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Article

Causal Link Analysis: An Examination

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The Indian anti-dumping authorities in recent findings in sunset review investigations concerning imports of Acetone[1] and Phenol[2] recommended the discontinuation of the duty as, among other things, factors other than dumped imports from the subject country were found to be responsible for the injury caused to the domestic industry. The Designated Authority's (DGAD) finding not recommending the continuation of the duty is particularly interesting for the reason that one of the reasons for the termination of the review proceedings was based on the fact that the causal link in the particular investigation was absent. The Indian authorities have very rarely terminated an investigation based on the absence of a causal link perhaps purely for the reason that undertaking a non-attribution analysis is not always direct and easy.

The article explores the difficulties in undertaking a causal link analysis, particularly in light of the lack of guidance in the legal provisions. Further, it examines whether such an examination should also be taken at a time of a sunset review, which on a plain reading of the relevant legal provisions is not required.

The three pillars for imposition of anti-dumping duties

An anti-dumping duty is imposed on a product which is found to be dumped and such imports are causing injury to the domestic industry in the importing country that produces the like product. In simpler terms, the essentials for an anti-dumping duty to be imposed is (a) presence of dumping; (b) material injury to the domestic industry in the importing country that is producing the like product; and (c) a causal link between the dumped imports and injury to the domestic industry. There is considerable amount of guidance in the legal provisions regarding the determination of dumping and injury however the determination of a causal relationship between the dumped imports and injury to the domestic industry has been left open-ended to a certain extent. As a result, member countries have been given the discretion on devising methodologies to undertake a causal link analysis.

Article 3.5 of the AD Agreement

Article 3.5 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("AD Agreement") governs the undertaking of a causal link analysis and a similar provision is provided in Annexure II(v) of the Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 ("Indian AD Rules"). It provides, in relevant part, as under:

[1] Final findings in the Sunset Review anti-dumping investigation concerning imports of Acetone originating in or exported from Japan and Thailand dated 1 July, 2016.

[2] Final findings in the Sunset Review anti-dumping investigation concerning imports of Phenol originating in or exported from Japan and Thailand dated 1 July, 2016.

> The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, *inter alia,* the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

The obligation on the authorities, as per the above provision, is to examine whether any other known factors might be responsible for the injury being caused to the domestic industry and an indicative list of factors has been set out in the last sentence. The WTO Appellate Body in *US – Hot rolled Steel*[3] noted that the obligation under Article 3.5 of the AD Agreement requires the authority to undertake a two-step approach – first, to examine all "known factors", other than the dumped imports which are causing injury to the domestic industry; and second, the authority must ensure that the injury being caused by the other identified factors is not attributed to the dumped imports. The difficulty in this two-step approach arises in separating and distinguishing the injurious effects of the other known causal factors from the injurious effects of the dumped imports.

Although segregation and differentiation of the injurious effects of other known factors is theoretically possible, undertaking such an examination practically is not always possible. The Appellate Body in the above dispute accepted that the process of undertaking such an examination is not easy but underscored the fact that the obligation under Article 3.5 of the AD Agreement is mandatory to be undertaken. The AD Agreement is silent on the methodology to be followed for this non-attribution analysis. Therefore, as long as there is an indication that the authority has undertaken such an examination, the obligation under Article 3.5 of the AD Agreement will be satisfied.

Notably, there is a little more guidance in the conduct of safeguards investigation for the manner in which this non-attribution analysis is to be conducted. The Panel and Appellate Body in *Argentina – Footwear (EC)*[4] held that in the context of a causation analysis, there should be a relationship between the

[3] Appellate Body, *United States – Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan,* WT/DS184/AB/R [24 July 2001] *("US – Hot Rolled Steel")*

[4] Panel Report, *Argentina – Safeguard Measures on Imports of Footwear,* WT/DS121/R [25 June 1999]; Appellate Body, *Argentina – Safeguard Measures on Imports of Footwear,* WT/DS121/AB/R [14 December 1999]

movements in the imports and the movements in the injury parameters. In other words, the increase in imports should coincide with the decline in the relevant injury parameters. Although the nature of the analysis in a safeguards investigation would differ from an anti-dumping investigation, but guidance on the manner in which such an analysis may be undertaken could be taken from the examination in safeguards investigations.

In most investigations, the authority has restricted its examination to only the factors provided in Annexure II(v) of the Indian AD Rules or Article 3.5 of the AD Agreement. It is only in very few cases that claims of lack of a causal link have resulted in termination of the examination. The two investigations mentioned above therefore could be considered as a rarity.

