domestic industry. So, Article 3.4 of the Anti-Dumping Agreement explains these 15 economic factors which includes actual and potential decline in sales. So, there may be a sudden decrease in sales due to that there is a sudden decrease in profits and there is sudden decrease in output, sudden decrease in market share and sudden decrease in productivity and sudden decrease on return on investment(ROI). So, the entire business is dependent upon the return on investment(ROI) then decreasing utilization capacity mainly due to the due to these economic factors. So, this is where you can see the potential decline in the volume, or price. Then we will look into the factors affecting domestic prices and also the magnitude of the margin of dumping. So, what are the actual and potential negative effects? And the other, the second category of injury factors are related to price. This includes cash flow, and also this includes growth rate, increase in inventories, the ability to raise capital, employment opportunities and the ability to raise investment. So, the second part is if the first part deals with the volume, the second part deals with the price. So, there are 15 economic factors which you can find for the calculation of injury and I would say that there is no two categories, there is only one category and all are economic factors or financial factors and other exterior or external factors are not going to be considered for the injury factor, for the consideration of injury factor. So, these 15 factors are very crucial, so that means the investigation authorities must consider these 15 injury factors when they investigate into the injury to the domestic industry. So, this we will see elaborately in some of the case laws as well what the panel and appellate body of the dispute settlement body of the WTO said.

Thailand H-Beams

...The Panel concluded its comprehensive analysis by stating that "each of the fifteen individual factors listed in the mandatory list of factors in Article 3.4 must be evaluated by the investigating authorities..." We agree with the Panel's analysis in its entirety, and with the Panel's interpretation of the mandatory nature of the factors mentioned in Article 3.4 of the Anti-Dumping Agreement.[24]

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In the Thailand H-Beams case the panel said that, so this is with regard to the consideration of these 15 economic factors. The panel said that each of the 15 individual factors listed in the mandatory list of factors in Article 3.4 must be evaluated by the investigating authorities. So, when an investigation is made by the investigating authorities on Anti-Dumping they have to mandatorily consider all these 15 economic factors, 15 economic factors to be taken into consideration for consideration of injury to

the domestic industry. So, these factors mentioned in Article 3.4 are mandatory after this particular. So, it is clarified by the panel in Thailand H-Beams case. So, these economic factors are mandatorily to be considered in each and every investigation.

Determination of Material Injury

The determination of material injury must be based on *positive* evidence and involve an *objective* examination of the volume of the dumped imports, their effect on the domestic prices in the importing Member market and their consequent impact on the domestic industry. The Appellate Body has held that this determination may be based on the confidential case file and overruled a panel finding that it follows from the words 'positive' and 'objective' that the injury determination should be based on reasoning or facts disclosed to, or discernible by, the interested parties.

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And then you can see that how the material injury is determined. So, we already said that material injury is based on positive evidence and then objective examination of the volume of dumped imports and it is not only based on the volume of dumped imports because we said that the dumping per se is not prohibited. But what is their effect on domestic prices, markets and then consequent impact or its effect on the domestic industry. So, we can see that the appellate body that is the dispute settlement body of the WTO held that in certain cases it must be based on confidential case file and overruled a panel finding that it follows from the words positive and objective that the injury determination should be based on reasoning or facts disclosed to or discernible by the interested parties. That means if it is confidential information, the panel need not disclose what exactly this is, but the panel must assess the positive evidence and also an objective assessment of the volume of imports or the positive objective assessment of the evidence produced before it. So, that means that in any case, the members of the countries who are subject to anti-dumping investigations cannot escape by simply saying that that particular information is confidential in nature, you cannot escape. So, the appellate body made it very clear that the panel must take into consideration the positive evidence and objective examination of such evidences.

Volume and Prices

Article 3.2 provides more details on the volume and price analysis. It emphasizes the relevance of a significant increase in dumped imports, either absolute or relative to production or consumption in the importing Member. With regard to the effect of the dumped imports on prices, the investigating authority must consider 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, which otherwise would have occurred.

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So, we already talked about the volume, the volume criteria as well as the price criteria. So, the volume criteria and price criteria must be analyzed these are the two economic components. So, the 15 economic criteria will come under these two branches. So, when you consider the volume and prices, especially the volume and price analysis. So, the investigating authorities must consider if there is a significant increase in dumped imports. So, whether either absolute or relative production or consumption in the importing member and also the prices of dumped imports. So, the investigating authorities must consider whether there has been a significant price undercutting by the by the dumped imports. So, basically, we said the definition of dumping is a price comparison. So, the investigating authorities should look into whether there has been a significant price undercutting and also whether there is any depressing effect on prices or prevent any pricing releases or otherwise having occurred in the usual course of trade. So, the volume and prices, the prices to be very carefully analyzed by the investigating authorities in each investigation when they consider the volume and prices of dumped imports.

Cumulation Principle

The principle of cumulation, contained in Article 3.3, means that where imports from several countries are simultaneously subject to anti-dumping investigations, their effects may be assessed cumulatively for injury purposes as long as they do not qualify for the *de minimis* or *negligibility* thresholds and a cumulative assessment is appropriate in light of the conditions of competition among the imports and between imports and the like domestic product. Many WTO Members apply cumulation almost as a matter of course as long as the thresholds are not met.

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So, the Cumulation principle is talked about under Article 3.3. So, what do you mean by Cumulation. It says that, so definitely the investigating authorities are investigating dumping not from one country. So, they have to consider all the countries those who are exporting that particular material, you cannot pick and choose one country they have to investigate all the countries and subject to Anti-Dumping investigations their effect may be assessed cumulatively for injury purposes. So, we have already said that India argued that this non-dumped import should be eliminated from the injury criteria and if the dumping margin is de minimis that should also be excluded or the dumping margin is within the negligible thresholds, we will see what are the negligible thresholds under the Agreement, then the cumulative assessment be done in certain conditions. So, cumulative assessment in certain conditions between imports and between imports and the like domestic product. So, you can see that this Cumulation should be made. Then many WTO members use this particular methodology so that the thresholds are not met. So, that is the Cumulation principle. Actually the rule is that if more than one country is investigated you have to cumulatively assess the injury matters for the purpose of injury purpose, should be cumulatively assessed.

Thailand H-Beams Case

...The Panel concluded its comprehensive analysis by stating that "each of the fifteen individual factors listed in the mandatory list of factors in Article 3.4 must be evaluated by the investigating authorities..." We agree with the Panel's analysis in its entirety, and with the Panel's interpretation of the mandatory nature of the factors mentioned in Article 3.4 of the Anti-Dumping Agreement.[24]

It appears from this listing that data was not even collected for all the factors listed in Article 3.4, let alone evaluated by the EC investigating authorities. Surely a factor cannot be evaluated without the collection of relevant data.[25]

So, again in Thailand H-beams case the panel said that each of the 15 factors are mandatory, this we have seen. Also, the panel said that it appears from this listing that data was not even collected for all the factors listed in Article 3.4, let alone evaluated by the EC investigating authorities. Surely, a factor cannot be evaluated without the collection of relevant data. So, that means every anti-dumping authority must collect data on all 15 economic factors. All 15 economic factors to be taken into consideration and that data - 15 economic criteria data should be collected for the calculation of injury in every case. This was confirmed by the panel, which is one branch of the WTO dispute settlement body. The panel held that in the Thailand H-beams case. So, it is very clear that all 15 economic factors should be considered.

Impact of Dumped Imports

Article 3.4 requires that the examination of the impact of the dumped imports on the domestic industry shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry producing the like product in the importing country and then mentions 15 specific factors. Article 3.4 concludes that this list is not exhaustive and that no single or several of these factors can necessarily give decisive guidance.

Then, what is the impact of dumped imports? So, the effect of dumped imports is to be assessed by the investigating authorities and also evaluation of all relevant economic factors. We already said that all 15 economic-specific factors should be taken into consideration. So, and also Article 3.4 says that these 15 economic factors are not exhaustive and it only gives indications. So, several of the factors can necessarily give this guidance, it means that you cannot pick and choose one economic factor and you have to consider all 15 economic factors at a time for the calculation of injury factors to the domestic industry.