Recent investigations in India

In reference to the investigations on Acetone and Phenol review proceedings noted above, the domestic industry in both the investigations was the same. In particular, in both investigations, one of the domestic producers had suffered significant product losses while the performance of the other domestic producer did not exhibit any significant deterioration and in fact was performing at full capacity and earning positive profit margins. On an examination of the reasons behind this discrepancy, it was found that the reason for its losses was directly linked to its working capital losses and management issues and therefore it was found that its negative performance could not be linked to imports from the subject countries. On the basis of the same, the authority did not find any causal link between the allegedly dumped imports and the injury being suffered by the domestic industry as a whole.

Notably, a similar situation arose in a safeguards investigation conducted by the Indian authorities last year. In the safeguards investigation concerning imports of cold rolled flat products of stainless steel of 400 series[5] the authority held that based on an evaluation of the overall position of the domestic industry, it was noted that the factors such as abnormally high depreciation and finance charges were responsible for the losses being suffered by the domestic industry. Therefore, the investigation was terminated based on the fact that the causation analysis in the particular investigation was absent.

Is a causal link examination necessary at the time of a sunset review investigation?

Another issue that arises in regard to the above two anti-dumping findings is whether the authority was obligated to undertake a causal link analysis in a sunset review investigation. In particular, Article 11.3 of the AD Agreement deals with the conduct of sunset reviews and requires the authority to determine whether "the expiry of the duty would be likely to lead to continuance or recurrence of dumping

[5] Final findings in the safeguards investigation concerning imports of Cold Rolled Flat Products of Stainless Steel of 400 series dated 23 March 2015

and injury". On a reading of the provisions therefore, it is clear that a causal link analysis is not mandated at the time of a review.

The Appellate Body in *US – Anti-dumping Measures on Oil Country Tubular Goods*[6] examined the anti-dumping mechanism as set forth under Article VI of the General Agreement on Tariffs and Trade 1994 ("GATT 1994") and the AD Agreement and concluded that authorities are not required to undertake a causal link analysis "anew" in an expiry review investigation. In particular, the Appellate Body held that re-establishing the link is not required as a legal obligation in a sunset review.

In India however, a causal link analysis is undertaken in all sunset reviews in the similar manner that the examination is undertaken in the original investigation. In this respect, the practice by the Indian authorities is an additional factor examined. The Indian authorities undertake a causal link analysis although such an analysis is not required under the investigation. This causal link analysis would in no way be considered WTO-inconsistent as it is merely an extra criteria that needs to be satisfied for the continuation of the duty. While the AD Agreement envisages only the examination of continuation and recurrence of injury and dumping in a sunset review, the Indian authorities in practice examines not only the presence of dumping and injury but also a causal link between the two. Nonetheless, the fact that the above investigations were terminated on account of the break in the causal link in the investigation at the time of a sunset review could be used as a basis for investigations in the future.

Conclusion

In most jurisdictions, termination of an investigation based on the failure to establish a causal link is very rare. A reason for the same could be the difficulty of undertaking such an analysis and further the lack of guidance in the AD agreement.

In regard to India's practice of undertaking a causal link analysis even in sunset review proceedings, the same is merely an additional step to be satisfied in the investigation. In the above investigation, the result of undertaking a causal link in the review stage would have given the same results had the facts surrounding the other domestic producer remained the same as compared to the original investigation. However, as there was a change in the facts and circumstances, the examination of these factors led to a different conclusion. Therefore, it can be concluded that a causal link analysis undertaken at the time of the sunset review investigation does not prejudice the rights of parties in any manner and is merely an additional factor examined.

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[6] Appellate Body Report, *United States –Anti-dumping Measures on Oil Country Tubular Goods*, WT/DS282/AB/R [2 November 2005]

Trade Remedy News

Trade remedy measures by India

Product	Country	Notification No.	Date of Notification	Remarks
1,1,1,2-Tetrafluoroethane or R-134a	China	30/2016-Cus. (ADD)	11-7-2016	Definitive anti-dumping duty continued after sunset review
Acetone	Japan & Thailand	F.No.15/29/2014-DGAD	1-7-2016	Sunset review recommends non-continuation of ADD
Ammonium Nitrate	Russia, Indonesia, Georgia and Iran	F.No. 14/1/2016-DGAD	5-8-2016	ADD investigation initiated
Cold-rolled flat products of steel	China , Japan, Korea and Ukraine	F.No. 14/12/2016-DGAD	3-8-2016	Provisional ADD recommended
Opal Glassware	China & UAE	F.No.15/4/2016-DGAD and 38/2016-Cus. (ADD)	8-7-2016 and 4-8-2016	Sunset Review initiated and ADD extended till 8-8-2017
Phenol	Japan & Thailand	F.No.15/5/2015-DGAD	1-7-2016	Sunset review recommends non-continuation of ADD
Plain Medium Density Fibre Board (MDF) having thickness of 6mm and above	Indonesia & Vietnam	34/2016- Cus. (ADD)	14-7-2016	Definitive anti-dumping duty imposed
Polytetraflouro-ethylene or PTFE	China	F.No.15/11/2016-DGAD and 36/2016-Cus. (ADD)	8-7-2016 and 2-8-2016	Sunset Review initiated and ADD extended till 23-8-2017
Rubber Chemicals	TDQ & PX 13 from EU and MOR from China	F. No.15/05/2016-DGAD and 35/2016-Cus. (ADD)	8-7-2016 and 26-7-2016	Sunset Review initiated and ADD extended till 27-7-2017
Sewing Machine Needles	China	37/2016-Cus. (ADD)	4-8-2016	ADD extended till 21-6-2017
Sodium Nitrite	China	F.No.15/6/2016-DGAD	27-7-2016	ADD Sunset Review initiated
Viscose Staple Fibre excluding Bamboo Fibre	China & Indonesia	F. No.15/09/2015-DGAD	8-7-2016	Sunset review recommends continuation of ADD
Wire rod of alloy or non-alloy steel	China	F.No. 14/17/2016-DGAD	5-8-2016	Time limit for submission of response extended till 19-8-2016