Definition of Industry – A.4

- **"Domestic industry" has two meanings:**
- **– the domestic producers as a whole of the like product**

OR

- **– the producers whose collective output of the product constitutes a major proportion of the domestic production of the like products.**
- **Domestic industry determination important for:**
- **Who may file a petition**
- **Whose data are considered in injury analysis**
- **(Art. 4.1)**

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So, Domestic Industry: what is this domestic industry? So, the definition of domestic industry is given in Article 4. This is very important because you talk about domestic industry, and then the question is whether there are four industries in your country. So, in principle you can say that yes all the foreign companies are in your domestic market the question is whether they are foreign companies or domestic companies the answer is most of the companies are working in India for example, their Indian counterpart in the form of partnerships in the form of collaborations in the form of subsidiaries in other legal forms. So, they are not foreign companies, and they are considered to be domestic industries because they are registered under certain laws of the country. So, the domestic industry here you can see that domestic industry for the purpose of Anti-Dumping, they can be considered in two ways, two meanings one domestic producers as a whole-even for like products or the producers whose collective output of the domestic product constitutes a major proportion of the domestic production of the like products. So, it means it can be even individual producers of a particular product of the like product or even collective output of the product constitutes a major proportion. So, domestic industry calculation, who is the domestic industry, is very important; only domestic industry can submit a complaint to the respective authorities of WTO members. We will see that. In the next class, we will see what the Indian authorities are. The Indian authority is the Director General of Anti-Dumping, and if you want to qualify to be an industry, then you have to comply with the qualifications under Article 4. So, this is very important for filing a petition or application before the respective authorities and also,

most importantly, for injury analysis. The data collected from these particular members will be taken into consideration for the calculation of domestic industry injury. So, the injury criteria, the data will be collected from these domestic industry only. So, the determination of domestic industry is very important for the purposes of calculation of dumping margin.

Domestic Industry

Article 4 ADA defines the domestic industry as the domestic producers as a whole of the like products or those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products. The ADA does not define the term 'a major proportion.'

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So, what is this domestic industry? Article 4 of the Anti-Dumping Agreement defines domestic industry. So, it says domestic producers as a whole of the like products or those of them whose collective output of the products constitutes a major proportion of the total domestic production of the product. So, a major proportion is not defined, but the de minimis level is defined, negligible is defined, but what constitutes the major proportion is not defined under the Anti-Dumping Agreement. It makes a leeway or a gap for the investigating authorities to determine who constitute the major proportion, there is a legal vaccum or there is no guidelines.

Related Parties

- The Agreement recognizes that in certain circumstances, it may not be appropriate to include all producers of the like product in the domestic industry.
- Thus, Members are permitted to exclude from the domestic industry producers related to the exporters or importers under investigation, and producers who are themselves importers of the allegedly dumped product.

And also in cases there are certain related parties. So, in certain circumstances so, the produces of the like product in the domestic industry or importers and exporters may be related parties. How it happens? in what cases it happens? For example, if Suzuki Motors exports engines from Japan to India and to the Indian subsidiary, they are considered to be related parties. Because in the case of related parties the investigating authorities look into if there is any price manipulations and also whether they qualify to be domestic industry. So, whether they are related to exporters or importers, related in many ways. So, it can be the same directors, it can be subsidiaries, there can be collaborations. So, it can be related in many ways, and also even the subsidiaries can be the importers of the allegedly dump product from the foreign mother company. So, that also may affect the calculation of not only dumping, the calculation of injury to the domestic industry. So, the related party transactions should be taken into consideration by the investigating authorities.

Related Parties

- The Agreement provides that a producer can be deemed "related" to an exporter or importer of the allegedly dumped product if there is a relationship of control between them, and if there is reason to believe that the relationship causes the domestic producer to behave differently from non-related producers.

And also in certain cases they may be deemed to be related parties. So, if there is a relationship between the two companies, this relationship can be in the form of control, this relationship can be in the form of common directors, and this relationship can be a major acquisition as well as a merger and acquisition. So, if domestic producer and exporter and importer is related in any way then they will be considered as related parties. Related parties transactions should be taken into consideration by the investigation authorities.

Regional Domestic Industry

- The Agreement contains special rules that allow in exceptional circumstances, consideration of injury to producers comprising a "regional industry".
- A regional industry may be found to exist in a separate competitive market if producers within that market sell all or almost all of their production of the like product in that market, and demand for the like product in that market is not to any substantial degree supplied by producers of the like product located outside that market.

Another important factor is the regional domestic industry. So, what do you mean by regional domestic industry. So, the special rules will be applicable in that case for the calculation of dumping margin. So, injury to the producers as a regional industry. So, here you can see the separate competitive market is found by a regional industry whether

they market sell and almost all of their production of the like product in the same market and at the same time the demand for the product in that particular market is not to any substantial degree supplied by the producers of the like product located outside that particular market. Then that can be considered as a regional industry and regional industry will be separately considered by the investigating authorities.

Regional Domestic Industry

- **If this is the case, investigating authorities may find that injury exists, even if a major proportion of the entire domestic industry, including producers outside the region, is not materially injured.**
- **However, a finding of injury to the regional industry is only allowed if (1) there is a concentration of dumped imports into the market served by the regional industry, and (2) dumped imports are causing injury to the producers of all or almost all of the production within that market.**

So, even in the case of injury that exists in that regional domestic industry, a major proportion of the Indian domestic industry producers outside the region, the investigating authorities can find injury to the domestic industry even though the outsiders are not injured in that particular case. So, finding of injury to the regional industry is only allowed if there is a concentration of dumped imports into the market served by the regional industry and dumped imports are causing injury to the producers of all or almost all of the production within that same market. So, it means there is an exception to the regional industry. So, there is a very strict definition of the regional industry for the calculation of injury to the domestic industry.

Regional Domestic Industry

- If an affirmative determination is based on injury to a regional industry, the Agreement requires investigating authorities to limit the duties to products consigned for final consumption in the region in question, if constitutionally possible.

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And also we can see that the affirmative determination of injury to this regional industry can be considered only when the investigating authorities to limit the duties to products consigned for final consumption in the region, in that particular region only. So, if that is possible, then only they will be considered as regional industry.

Regional Domestic Industry

- If the Constitutional law of a Member precludes the collection of duties on imports to the region, the investigating authorities may levy duties on all imports of the product, without limitation, if anti-dumping duties cannot be limited to the imports from specific producers supplying the region.
- However, before imposing those duties, the investigating authorities must offer exporters an opportunity to cease dumping in the region or enter a price undertaking.

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So, we can see that. So, if the constitutional law of a particular. So, this is mainly because of, with regard to European Union, African Union and other kind of regional organizations, regional industries, industries from different countries and if the investing authorities levy duties on all imports of that particular product without limitation then the Anti-Dumping duties cannot be limited to the imports from specific producers supplying in that particular region. It means that the investigating authorities should be careful when they impose Anti-Dumping duties on regional industries. So, and the authorities, the

investigating authorities must offer exporters an opportunity to seize dumping in the region or enter a price undertaking. So, it means that in the case of regional industries, there are certain concessions. So, these concessions include that the authorities must offer exporters an opportunity to seize dumping in the region or enter a price undertaking. So, this is to be taken into consideration.

Rules for Cumulative Assessment

- **Permissible, provided that the following tests are satisfied:**
- **–the margin of dumping established in relation to the imports from each country is more than *de minimis*, i.e. not less than 2%**
- **–the volume of imports from each country is " not negligible", i.e. not less than 3% of the total volume of imports of the like product, unless imports which individually account for less than 3% collectively account for more than 7% of such imports**
- **–a cumulative assessment is appropriate in light of the *conditions of competition between the imported products and the like domestic product* (Art. 3.3)**