Trade remedy measures against India

Product	Country	Notification No.	Date of Notification	Remarks
Cold-Rolled Steel Flat Products	USA	[A-533-865] 81 FR 49938	29-07-2016	Final dumping margin determined at 7.6%
Cold-Rolled Steel Flat Products	USA	[C-533-866] 81 FR 49932	29-07-2016	Final subsidy rate determined at 10%
Corrosion-Resistant Steel Products	USA	[C-475-833] 81 FR 48387	25-7-2016	Countervailing duty Order issued
Corrosion-Resistant Steel Products	USA	[A-533-863] 81 FR 48390	25-7-2016	ADD Order issued
Finished Carbon Steel Flanges	USA	[C-533-872] 81 FR 49625 [A-533-871] 81 FR 49619	28-07-2016	Countervailing Duty Investigation initiated Anti-Dumping Duty Investigation initiated
Hollow structural sections	Australia	Anti-dumping Notice No. 2016/71	25-7-2016	ADD investigation terminated

WTO News

USA and EU file disputes against China over restrictions on export of certain raw materials

The European Union has on 19-7-2016 notified the WTO Secretariat of a request for consultations with China over duties and other measures imposed by the latter on exports of antimony, chromium, cobalt, copper, graphite, indium, lead, magnesia, talc, tantalum and tin therefrom (DS509). The EU alleges that the duties, quotas and other restrictions are inconsistent with China's Protocol of Accession and other WTO provisions, including Article XI:1 of the GATT 1994.

It may be noted that EU's request follows a similar one filed by the United States on 13th of July (DS508). US request however not includes Chinese restrictions in respect of chromium and indium. According to the documents circulated in WTO by EU and USA, China imposes export duties along with quantitative restrictions on various forms of the above mentioned raw materials. It is alleged that China's measures appear to be inconsistent with the Protocol on the Accession of the People's Republic of China because China had not eliminated all taxes or charges applied to exports of these

products, and China's export duties are not specifically provided for in Annex 6 of the Accession Protocol.

US request for retaliation against India in farm goods dispute referred to arbitration

The Dispute Settlement Body of the WTO on 19 July 2016, taking note of the statements made by various members, has referred the issue of compliance by India to the Appellate Body report in dispute DS430, to arbitration in line with WTO rules. The dispute involved prohibitions imposed by India on importation of various agricultural products from the USA because of concerns related to Avian Influenza.

United States alleges that India had not removed or altered the measures concerning imports of certain agricultural products in the dispute (DS430), within the agreed reasonable period of time. Accordingly, the US had requested the DSB's authorization to suspend concessions or other obligations with respect to India totalling approximately $450 million in 2016. India on the other hand said that it believed it had brought the measures at issue into conformity with the DSB ruling, after issuance of notification on 8-7-2016 in this regard. India was of the view that USA's request to suspend concessions has no legal basis and that proper course in this regard would be to refer the matter to the compliance panel.

Safeguard investigations on steel

Steel has been at the centre of attention around the world for long now. Last month also while Vietnam launched safeguard investigation on pre-painted galvanized steel sheet and strip, South Africa started similar investigation on imports of certain cold-rolled steel products.

According to document G/SG/N/6/ZAF/5, dated 1-8-2016, of the Committee on Safeguards, the product under consideration is 'flat-rolled products of iron or non-alloy steel, or other alloy steel but excluding stainless steel, of all widths, cold-rolled (cold-reduced), not clad, plated or coated and not further worked than cold-rolled (cold-reduced)'. The investigation has been initiated by South Africa on 29-7-2016 and the period of investigation for data evaluation for the purposes of determining the allegation of serious injury is 1st January 2012 to 31st December 2015.