And also, you can see the rules for cumulative assessment, we talked about the cumulative assessment. So, there are rules for cumulative assessment as well because in most of the investigations there will be more than one exporters or one importers or more than one country. In that case how the Anti-Dumping investigation is done, how the cumulative assessment is to be made. So, in case of imports from each country from individual countries will be considered as de minimis if it is less than 2 percent. The volume of imports from each country is not negligible if it is not less than 3 percent of the total volume of imports of a like product unless that particular imports are individually accounted for less than 3 percent and collectively accounted for 7 percent of such imports. That means this particular provision talks about how the cumulative assessment can be made. So, the cumulative assessment is appropriate in the light of the conditions of a competition between imported products and the like domestic product. So, Article 3.3 talks about the rules for cumulative assessment.

Causal Relationship

- For initiation of an anti-dumping investigation the causal relationship between dumping and injury should be established.

And then comes the third prerequisite for imposing Anti-Dumping duties. So, the third criteria is the causal relationship between dumping and the injury to the domestic industry. So, this is the third criteria or prerequisite for imposing Anti-Dumping duties on any products which came to your market.

Causation and Factors

The evaluation of import volumes and prices and their impact on the domestic industry is relevant not only for determining whether the domestic industry has in fact suffered material injury, but often will also be indicative of whether the injury has been caused by the dumped imports or by other factors. Thus Article 3.5 ADA, first sentence, refers back to Articles 3.2 and 3.4 ADA.

So, we will see what are these causal factors. So, injury factors: we saw that there are 15 injury factors and what are the causal factors. So, here you can say that again here also it is import volumes and price volumes or price differences and import volumes. And here also the domestic industry has whether suffered a material injury. So, indicative of whether the injury has been caused by this particular dumps. So, it means that there must be a cause and effect on the dumping and injury, otherwise not be attributable to other factors. So, it is very clear that dumping must be related to the injury. The injury must be

because of the dumping and if this causation factor, the cause and effect factor if it cannot be proved then there would not be imposition of Anti-Dumping duties.

Causality

- In the causal relationship analysis known factors other than the dumped imports which are injuring the domestic industry shall be examined
- Illustrative list of such "other factors":
- » The volume and price of imported goods
- » Contraction in demand
- » Restrictive trade practices of, and competition between, foreign and domestic producers
- » Developments in technology
- » Export performance and productivity of domestic producers
- And shall not attribute the injuries caused by such other
- factors to the dumped imports (Attribution Provision)

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So, the causality factor is very important to be examined and also the other factors. For example, the other factors includes volume and price of imported goods, the contraction in demand. So, the introduction of new technologies and restrictive trade practices for restrictive trade practices includes these anti-competitive practices, abuse of dominant position. So, the activities for example, cartel, tie-in arrangements. So, these are the activities which are against the market principles or against the competition law. Development of new technology. So, if your product is not selling in the market because your product carries an old technology and a new technology comes to the market the old product, the stock of the old product increases then you cannot blame the new manufacturer. For example, in the case of the smart phones. So, the earlier phones disappeared when the smart phones came to the market. So, you cannot file an Anti-Dumping case against the smartphones suppliers for the increase in volume, increase in the stock of the old telephones and then productivity. Definitely the productivity depends upon the product and also the market demand or market contraction. And then it shall not be attributable to the injuries caused by other factors. So, that means, these other factors, this attribution provision is very important these other factors cannot be attributable to injury determination. So, the causality factor is very clear, and the other factors are also very clear. These other factors cannot be taken into consideration for the calculation of injury to the domestic industry.

Thailand H-Beams

The text of Article 3.5 refers to "known" factors other than the dumped imports which at the same time are injuring the domestic industry but does not make clear how factors are "known" or are to become "known" to the investigating authorities. We consider that other "known" factors would include those causal factors that are clearly raised before the investigating authorities by interested parties in the course of an AD investigation. We are of the view that there is no express requirement in Article 3.5 that investigating authorities seek out and examine in each case on their own initiative *the effects of* all *possible factors other than imports that may be causing injury to the domestic industry under investigation.*[28]

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Again, in the Thailand H-beams case, the panel has the taken into consideration these factors, known factors. So, the known factors other than the dumped imports. So, what did the panel say? The panel said that "injuring the domestic industry, but does not make any clear how factors are "known" or are to become "known" to the investigating authorities. So, we consider that other "known" factors would include those causal factors that are clearly raised before the investigating authorities by the interested parties in the course of the Anti-Dumping investigation. So, we are of the view that there is no express requirement under Article 3.5 that investigating authorities seek out and examine in such case on their own initiative the effect of all possible factors other than imports that may be causing injury to the domestic industry under investigation". So, in the Thailand H-Beams case, the panel basically said that the other factors should not be taken into consideration for the calculation of injury.

Mexico Corn Syrup Case

While an examination of the Article 3.7 factors is required in a threat of injury case, that analysis alone is not a sufficient basis for a determination of threat of injury, because the Article 3.7 factors do not relate to the consideration of the impact of the dumped imports on the domestic industry.…In our view, consideration of the Article 3.4 factors in examining the consequent impact of imports is required in a case involving threat of injury in order to make a determination consistent with the requirements of Articles 3.1 and 3.7.[29]

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One more case that we can see is the Mexico Corn Syrup case. In Mexico Corn Syrup case also, the panel talked about the factors to be taken into consideration for the threat of injury. So, we said the injury must be present or injury must be future, there is a threat of injury. In that case alone that means the threat of injury analysis is alone is not a sufficient basis for a determination of threat of injury because the Article 3.7 factors do not relate to the concentration of the impact of the dumped imports on the domestic industry. So, what is the view of the panel? In our view consideration of Article 3.4 factors…. Article 3.4 remember - the 15 economic factors. ….in examining the consequent impact of imports is required in a case involving threat of injury in order to make a determination consistent with the requirement of Article 3.1 and 3.7. So, the panel in Mexico Corn syrup case also said that when you calculate, when you take into account the threat of injury, these economic factors are to be taken into consideration again if there is any threat. So, these economic factors are crucial for the calculation of injury to the domestic industry and even causation factors.

Threat of Injury

It may occur that a domestic industry alleges that it is not yet suffering material injury, but is threatened with material injury, which will develop into material injury unless anti-dumping measures are taken.

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We said that threat of injury so what does the Agreement say? The threat of injury means it is only a threat, not in the present, in the future it there may be a material injury which will develop if the anti dumping duties are not imposed. So, it is a future event. So, the future event is very difficult to calculate, it is difficult to find out what is going to happen in the future. So, it means that the industry is going to be injured by the dumping and it is very imminent. So, you have to produce sufficient evidence to prove that this dumping is imminent and not only dumping material injury to the domestic industry is also imminent.

Determination of Threat of Injury

- **Threat of injury is "future injury"**
- **Must be based on facts and not on "allegation, conjecture or mere possibility"**
- **Application of anti-dumping measures shall be considered and decided with special care.**

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So, the future injury is imminent. So, this must be based on positive evidence not allegation, not conjuncture or not mere possibility. So, it can be decided that the threat of injury should be taken care of by the investigating authorities very carefully.

Determination of Threat of Injury

- Authorities should consider such factors as:
- –significant rate of increase of dumped imports indicated the likelihood of substantially increased importation
- –sufficient freely disposable, or an imminent, substantial increase in capacity of the exporter
- –whether imports are entering at prices that will have a significant depressing / suppressing effect on domestic
- prices, and would likely increase demand for further imports
- –inventories of the exporter / Importer (Art. 3.7).

And also the authorities must consider other factors. What are these other factors? First, Significant rate of increase of dumped imports, significant increase in the dumped imports which shows a likelihood of substantially increased importation in future as well. Second, sufficiently freely disposable or an imminent substantial increase in capacity of the exporter. Third criteria, whether imports are rendering at prices that will have a significant depressing and suppressing effect on domestic market not only on the market domestic prices and that will increase the demand for further imports. And also the inventories of the exporter and importer are also very critical factors taken into consideration for further determination of threat of injury in the future.