Further, Vietnam has on 6-7-2016 initiated a Safeguard duty investigation on pre-painted galvanized steel sheet and strip. The steel products covered in the investigation include Pre-painted Aluminium – Zinc alloy coated steel sheet and strip, Pre-painted Galvanized steel sheet and strip, pre-pained cold – rolled steel sheet and strip, PPGL, PPGI and PPCR.

Jordan initiates Safeguard investigation on aluminium bars, rods and profiles

On 24 July, 2016, Jordan has initiated a Safeguard duty investigation against imports of aluminium bars, rods and profiles covered under the Tariff Heading 7604 of the Jordanian Harmonised Tariff System. The Authority analysed import data of aluminium bars, rods and profiles for the period of investigation from 2010 to 2015.

Statutory Update

India removes MIP requirement for many iron and steel products

In line with WTO Director-General's mid-year report on trade-related developments issued on 25 July, 2016, urging WTO members to resist protectionism and 'get trade moving again', India has removed requirement of Minimum Import Price (MIP) restrictions on number of iron and steel products. List of products which can be imported only on mandatory specified minimum import price has been pruned to 66 from initially notified 173 products falling under Chapter 72 of the ITC (HS) Classifications. It may be noted that 173 products were under the stated import restriction from 5-2-2016 till 4-8-2016. New Notification No. 20/2015-20, dated 4-8-2016 issued by the Director General of Foreign Trade under the Indian Ministry of Commerce allows MIP restrictions for two more months on the specified 66 products. Imports under Advance Authorisation scheme of the Indian Foreign Trade Policy are however exempted from such requirements.

Ratio Decidendi

Anti-dumping duty - Time limit for adopting a decision on market economy treatment

Court of Justice of the European Union has held that compliance with the time limit of three months [as during the relevant period] for determining market economy treatment (MET), laid down in the second sub-paragraph of Article 2(7)(c) of EU's Basic Regulation, does not constitute, for the EU authorities, an option, but the same is a requirement. The Court in this regard noted that the option of derogating from the requirement to determine MET within the time limit of three months was not provided for in the said provisions, in the version in force at the date on which the decision under dispute was adopted. Contention of the authorities that it was not possible to carry out verification visits to the premises of the exporter earlier, which lead to the delay, was rejected by the court here.

It may be noted that the Basic Regulation was amended from 15-12-2012 to provide that determination of MET is normally to be made within seven months of, but in any event not later than eight months after, the initiation of the investigation. Considering the retrospective effect of the amending regulation, the Court was of the view that procedural rules are generally taken to apply from the date on which they enter into force, as opposed to substantive rules, which are usually interpreted as applying to situations existing before their entry into force only in so far as it clearly follows from their terms, their objectives or their general scheme that such an effect must be given to them. It was held that such retrospective effect was not clear from the wordings of the amending regulation.

However, observing that failure to rule on MET within the prescribed time limit cannot

automatically result in annulment of the contested regulation, in particular where the applicant's rights of defence have not in fact been adversely affected, the court dismissed the plea of infringement of Article 2(7) of the Basic Regulation of the European Union. It was noted that the applicant was not able to establish if the MET decision had been adopted within the prescribed time limit, the procedure could have had a different outcome and, consequently, the applicant's rights of defence were in fact adversely affected by the failure to comply with that time limit. [*Jinan Meide Casting Co. Ltd.* v. *Council of the European Union* – Judgement dated 30-6-2016 in Case T-424/13, CJEU]

Anti-dumping duty – Non-supply of normal value calculation to exporter, fatal

The Court of Justice of the European Union has annulled Council Implementing Regulation (EU) No. 430/2013, dated 13-5-2013 imposing a definitive anti-dumping duty on imports of threaded tube or pipe cast fittings of malleable cast iron, originating in the People's Republic of China and Thailand. Proceedings with regard to Indonesia, to the extent that it applied to specified exporter (appellant) have also been terminated and costs imposed on the Council of the European Union. The appellant here had alleged that the EU institutions refused it, in breach of Article 20(2) and (4) of the EU Basic Regulation, access to the normal value calculations after it received the authorisation of the analogue country producer to view the underlying data for those calculations.

The EU authorities had refused the disclosure, even after the analogue country producer had given his consent for providing the data, on the plea that there was a need to respect the principle of non-discrimination with regards to the other Chinese exporting producers included in the sample. The Court in this regard noted that argument of the EU authorities according to which it was not possible to waive the confidentiality of a piece of information as regards a specific interested party, finds no support in Article 19(5) of the basic regulation. Terming it as a restriction on rights of defence, the Court found the act contrary to the wordings and the purpose of Articles 19 and 20 of the Basic Regulation. [*Jinan Meide Casting Co. Ltd.* v. *Council of the European Union* – Judgement dated 30-6-2016 in Case T-424/13, CJEU]

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