Threat of Injury - Factors

(i) a significant rate of increase of dumped imports into the domestic market indicating the likelihood of substantially increased importation;

(ii) sufficiently freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased dumped exports to the importing Member's market, taking into account the availability of other export markets to absorb any additional exports;

(iii) whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports; and

(iv) inventories of the product being investigated.

So, we can conclude this threat of injury factors. What is the threat of injury factors? This threat of injury factors are (1) a significant increase of dumped imports, (2) freely

disposable or imminent substantial increase in capacity of the exporter or likelihood of substantially increase dumped exports to the importing members market. Then whether imports are entering into the prices, the price criteria at a very lower level, significant depressing and suppressing effect on domestic prices and also which will lead to the high demand of that particular imports. Then, inventories of the product are also to be investigated. So, these are the threat of injury factors to be taken into consideration by the investigating authorities when they investigate the future threat. So, that is threat of injury factors.

DSB

- **No single factor is decisive – totality of the factors should be considered.**
- **Mexico Corn Syrup – Panel**

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So, here the main problem is in the decisive factor, the threat of injury how to be calculated there is no guidelines as such. So, how the totality of these factors are to be taken to consideration there is no guideline which is provided. This is what the panel said in Mexico Corn Syrup case.

Determination of Material Retardation

- The Agreement does not provide any Guidance regarding the determination of material retardation

So, then we saw criteria such as injury to the domestic industry, future injury or threat of injury to the domestic industry, and the last criterion is material retardation. Actually, here also the WTO Agreement does not give a guideline with regard to how the material retardation is to be calculated. So, it is up to the investigating authorities to determine. This gives a lot of leeway or lot of gap or lot of freedom to the investigating authorities to determine the material retardation, what you exactly mean by it. So, I would say that it must be based on this economic criteria rather than any other criteria.

Imposition of AD Duties

- Not mandatory
- Amount of AD duty shall not exceed the margin of dumping
- "It is desirable" that the duty be less than the margin of dumping if such lesser duty would be adequate to remove the injury to the domestic industry ("Lesser duty principle")
- Public interest

Then comes the imposition of duties. So, it is very important to note that the Anti-Dumping Agreement says that imposition of duty is not mandatory and the second criteria: the Anti-Dumping duty should not exceed the margin of dumping and third again it says that it is known as the lesser duty principle. It is desirable that the duty be less than

the margin of dumping, the duties imposed be less than the margin of dumping; the lesser duty would be adequate. So, first, the member should see what is the dumping margin, what Anti-Dumping duty is to be imposed, What is the appropriate percentage of dumping duty? It is not necessary to be equal to as that of the dumping margin - If a lesser duty is sufficient, that lesser duty is to be imposed as an Anti-Dumping duty, and also, each member should take care of and look into the public interest. Every government before imposing Anti-Dumping duties must consider the public interest as well for imposing Anti-Dumping duties.

Conclusion

- **Injury to the domestic industry is a pre-requisite for imposing anti-dumping duties.**
- **Domestic industry is narrowly interpreted**
- **Injury factors are not conclusive**
- **Material injury factors are not clearly defined.**

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So, in conclusion I would say the second criteria of imposition of Anti-Dumping duties is injury to the domestic industry. Not only injury, injury is in three forms: the present injury, the future injury, the threat of material injury and material retardation of the domestic industry. But, there is a lot of freedom to the investigating authorities given for the calculation of domestic industry. Cumulation principles: Cumulation also gives a lot of freedom and who is a foreign industry and who is a domestic industry this is also a question and also related parties are also always a question. And the injury factors: most of the investigating authorities does not look into the all 15 injury factors even though the panel said that this it is mandatory to look into all these 15 injury factors. So, material injury factors are not very clearly defined.

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I would say that without material injury and material retardation of the domestic industry, no investigating authorities should impose Anti-Dumping, or give recommendations for imposing Anti-Dumping duties. So, in this lecture we covered basically the injury criteria and also we covered what is exactly meant by the domestic industry and how the duties can be imposed, to what extent the duties can be imposed. And in the next lecture we will see the procedural aspect of Anti-Dumping duties.

Thank you.